Supreme Court

New South Wales

Case Name:	Trentelman v The Owners - Strata Plan 76700; The Owners - Strata Plan 76700 v Trentelman
Medium Neutral Citation:	[2021] NSWSC 155
Hearing Date(s):	9 March; 4, 6 and 7 May; 11 June; further written evidence and submissions ending 17 December 2020
Date of Orders:	26 February 2021
Decision Date:	26 February 2021
Jurisdiction:	Equity - Real Property List
Before:	Parker J
Decision:	See [332]-[336]
Catchwords:	CONTRACT – formation and validity – proposal by owner of development lots to convert lots into non-strata blocks and build townhouses of specified height – cooperation of strata corporation required – development lot owner promised proposal would result in continuing access for strata owners to swimming pool on her land – resolution passed at general meeting – no contractual effect ESTOPPEL – proprietary estoppel – encouragement – detrimental reliance – whether lot owner's promise made to strata corporation – whether reliance by corporation – corporation entitled to easement over pool land EQUITY – rectification – mistake – strata plan of subdivision included notation that pool structures formed part of common property – notation failed to include three-dimensional space around pool structures – inclusion of notation deliberate and

	mistake established but intended form of plan could not be determined – rectification refused
Legislation Cited:	Conveyancing Act 1919 (NSW), s 54A Real Property Act 1900 (NSW), s 12 Strata Schemes (Freehold Development) Act 1973 (NSW), ss 5, 8A, 9 Strata Schemes (Freehold Development) Regulation 2012 (NSW), cl 7 Strata Schemes Development Act 2015 (NSW), s 8 Strata Schemes Management Act 1996 (NSW), s 11
Cases Cited:	Cobbe v Yeoman's Row Management Ltd [2008] UKHL 55 Crabb v Arun District Council [1976] Ch 179 DHJPM Pty Ltd v Blackthorn Resources Ltd (2011) 83 NSWLR 728 Doueihi v Construction Technologies Australia Pty Ltd (2016) 92 NSWLR 247 Jones v Dunkel (1959) 101 CLR 298 Manly Council v Byrne [2004] NSWCA 123 Ramsden v Dyson (1866) LR 1 HL 129 Riches v Hogben [1985] 2 Qd R 292 Sidhu v Van Dyke (2014) 251 CLR 505 Slee v Warke (1949) 86 CLR 271 The Nominal Defendant v Gabriel (2007) 71 NSWLR 150 Thorner v Major [2009] UKHL 18 Watson v Foxman (1995) 49 NSWLR 315
Texts Cited:	Heydon, J D, M J Leeming and P G Turner, Meagher, Gummow and Lehane's Equity Doctrines and Remedies (5th ed, 2015, LexisNexis Butterworths)
Category:	Principal judgment
Parties:	2018/312426 Natalia Trentelman (Plaintiff) The Owners - Strata Plan 76700 (First Defendant) Registrar-General, New South Wales (Second Defendant) 2018/328341 The Owners - Strata Plan 76700 (Plaintiff) Natalia Trentelman (Defendant)

Representation:	Counsel: 2018/312426 M Ashhurst SC/G Farland (Plaintiff) E Peden SC/ J Mee (First Defendant) 2018/328341 E Peden SC/ J Mee (Plaintiff) M Ashhurst SC/G Farland (Defendant) Solicitors: 2018/312426 Bannermans Lawyers (Plaintiff) Sarvaas Ciappara Lawyers (First Defendant) Submitting appearance Registrar-General, New South Wales (Second Defendant) 2018/328341 Sarvaas Ciappara Lawyers (Plaintiff) Bannermans Lawyers (Defendant)
File Number(s):	2018/312426; 2018/328341
Publication Restriction:	Nil

JUDGMENT

1 Before the Court are two lawsuits concerning a parcel of property which forms part of an apartment development at Bogangar on the far north coast of New South Wales. Bogangar is just inland from Cabarita Beach, mid-way between Byron Bay and Tweed Heads.

2 The development is known as Cabarita Lake Apartments. It lies just to the south of Cudgen Lake, which forms part of the Cudgen Nature Reserve. The development includes a four storey apartment building and surrounding land.

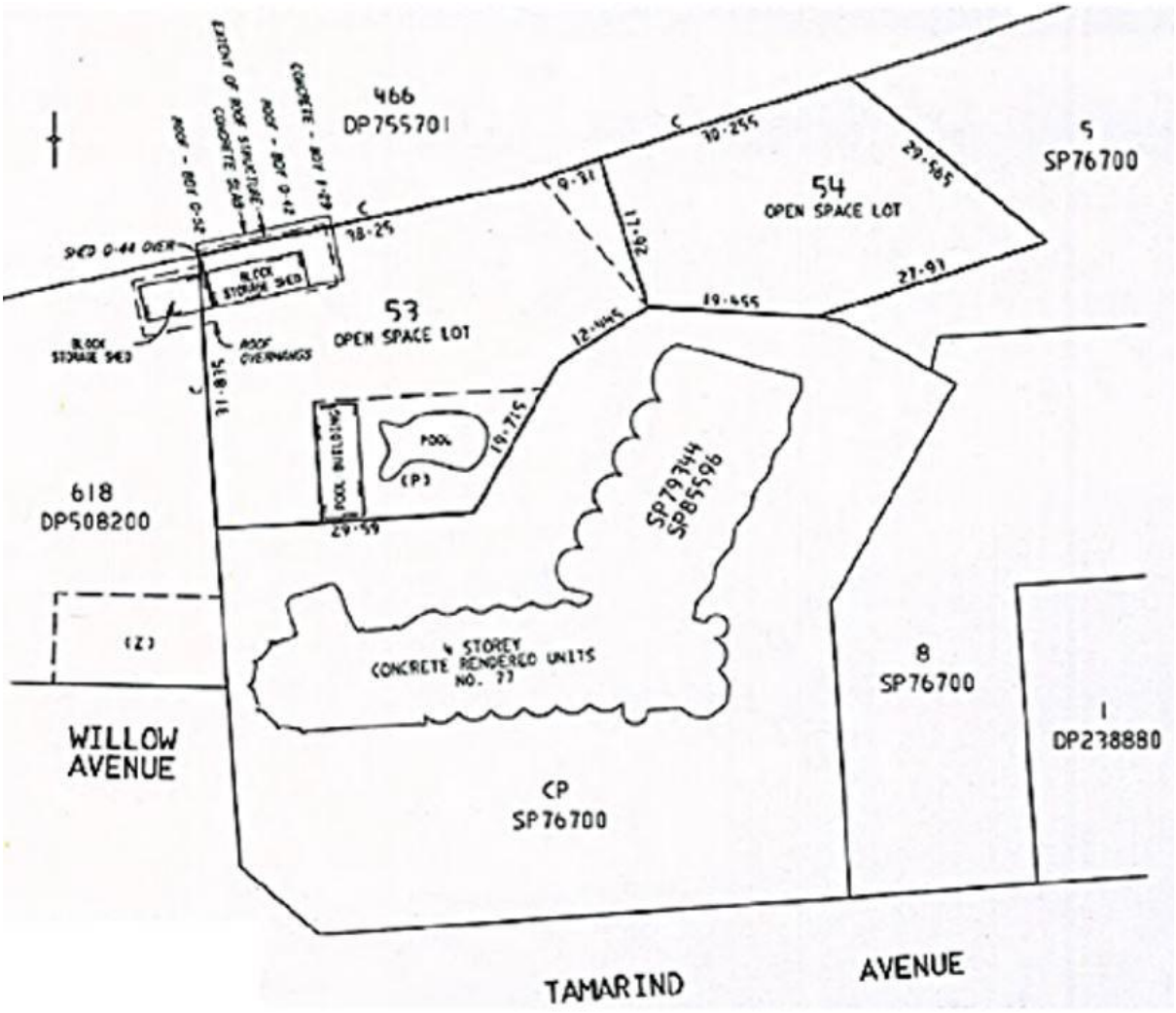
3 Set out below is an aerial photograph showing the main features of the development as it was prior to 2017:

4 The parcel of land which is the subject of the proceedings is the site of a swimming pool and a pavilion-style building which contains facilities for using the pool. The pool and the pool building can be seen in the photograph, to the north-west of the apartment building.

5 The development is under strata title. The strata scheme was established by the registration of Strata Plan 76700 in 2006. I will refer to the strata owners' corporation in the scheme as the "Strata Corporation".

6 The landscaped areas and car park falling within the curtilage of the apartment building form part of the common property under the strata scheme. The pool does not. It is on a privately owned lot, now known as lot 53.

7 The boundaries between the lots and the common property are shown in the survey plan below:



8 The part of lot 53 which contains the pool and the pool building is not a separate lot and its boundaries were not formally defined by the survey plan. I will refer to it for convenience as the “pool land”.

9 Lot 53 belongs to Natalia (also known as Natasha) Trentelman. She and her husband, Johannes Theodorus (known as John) Trentelman at one point owned all the lots in the scheme.

10 When Mr and Mrs Trentelman owned all of the lots in the scheme, some of the lots were owned by them individually and some jointly. The evidence showed that in their dealings with the lots, Mr and Mrs Trentelman worked as a couple. Irrespective of the legal ownership of the lots, they consulted each other and made decisions jointly. Mr Trentelman, in particular, would give instructions to professional advisors about lots owned by Mrs Trentelman, with her express or tacit agreement. In the rest of this judgment, except where it is necessary to

distinguish between Mr and Mrs Trentelman, I will refer to them collectively as "the Trentelmans".

11 Previously there was a registered easement over the land in lot 53 in favour of the apartment building lots (or nearly all of them) which allowed the owners of those lots and their guests to use the pool. The term of that easement expired in October 2017. Since then the Trentelmans have prevented the lot owners (or most of them) from having access to the pool.

12 The proceedings have a complicated pre-hearing history which it is unnecessary to recount. They were first fixed for hearing before me on 9, 10 and 11 March. In the course of the opening on 9 March, it became apparent that counsel for the Strata Corporation wished to argue the Corporation's case on a basis which had not previously been articulated. This resulted in an adjournment of the hearing to 4, 6 and 7 May.

13 The evidence was presented (on the issues that then arose) at the May hearing, but there was insufficient time for the parties to present their submissions. That happened on 11 June, with the benefit of written submissions which had been lodged in the meantime.

14 The course of the debate on 11 June led counsel for the Strata Corporation to foreshadow an application to seek a further alternative form of relief. The application was to file a cross-summons in the proceedings brought by Mrs Trentelman. The parties agreed to a timetable for lodgement of the proposed cross-summons and submissions.

15 This led to a long delay. For the Strata Corporation, a proposed cross-summons was lodged, accompanied by supporting evidence and further written submissions. This resulted in objections on behalf of Mrs Trentelman, and an affidavit of her own, as well as written submissions. The Strata Corporation replied with extensive objections of its own to Mrs Trentelman's further affidavits, as well as yet further written submissions.

16 Eventually the parties agreed that I should deal with the application and the further evidence on the papers, with the benefit of yet more written submissions. The final submissions were lodged on 17 December.

Claims for determination

17 In order to understand the issues which arise, it is necessary to go a little further into the conveyancing history. The land in lot 53 forms part of a number of lots previously owned by Mrs Trentelman which were "development lots" under the *Strata Schemes (Freehold Development) Act 1973* (NSW) ("SSFDA") (that Act has since been repealed and replaced by the *Strata Schemes Development Act 2015* (NSW) ("SSDA")). The Trentelmans wished to convert those lots into ordinary (non-strata) blocks of land under the *Real Property Act 1900* (NSW) ("RPA"). This required co-operation from the Strata Corporation (including the passage of a special resolution by the members).

18 The necessary resolution was passed at the Annual General Meeting ("AGM") of the Strata Corporation in July 2014. On behalf of the Strata Corporation in these proceedings, it is alleged that in order to secure passage of the resolution, the Trentelmans promised to "give the pool" to the apartment building lot owners.

19 In December 2014 a strata plan re-subdivision was drawn up and executed which adjusted the boundaries between two of Mrs Trentelman's lots (it was this plan which created lot 53). The application to register the plan was executed on behalf of the Strata Corporation, as was required by SSFDA. It was eventually registered in 2015. At the time, the Trentelmans accounted for two of the three members of the Strata Corporation's executive committee, and they effectively controlled the committee.

20 The plan as registered included a notation that the pool building and the pool itself formed part of the common property under the strata scheme. I will refer to this as the "Pool Notation".

21 While the easement lasted, the Pool Notation was of little practical significance. But when the easement expired, the Strata Corporation, acting on behalf of the apartment building lot owners, relied upon it to claim an entitlement to continued access. The validity of the notation was thereupon denied by the Trentelmans, who claimed that it ought to be removed from the register.

22 This dispute is the subject of the first of the lawsuits before the Court (proceedings 2018/312426). Mrs Trentelman is the plaintiff. The Strata

Corporation is the first defendant. The Registrar-General is the second defendant, but has entered a submitting appearance.

23 If Mrs Trentelman's case fails, the notation will remain on the register. But the Strata Corporation now accepts that, even if valid, the notation is of limited use. It purports only to make the pool structures themselves part of the common property. It does not apply to land below, or air above, those structures. Nor does it carry with it any right of access to the structures, which are entirely enclosed within lot 53.

24 The Strata Corporation attempts to overcome this problem in the second lawsuit (proceedings 2018/328341). In that lawsuit the Strata Corporation is the plaintiff and Mrs Trentelman is the defendant. The Strata Corporation claims that it is entitled to have the pool land transferred to it, or alternatively to have a further or extended easement granted to it over the pool land. The pool land, or the easement over it, would be held by the Strata Corporation as common property for the benefit of all lot owners.

25 The Strata Corporation relies upon the alleged promise at the 2014 AGM, contending that it gave rise to an enforceable contractual entitlement, or alternatively an equitable entitlement by way of proprietary or promissory estoppel, to have the promise fulfilled. Mrs Trentelman resists these claims.

26 By its proposed cross-claim in Mrs Trentelman's lawsuit, the Strata Corporation now attempts to overcome the problem with the Pool Notation in a different way. The proposed cross-claim seeks an order which would vary the registered plan by substituting a new plan prepared by the Strata Corporation's surveyor. That plan would make the pool land (including, of course, the air space above and the earth underneath) common property. The proposed claim is based on rectification.

27 While the Trentelmans controlled the executive committee, they were also responsible for registering a right of way over part of the Strata Corporation's land in favour of Mrs Trentelman. That registration was challenged in the Strata Corporation's lawsuit on grounds which included lack of authority. At the hearing on 9 March counsel for Mrs Trentelman abandoned her defence to that

part of the Corporation's claim, and an order was made by consent for the right of way to be removed from the title.

Summary and analysis of evidence

28 In this part of the judgment I first summarise and analyse the evidence presented at the May hearing (including supplementary evidence tendered on 11 June). In particular I consider, and express my conclusions on, the critical factual issues about the July 2014 AGM and the registration of the plan of subdivision containing the Pool Notation. For these purposes I do not need to consider the supplementary affidavits filed by the parties, or the objections to those affidavits. I deal with those matters in a separate section at the end of this part of the judgment.

Chronology of key facts

29 Strata Plan 76700 ("SP 76700") was registered by the previous owner of the land, Mother Earth Developments Pty Ltd ("MED"), in March 2006. The strata scheme consisted of lots 1-8. Lot 1 included a pre-existing four-storey building which had been built as a motel. Lot 7 included the pool and ancillary structures but was otherwise vacant apart from a disused building in the north-western corner. Lots 2-6 and 8 were completely vacant.

30 SP 76700 is depicted in the plan below (the survey lines have been removed):

31 Accompanying the SP 76700 registration was a development contract. Under SSFDA such a contract was required for the staged development of a strata scheme. The development contract had to identify the "development lots" which were defined to include lots reserved for future development works. The development contract also had to identify a "development proposal".

32 The development contract identified the development lots as lots 2 to 8. The development proposal was for a scheme consisting of nine stages. It involved a staggered development which would include the erection of several multi-level buildings on most lots, as well as sporting and recreational facilities. The development was to be completed by September 2010.

33 In August 2007, Strata Plan 79344 ("SP 79344") was registered by MED. Lot 1, which included the four-story structure, was subdivided to create common property and lots 9-51. Lot 9 included the rooftop terrace and ground floor car park. The remaining lots were the individual motel (apartment) rooms.

34 MED then registered an easement over the pool lot in October 2007. The servient tenement was lot 7 of SP 76700 and the dominant tenements were lots 9-48 of SP 79344 (which were also lots 9-48 in SP 76700). The easement was described as "[f]or use of swimming pool". The attached condition provided:

> The lots in the dominant tenement [sic; the transfer creating the easement directly identified lots 9-48 as the dominant tenement] shall bear the cost of operation, repairs and maintenance of the pool and surrounding facilities in the proportions of their unit entitlement in SP79344. Such easement shall continue until the earlier of 10 years from the date of registration or until a further easement to the use of a swimming pool benefiting the same parcels is created in any of the other lots in SP76700.

35 It seems that the reason for the easement being only for a limited term was that the pool on lot 7 would be replaced by a new swimming complex as part of the staged development. Although strata lots 49-51 were in existence at the time the easement was created, they were not given the benefit of it. There was no evidence to explain the omission, and it seems that no-one paid any attention to it until the second half of 2016.

36 Around 2008, MED fell into financial difficulties and the mortgagee, Commonwealth Bank of Australia, took possession of the property. Between

them, the Trentelmans acquired all the lots in the strata scheme in July 2009. They continued to operate the building as a motel.

37 The Trentelmans acquired the lots in different capacities. Mr and Mrs Trentelman purchased some of the units in their personal capacities and the remaining units were purchased by them as the trustees of their superannuation fund, Frogmore Super Fund. The units acquired by Mrs Trentelman alone included all the development lots (lots 2-8).

38 In September 2010, the development scheme deadline expired. The Trentelmans began selling individual lots in the apartment building the following month. Prospective purchasers were offered the opportunity to have their units managed for them. This was done by way of an agreement with Mr Trentelman (who acted as caretaker) or some other entity controlled by the Trentelmans.

39 Once the Trentelmans started selling off the apartment lots in the strata scheme, it became necessary for the Strata Corporation to operate more formally. The necessary general meetings of the body corporate were held, and likewise the necessary appointments were made to the executive committee. But both of the Trentelmans were appointed to the committee, and it appears that for practical purposes their control of the Corporation continued as before.

40 Another aspect of having the Strata Corporation functioning more formally was that the other lot owners had to start paying for the common expenses. In the usual way, the lot owners in the apartment building were required to contribute to the Corporation's administration and sinking funds in accordance with the unit entitlements.

41 The development lots likewise had been allocated unit entitlements in the strata scheme and under the applicable legislation the lot owner (Mrs Trentleman) was obliged to contribute to the common expenses in accordance with the specified lot entitlements. The obligation was considerable, because each development lot carried a unit entitlement of ten to fifteen times the entitlement of a typical apartment lot. But this obligation was overlooked. The development lots neither contributed to the Strata Corporation's funds, nor

were their unit entitlements counted for voting purposes at general meetings of the Corporation.

42 Although the easement identified the individual lots (excluding lots 49-51) as the “dominant tenement”, the costs of maintaining the pool were treated as body corporate expenses and levies were calculated for all lot owners in the apartment building (including lots 49-51) accordingly. This arrangement continued right through until the second half of 2016.

43 The Trentelmans caused the Strata Corporation to register Strata Plan 85596 (“SP 85596”) in October 2011. The registration subdivided lot 9 (see [33] above) to create a new lot 52 (manager/caretaker’s residence); the rooftop terrace and ground floor car park were also converted to common property. The Trentelmans retained a surveyor, Mr Phillip Wyper, to do the surveying work (he had completed the two previous strata plan surveyor certificates for MED).

44 Following the registration of SP 85596, the Strata Corporation’s by-laws were amended to confer a special status of lot 52. The owner of the lot (then Mr Trentelman) was given the exclusive right to operate a sale and letting business for the lots in the building, and was also allowed to offer other associated services. Clearly this was designed to formalise the Trentelmans’ management business. There was also a formal caretaker agreement between Mr Trentelman and the Corporation. Among other things, the agreement defined the caretaker’s maintenance responsibilities. These included the pool area.

45 In 2013 the Trentelmans decided not to pursue the development proposal as described in the strata development contract and in late 2013 they entered into negotiations to sell lot 7 to a third party. The prospective purchaser was John James Luddington. He is the husband of Shimonti Chatterjee, who is the owner of lot 43 (or was her husband: according to Ms Chatterjee, they were actually separated when she bought the lot).

46 By 2014 the Trentelmans wanted to free the development lots (owned by Mrs Trentelman) from the restrictions of the strata scheme so that the land could be sold off or developed as ordinary RPA lots. The Trentelmans had also

developed specific plans for the development of lot 7 by building a group of three townhouses on it.

47 It was not possible under the terms of SSFDA to convert the lots directly from strata development lots to ordinary RPA lots. They had to be converted to common property in the strata scheme, and then transferred back by the Strata Corporation as RPA lots. Conversion of the lots into common property required a strata re-subdivision.

48 In order to obtain a strata re-subdivision a special resolution of the Strata Corporation was required. The Trentelmans also wanted resolutions that the Corporation would, once their lots had been converted to common property, transfer the land back as RPA lots; and that the Corporation would consent to their application for development approval of the townhouses.

49 The promise which is the subject of the Strata Corporation's claim was allegedly made at the Strata Corporation's 2014 AGM, which took place in July 2014. The resolutions sought by the Trentelmans were passed. I analyse the evidence on this issue in detail in a later section of this part of the judgment.

50 At some point in the second half of 2014, it was discovered that the development lots carried obligations to contribute towards the Strata Corporation's expenses (and corresponding voting entitlements). The minutes of the 2014 AGM (which were prepared and approved in December) record that there was a resolution that the development lots (which, on conversion to ordinary RPA lots would be removed from the strata scheme) did not have to contribute in the meantime. Whether such a resolution was actually passed at the AGM appears to be disputed; I touch further on this when analysing the evidence below.

51 In the months following the AGM, the Trentelmans continued their negotiations to sell lot 7 to Mr Luddington. Both parties retained solicitors and a contract was drawn up.

52 The December 2014 plan of strata re-subdivision containing the Pool Notation was drawn up by Mr Wyper on the Trentelmans' instructions (as the plan which created SP 85596 had been). Lots 7 and 6 became lots 53 and 54 (the plan

has already been reproduced at [7] above). The plan was eventually registered in the following year as Strata Plan 91510 ("SP 91510").

53 The Trentelmans allege that the inclusion of the Pool Notation was a mistake. I will consider the evidence on this issue in a later section of this part of the judgment.

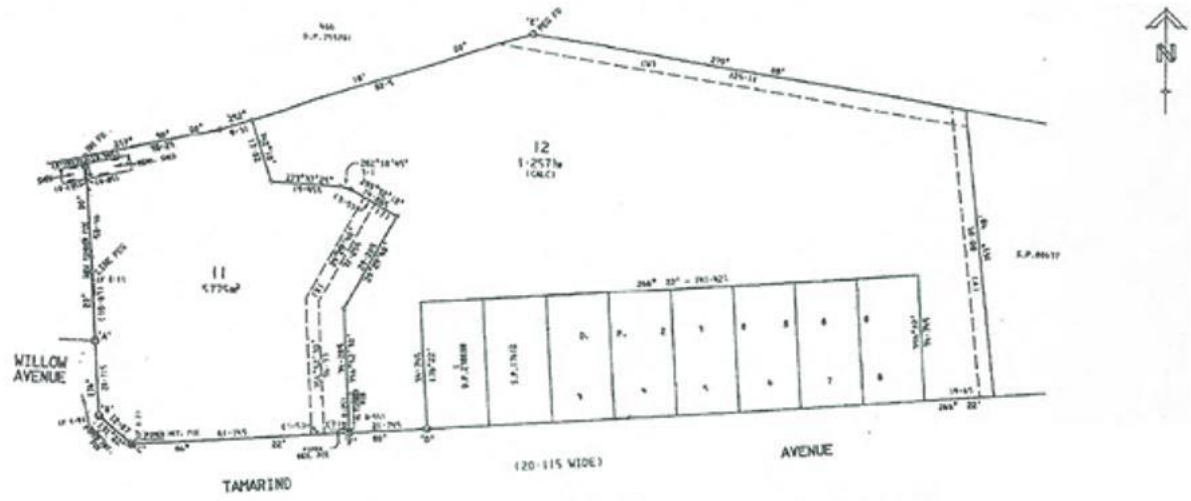
54 In early 2015, the Trentelmans sold their management and caretaking rights to an external purchaser, Mr Geoff Walton. He became the owner of lot 52, and accepted the burden of the caretaker agreement.

55 At around the same time, Mr Luddington withdrew from his negotiations with the Trentelmans to buy lot 7 (now lot 53). The Trentelmans, however, continued to pursue their plan to convert the development lots to ordinary RPA lots and to obtain development approval for the construction of three townhouses on lot 53. The development application ("DA") for the townhouses was lodged in September 2015.

56 In November 2015, Mrs Trentelman entered into a deed with the Strata Corporation to complete the arrangement contemplated by the 2014 AGM resolutions, by converting her development lots into common property and then transferring those lots back to her as ordinary RPA lots. The conversion and transfer back of lots 2, 3, 4, 5, 8 and 54 (roughly corresponding with the former lot 6) was completed in February 2016. The process was not followed for lot 53. It remained (and remains) part of the strata plan.

57 The result was the registration of an RPA deposited plan (DP 1208402). In this plan the strata scheme (including lot 53) was lot 11 and the remaining land transferred back to Mrs Trentelman was lot 12.

58 DP 1208402 is reproduced below. The right of way over lot 11, which was created by registration of the plan, but was abandoned by counsel for Mrs Trentelman at the hearing on 9 March 2020, can be seen on the eastern side of the lot:



59 In 2014 and 2015, while all of the relevant conveyancing steps were taken, the executive committee of the Strata Corporation consisted of Mr Trentelman as chairman, Mrs Trentelman as treasurer, and Ms Sharyn McConnell as secretary. Between them, they were responsible for the execution by the Corporation of the December 2014 strata re-subdivision plan and the November 2015 deed.

60 By late 2015, disputes had arisen between the Trentelmans and some of the other lot owners about the management of the Strata Corporation which remained effectively under the Trentelmans' control. The new caretaker, Mr Walton, was one of the parties dissatisfied with Mr Trentelman's conduct.

61 According to the lot owners, Mr Trentelman gave an undertaking that he and Mrs Trentelman would resign from the executive committee when the development lots had been converted to ordinary RPA lots. This happened in February 2016 but they did not do so. By this stage the Trentelmans had decided that, rather than selling lot 53 with its DA, they would carry out the townhouse development themselves.

62 In May 2016 the disgruntled lot owners requisitioned an extraordinary general meeting. At that meeting a resolution was passed for the appointment of an independent strata management company. Resolutions had also been tabled to remove the Trentelmans and Ms McConnell from office. Ms McConnell resigned, but the Trentelmans did not. The resolutions failed to achieve the necessary special majority, so the Trentelmans remained in office.

63 The AGM took place in September 2016. Mr Trentelman declined to relinquish the chair to the representative of the strata management company. The Trentelmans nominated themselves for re-election but were unsuccessful. A new committee of five members was elected. The new chair was Charito Lofthouse, who was a resident lot owner. Another member of the new committee was Mr Luddington.

64 About three weeks later, the Trentelmans appear to have discovered that the easement was expressed to be in favour of the owners of lots 9 to 51, rather than the Strata Corporation. On 8 November, the Trentelmans (to use their description) "took back" the pool. Mr Trentelman took over the maintenance and cleaning, and excluded Mr Walton and the pool cleaning contractor retained by the Corporation. Mr Trentelman also wrote a sign excluding everyone other than owners and tenants of lots 9 to 51.

65 As part of the process of "taking back" the pool, the Trentelmans' solicitors wrote to the Corporation asking for the pool expenditure to be removed from the Corporation's expenses. Instead the Trentelmans sent bills to the individual lot owners, going so far as to bring debt recovery claims against owners who did not pay.

66 In about mid-2017, the Trentelmans completed construction of the three townhouses on lot 53. When the easement expired in October 2017 they completely excluded the lot owners (except for certain owners with whom they were friendly, such as Ms McConnell) from the pool area.

67 Since October 2016, Mr Ian McKnight has acted as solicitor for the Strata Corporation. Following the restriction of access in October 2017, he sent a letter to solicitors acting for the Trentelmans concerning the use of the pool. Mr McKnight quoted the Pool Notation, asserting that the pool lot was common property.

68 The Trentelmans reacted by instructing Mr Wyper to apply to the Registrar-General to remove the Notation. Their instruction was that the Notation had been a mistake and the 2014 AGM resolutions had never intended to make the pool common property. The litigation with which I am concerned then followed.

Witnesses

69 It was agreed that the Strata Corporation would present its case first at hearing. The Corporation called evidence from five witnesses who attended the 2014 AGM about the events at that meeting. Each of the five was either a lot owner or the spouse of a lot owner. Affidavits had been filed from five other witnesses but these were not read.

70 The five witnesses who gave evidence for the Strata Corporation about events at the meeting were Mr Luddington; Ms Chatterjee; Mrs Lofthouse and her husband, Mr Donald Harley Lofthouse; and Mr Gregory Robert Flynn. The Strata Corporation also called evidence from another lot owner, Mr Randall Kelly. Mr Kelly gave evidence of a meeting with Mr Trentelman shortly before the AGM at which he alleged that a similar promise was made.

71 Each of these witnesses was cross-examined. I discuss their testimony when analysing the evidence on this issue in more detail below.

72 The Strata Corporation's solicitor, Mr McKnight, was also called as a witness by the Corporation. His testimony concerned the events surrounding the Trentelmans' denial of access to the pool in October 2017. He was cross-examined but in the end nothing turned on the events in question, and it is not necessary to say anything more about his evidence.

73 The witnesses in Mrs Trentelman's case were Mr Trentelman, Mrs Trentleman and Ms McConnell. Each of them was cross-examined. I will set out my findings on their credibility when dealing in detail with the factual issues below.

74 Mr Wyper was not called to give evidence about the preparation and registration of the strata plan containing the Pool Notation. His absence was not explained.

Documentary evidence

75 **2014 Annual General Meeting**: A notice of meeting for the 2014 AGM was distributed to members of the Strata Corporation. The notice included motions 10 and 11, explanatory notes to the motions and a two page plan of the townhouses with handwritten annotations.

76 Motion 10 was lengthy. It proposed five separate resolutions, to which I will refer as resolutions 10.1 to 10.5.

77 Resolution 10.1 was:

> that the Owners Corporation specially resolve to consent to the removal of the development lots (lots 2, 3, 4, 5, 6, 7, and 8) in strata plan 76700 (Development Lots) (as hatched and outlined on the pages of the strata plan attached and marked "DL-1" to "DL-3") from the strata scheme in accordance with the *Strata Schemes Freehold Development Act 1973* (SSFDA).

78 Resolution 10.2 was:

> that the Owners Corporation agree to the carrying out of the following matters (or such similar procedures as may be authorised by the Executive Committee to give effect to the intention of this resolution) by the owners of the Development Lots (at the cost of the owners of the Development Lots) to give effect to the proposal:
>
> (a) conversion of the Development Lots to common property in accordance with the SSFDA;
>
> (b) preparation and registration of such deposited plans as may be required to give effect to the proposal;
>
> (c) preparation and registration of such transfers of land for the newly created lots as may be required to transfer the relevant parcels of land as necessary to give effect the proposal;
>
> (d) future development on Lot 7 in strata plan 76700 (Lot 7) of no more than 3 townhouses of no more than two storeys in height, (Proposal).

79 Resolution 10.3 was:

> that the respective amount that each remaining lot's unit entitlement bears to the overall unit entitlement will be proportionally increased as a result of the removal of the Development Lots from the scheme and the reduction in the aggregate unit entitlement for all the lots remaining in the scheme following the Proposal.

80 Resolution 10.4 was (emphasis added):

> that the Owners Corporation sign such documents under seal in accordance with section 238 of the *Strata Schemes Management Act 1996* as may be required to give effect to the Proposal, including (but not limited to):
>
> (i) application for development approval to Tweed Shire Council (Council);
>
> (ii) notice of conversion in the form approved under the Real Property Act 1900 and such other documents and certificates which may be required to accompany same;
>
> (iii) administration sheets (approved form 23) in accordance with the SSFDA;
>
> (iv) certificates and approved forms in accordance with the SSFDA (including approved forms 9, 10, 11 and 12);

(v) transfers of land for the newly created lots (including approved form 9); and

(vi) preparation and registration of such documents for the surrender or creation of such easements or covenants as may be necessary or desirable, including any section 88B instruments, to ensure:

• ***Owners and occupiers of lots within the scheme have a continuing right to use the swimming pool on Lot 7***;

• Owners and occupiers of Lot 7 have a continuing right to traverse the scheme by road and foot for the purposes of accessing Lot 7 (including the carrying out of future development work); and

• the carrying out of future development work on Lot 7 is restricted in accordance with the conditions included in this motion

81 Resolution 10.5 was:

that the Executive Committee and/or Strata Managing Agent liaise with such representatives of the owners of the Development Lots (e.g. surveyor and solicitor) or such other persons on behalf of the Owners Corporation to assist with the preparation and registration of all documentation as may be required to give effect to the Proposal.

82 Motion 11 proposed that, subject to passing of Motion 10, the Strata Corporation (emphasis added):

unanimously resolve to consent to the making of an application for development approval to Tweed Shire Council (Council) by the owner of former development lot 7 in strata plan 76700 (being any new lot into which Lot 7 is subdivided consequent upon the removal of the Development Lots from the scheme in accordance with motion 10) (Lot 7) for the creation of a community association over Lot 7 and the scheme in accordance with the provisions of the *Community Land Development Act 1989* (CLDA) and the creation of the following community lots:

• Lot 1 - association property, ***comprising the swimming pool*** (currently on Lot 7 (to become ***Lot 3***) and/or any common roadways and footpaths (***provided that, if the swimming pool does not form association property, owners and occupiers of lots within the scheme have a continuing right to use the swimming pool by way of easement or similar*** and, if any roadways or footpaths providing access to Lot 3 do not form association property, owners and occupiers of Lot 3 have a continuing right to use any relevant roadways and footpaths within the scheme for the purposes of accessing Lot 3 by way of easement or similar);

• Lot 2 - comprising the area forming the scheme (less any association property); and

• Lot 3 - comprising the area forming Lot 7 (less any association property),

(Community Association)

83 Motion 11 went on to contain further resolutions dealing with lot entitlements within the Community Association and the planning and conveyancing steps

required to give effect to the proposal. These did not say anything specific about the swimming pool.

84 Motions 10 and 11 were accompanied by an explanatory note. The explanatory note for Motion 10 stated (emphasis added):

> The strata scheme includes a series of development lots (being lots 2 - 8), which were originally intended to be developed and subdivided further plans of subdivision to create additional lots in the scheme. The proposed development was 'authorised development' and not 'mandatory development' and development was never completed in accordance with the strata development contract.
>
> Accordingly, motion 10 proposes to remove the development lots from the scheme. Following the removal of the development lots from the scheme, the existing built lots (9 - 51) will continue to be strata lots forming part of the strata scheme, which will continue in existence and be identical in all material respects to the existing strata scheme (without the balance development lots reserved for future development). This will benefit owners of lots in the scheme; who will not have to contribute to the upkeep and maintenance of additional common property that would have otherwise been created in the subsequent stages of development.
>
> ***The motion ensures that easements exist so that owners and occupiers of lots within the scheme have a continuing right to use the swimming pool on Lot 7*** and that owners and occupiers of Lot 7 have a continuing right to traverse the scheme by road and foot for the purposes of accessing Lot 7.
>
> The motion also provides that future development on Lot 7 is restricted to no more than 3 townhouses of no more than two storeys in height. Such development is far less intense than the original development permitted under the development contract, which allows for a 3-storey, 10 lot apartment building on the land. Accordingly, owners and occupiers in the strata scheme will benefit from retaining greater amenity of their units in relation to Lake Cabarita.

85 The explanatory note for Motion 11 stated (emphasis added):

> Should motion 10 be passed, motion 11 provides for an application to be made to Council for development approval to create a Community Association over the strata scheme and development Lot 7 (adjoining the scheme, which houses the swimming pool).
>
> Motion 11 may not necessarily be carried out as it is an alternative way of carrying out the development proposed in motion 2 (namely, the townhouses) and involves the creation of a Community Association (of which the scheme would be a part) and requires a unanimous resolution for its passage. The passing of the motion will provide flexibility for the owner of Lot 7 and Council
>
> in deciding the most suitable way of carrying out future development on Lot 7.
>
> ***The arrangement will allow the creation of community association property (being the swimming pool and/or common roadways) which will be shared between the scheme and Lot 7*** (to become Lot 3 (**Development Lot**)). The unit entitlements of each lot will be the same (until such time as the development contemplated on the Development Lot is carried out), so that

both the strata scheme and the Development Lot contribute equally to maintaining the common facilities.

Provision will be made for the Development Lot to be developed in the future to accommodate no more than 3 townhouses of no more than 2 storeys in height and the unit entitlements for the scheme and the Development Lot will be adjusted based on the respective number and value of lots in the scheme and the Development Lot respectively (taking into account that the scheme will have a greater intensity of use of the common facilities).

The proposed development on the Development Lot is far less intense than the original development permitted under the development contract, which allows for a 3-storey, 10 lot apartment building on the land. Accordingly, owners and occupiers in the strata scheme will benefit from retaining greater amenity of their units in relation to Lake Cabarita.

86 The minutes of the 2014 AGM were in evidence. The minutes were approved at the next general meeting of the Strata Corporation, which took place (an extraordinary general meeting) in December. They were prepared by Mr Trentelman shortly before that meeting took place, although Mr Trentelman claimed that he prepared them from notes taken by Ms McConnell at the AGM.

87 At the time of the 2014 AGM, the Trentelmans had sold 34 lots and had retained 8 lots for themselves. The minutes recorded that twelve lot owners were present at the meeting, including the Trentelmans (four non-owners were also in attendance). Mr Luddington was also present, although the minutes do not record his attendance.

88 The voting entitlements at the meeting, as recorded in the minutes, are set out in the following table:

	Ownership votes	**Proxy votes**	**Total**
Mr & Mrs Trentelman	17 (13.8%)	46 (37.4%)	63 (55.8%)
Ms McConnell	3 (2.4%)	8 (6.5%)	11 (9.7%)
Others	32 (26.0%)	7 (5.7%)	39 (34.5%)

89 The minutes do not record any discussion about motions 10 and 11. They simply record that the motions were passed unanimously (the text of the resolutions in the minutes was copied from the notice of meeting). At the end of motion 11, the minutes record:

> Additional amendment
>
> Further, the owners of Lot 7 whilst the land has not been developed with a residence or residences has no obligation to pay owner corporation levies.

90 **Preparation of plan including Pool Notation**: The process which led to the registration of the Pool Notation appears to have begun with a plan to adjust the boundary between lots 6 and 7. The boundary on the eastern side of lot 7 was to be made more square, resulting in the transfer of a triangular area to lot 7 from lot 6. The triangular area is shown on the survey plan which appears at [30] above.

91 The written evidence does not reveal when Mr Wyper was retained by the Trentelmans, or the instructions he was given. The earliest reference in the documentary evidence to Mr Wyper's involvement is a reference to a letter from him to Tweed Council dated 27 October 2014, but the letter itself is not in evidence.

92 On 3 December 2014 Mr Trentelman emailed Mr Wyper asking how the re-subdivision would proceed. Mr Trentelman explained that there had earlier been discussion about community title (as reflected in motion 11 at the 2014 AGM) and that the Trentelmans were trying to clarify the lot arrangements for the purpose of the proposed sale to Mr Luddington. Mr Wyper replied:

> We are planning to have a survey team on site tomorrow to peg the new bdy between lots 6 & 7 and the new motel bdy line for your approval.
>
> A Strata Plan of subdivision will then be prepared for new lots 6 & 7. They will become lots 53 and 54 and will be "open space lots". Lot 53 can then be transferred to the new owner. This plan can be registered ASAP.
>
> Then (after townhouse approval and construction) lot 53 will be s/div'd into lots 55, 56 and 57 (3 townhouses) and it will be part of the existing strata scheme. Body Corp approval will be required for this s/div as additional common property is being brought into the scheme.

> Lots 2-5, 8 and new lot 54 will be converted to CP. Then this CP will be s/div'd out of the existing strata scheme. The new s/div'd lot will need to be transferred into your and Natalia's name as previously discussed and agreed. Note stamp duty issues may arise.

93 The evidence does not identify what the "new motel" boundary was. Nor does it identify the "additional common property" being brought into the strata scheme.

94 Mr Wyper then prepared the survey plan reproduced at [30] above, which shows the pool land marked off from the rest of lot 7 (proposed lot 53) with a dashed line. That survey plan was described as annexure A to a report of Mr Wyper dated 14 December 2014, but the plan itself bore the date 18 December, as did the survey report which is in evidence. The discrepancy was not explained.

95 On 15 December 2014, Mr Wyper emailed his plan of strata re-subdivision to the Trentelmans. The plan was made up of two sheets. The first sheet was a location plan. It is reproduced below:

96 The area marked off by dashed lines within lot 7 (proposed lot 53) corresponded with the pool land shown on the survey plan. Notation (P) referred to the registered easement.

97 The second sheet contained the actual definition of the lot boundaries, and associated survey lines. It is reproduced below:

98 The sheet included two notations. The first noted that the stratum for each of lots 53 and 54 consisted of the space from 20 metres below ground level to 100 metres above ground level. The second notation was that areas were approximate only.

99 Mr Wyper's email also included a draft administration sheet to accompany the re-subdivision plan. The administration sheet included the unit entitlements for the existing lots. Mr Wyper noted that the current unit entitlements for lots 6 and 7 were 50 each and that these would need to be amended for the new lots 53 and 54 "to better represent share of common property and expenses etc". He also noted that the entitlements should be proportional to "the value of each respective unit".

100 On 18 December, Mr Wyper wrote to them enclosing a set of documents for signature. It seems that in the meantime he had been provided with further

instructions by way of response to his 15 December email, but there is no documentary evidence about this.

101 The enclosures included what Mr Wyper described as a "preliminary copy" of the "final" strata re-subdivision plan. The plan was in the same form as the plan provided on 15 December, except for the addition of the Pool Notation to the notations on the second sheet of the plan. The text of the Pool Notation was:

> The inground pool and auxiliary structures (shed, concrete, fencing etc) located within Lot 53 cubic space are common property. All other structures located within Lot 53 cubic space form part of Lot 53.

102 Accompanying the strata re-subdivision plan was the administration sheet. Mr Wyper's covering letter noted that this showed the unit entitlements for proposed new lots 53 and 54 as 15 each "as directed". The administration sheet also contained a panel for "signatures, seals and statements of intention to create easements, restrictions on use of the land or positive covenants". Mr Wyper asked that these be "signed" by Mrs Trentelman and the Strata Corporation although this was "not critical just yet".

103 The documents also included Mr Wyper's survey report, and the Council application forms which had been completed for signature. Mr Wyper stated that the Trentelmans were to submit the documents directly to the Council. They did so on 22 December, the following Monday.

104 The documents were signed as required by Mrs Trentelman. Her signature on the strata administration sheet is undated, but on the Council applications her signatures are dated 18 December.

105 The strata administration sheet was also executed on behalf of the Strata Corporation. It was signed by Ms McConnell and stamped with the Corporation's common seal. The relevant text was as follows (as prepared by Mr Wyper, with handwritten insertions in bold):

> The Owners – Strata Plan 76700 certifies that on **9/6/14** it passed a special resolution agreeing to each proposed unit entitlement and proposed aggregate unit entitlement shown in the schedule attached to this certificate.
>
> The common seal of the Owners – Strata Plan No.76700 was hereunto affixed on **22/12/14** in the presence of **Sharyn McConnell** being the person(s) authorised by section 238 Strata Schemes Management Act 1996 to attest the affixing of the seal.

106 The first handwritten insertion (the meeting date of 9 June 2014) was in Mr Trentelman's handwriting. The other handwritten insertions were in Ms McConnell's handwriting.

107 As completed by Mr Trentleman, the statement about approval was incorrect. There was a general meeting of the Strata Corporation on 9 June but it was an extraordinary general meeting which dealt with other issues. No doubt Mr Trentelman intended to refer to the AGM on 28 July 2014. But even so the statement was incorrect.

108 By the time the re-subdivision plan was prepared, the proposal had changed so far as lot 7 was concerned. Lot 7 was no longer to be converted into an ordinary RPA lot, but was to remain a lot (and eventually would become three lots) in the strata scheme. There was nothing in motions 10 and 11 about this, or about how it was to be reflected in revised unit entitlements, or about the boundary adjustment with lot 6.

109 **January 2015 solicitors' correspondence**: As already noted, at the time the plan of re-subdivision was executed, the Trentelmans were in negotiations to sell lot 7 (as it then was) to Mr Luddington, and a contract had been prepared. Mr John Saddington was the solicitor for Mrs Trentelman. Ms Sharon Flood was the solicitor for Mr Luddington. In the course of the negotiations there was some reference to the status of the pool.

110 On 8 January 2015, Ms Flood sent a letter to Mr Saddington setting out a list of comments and queries about the draft contract. The list included comments on proposed special condition 36 (which apparently concerned the swimming pool) and a new special condition proposed by Ms Flood allowing for further enquiries by way of "due diligence". These were:

Clause 36	Swimming Pool	Please confirm if your client is aware of any issues with the pool and if so what they are. This element is important as we understand that the pool will remain on the proposed lot and our client is to provide certain rights of use to the body corporate.

…

	Due Diligence	As previously requested we require a due diligence clause to be included (30 days from date of contract). Please see our proposed wording on the following page. This diligence period will allow our client to investigate not only the proposed development but also the proposed strata arrangements and allowance for future development by the owners corporation. In this regard can you please advise if the contents of the resolutions of motion 10 and 11 of the general meeting held 28 July 2014 are still the proposed way moving forward (as we understood the current proposal was that the 3 lots our client proposes to develop will form part of the current strata rather than a community association.

111 Mr Saddington responded on 13 January. He stated:

> **Clause 36 – Swimming Pool**
>
> Our client advises they are [sic] not aware of any issue in relation to the swimming pool and that the pool will remain on the proposed Lot 53 and that it is proposed that when your client develops the property into 3 Lots [sic]. We refer you to Transfer Granting Easement AD463207P annexed to the Contract.
>
> …
>
> **Due Diligence**
>
> Proposed Special Condition is agreed.
>
> In regard to the Resolution of Motions 10 and 11 at General Meeting on 28 July 2014, it was resolved that the Pool becomes part of the Common Property on the subdivision by your client of the proposed Lot 53 into 3 Lots and will remain part of the current strata.

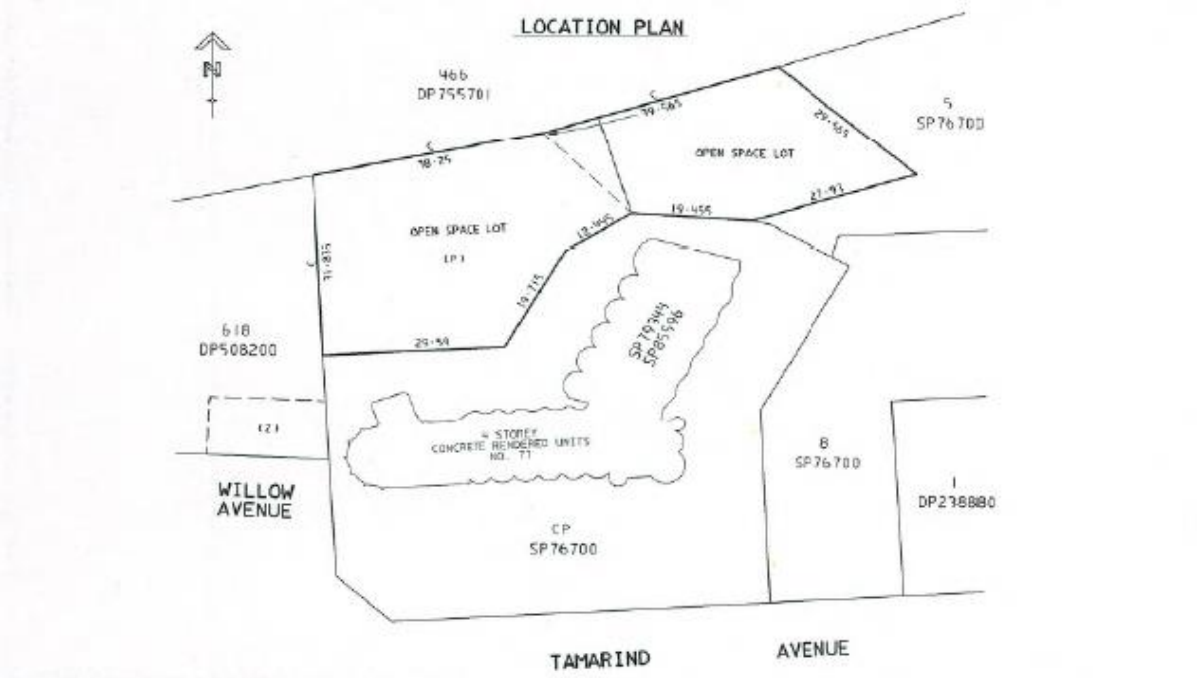
112 **Registration of plan including Pool Notation**: Meanwhile, the Tweed Shire Council had been considering the plan of re-subdivision. In March 2015 the Council issued the necessary approval. In May, Mr Wyper lodged the plan for registration with Land & Property Information ("LPI").

113 LPI responded with some requisitions. It was not clear whether all of the correspondence is in evidence. Two of the requisitions are relevant for present purposes.

114 One of the requisitions concerned the identification of the servient tenement for the pool easement, which was shown in the plan as part of the new lot 53 (see [7] above). LPI pointed out that the transfer creating the easement specified lot 7 (that is, the whole of lot 7) as the servient tenement. In response, Mr Wyper noted that at the time the easement was granted he had prepared a sketch (not itself in evidence) identifying the part of the lot which was to be the subject of the easement. For some reason it had not been registered. In response, LPI insisted that the identification of the servient tenement had to comply with what had in fact been registered.

115 The other relevant requisition concerned the unit entitlements for lots 53 and 54. LPI noted that the entitlements under the original strata plan (SP 76700) had been 30. Mr Wyper pointed out that they had been increased to 50 as a result of the lodgement of SP 79344 and queried why they could not be changed by the lodgement of a fresh re-subdivision. LPI appears not to have accepted Mr Wyper's submission in this regard either.

116 The plan itself was registered in July 2015. The site plan on the first sheet was modified so as to remove the dashed lines delineating the pool lot. The location plan as registered is set out below:



117 The second sheet (reproduced at [97] above) was registered unchanged, including the Pool Notation. The strata administration sheet was registered with the unit entitlements of Lots 53 and 54 shown as 30 rather than 15.

118 **2015 Annual General Meeting**: The Strata Corporation's next AGM was held in August 2015. At that stage, the strata plan containing the Pool Notation had been registered (see below), adjusting lot 7's boundary and converting it into lot 53, but motions 10 and 11 had not otherwise been carried into effect. The Trentelmans' application for a DA over lot 7 had not yet been completed (or consented to by the Strata Corporation). Nor had the developments been converted into ordinary RPA lots.

119 The meeting went for several hours. It was recorded by Mr Lofthouse. Later Mr Lofthouse gave the recording to Mr Luddington. An agreed partial transcript was in evidence which included a discussion of the Trentelmans' development proposal.

120 The discussion began when the agenda items had been addressed and the meeting had turned to general business. Mr Trentelman was asked to explain what the development would look like and what impact it would have. He apparently had a whiteboard or something similar on which he drew a plan of the development. He was asked to draw the pool.

121 When Mr Trentelman had done so, the transcript records an intervention from David Adam, one of the lot owners about the pool:

> Mr Adam: Technically, he's not passing it on.
>
> Mr Trentelman: No, no, it belongs to lot 53. Now when we bought the (inaudible) complex and we bought the complex and what was the, this was already existing, the boomerang [motel building] there, ok that was already existing. Now there were development approvals for all these lots. Now the development approval here was for a block of 10 apartments. Block of 10 apartments. Now that block of 10 apartments would have taken the whole of that and may have taken the pool as well.

122 Mr Luddington then intervened. By this stage he had decided not to buy lot 53 and had (to use his language) "changed his camp" (he later said he had "no sides of the fence"). Mr Luddington protested that Mr Trentelman "assured many of us that we would never lose our view".

123 Mr Trentelman denied this, and brought the discussion back to the original development proposal, stating that it would have involved 80 to 100 further units. The transcript continues (emphasis added):

> Mr Trentelman: Ok so, we went to to, to you guys and said look we don't want that, we, you guys have bought in here, and we don't want that for you, alright.
>
> Ms McConnell: That was the meeting last time.
>
> Mr Trentelman: We've said, we would try and make it as attractive as we possibly can. Okay, so we've said we will not build this, we will not build any of these. Ok. We will keep the development down and what we are going to do here is build 3 townhouses, 3 townhouses and the maximum height is 2 levels, ok being ground and next level and that's the maximum height. ***We also said because that we are building those, we will give you the swimming pool***.

124 The transcript then continues:

> Mr Luddington: Well that's all tied into the original [development] contract, the right of use for the pool as (inaudible) ... community pool, (inaudible) no issues (inaudible).
>
> Mr Trentelman: If you look at the swimming pool ... the swimming pool, if you, actually Charito [Lofthouse] actually found it, the swimming pool has a an easement for 10 years only. In 2 years time, that easement that easement is diminished, is gone.
>
> Mr Luddington: So we lose our right of access?
>
> Mr Trentelman: You lose your right of access to that pool.

125 Mr Luddington replied that this was “something you have assured us would never happen”. After some disjointed exchanges, the transcript continues (emphasis added):

> Mr Trentelman: John, what we have said... we look we don't agree with that, ***we don’t agree with taking the pool away from you***.
>
> Mr Luddington: Yeah that's fine, I understand that.
>
> Mr Trentelman: ***We have said, we will give you the swimming pool***.
>
> Mr Luddington: Yep.
>
> Mr Trentelman: Ok We will get. We will not have a block of 10 apartments there. We will keep our development to a minimum. That’s what we’ve done here (inaudible). We will section this off. We will not have all the blocks of townhouses there. Look I reckon it's a fair cop what we're (inaudible) giving you.

126 Mr Luddington then addressed the meeting further, complaining that the boundary adjustment effected by the December 2014 strata plan of re-subdivision had not been approved by the owners. Mr and Mrs Trentelman responded that Mr Luddington had himself asked for the adjustment (as erstwhile purchaser). The transcript ends with these comments from Mr Adam and another participant identified as “Malcolm”:

> Mr Adam: Legally John can do whatever he likes, he doesn’t have to give us that pool right (inaudible arguing).
>
> Malcolm: Give you nothing, the way you have treated him he has paid all this money out of his own pocket he has given you the shed, he has given the pool and you treat him like shit.
>
> Mr Trentelman: And you still want it.
>
> Malcolm: And you are still after blood. I’ve never seen people like you, you are not very business minded people

127 **2017 correspondence**: About two years later, there was correspondence between the parties which touched on the status of the pool. The context for the correspondence was that the Trentelmans were constructing the townhouse development and issues arose about the sewerage and stormwater on lot 53.

128 The correspondence began with a letter from Ms Carolyn Byrne, a solicitor acting for Ms Trentelman, to Ms Lofthouse, who was then the president of the Corporation, on 27 April 2017. By this stage Mrs Trentelman’s plumber had

investigated the drainage systems and had dug up part of the carpark, apparently for the purpose of laying or connecting pipes for the development.

129 Ms Byrne's letter identified three particular issues. The third was that the pool sewer line was not connected to the Strata Corporation's sewerage network, but instead drained to a neighbouring property.

130 Ms Byrne's letter continued:

> It is requested that SP76700 rectify these faults as a matter of urgency, now that they are aware of these issues and prior to any claims of public nuisance may arise.
>
> We request the SP76700 investigate these matters as identified and notify our office of their willingness to rectify these issues at their own costs. We have requested our plumber to suspend work on rectifying the bitumen of the car park for a period of seven days, in the hope that these issues can been addressed within that timeframe and manage the expenses of resurfacing the car park on two separate occasions for the works to be completed.
>
> We have also requested our plumber to provide a report and quote on the rectification works to assist you in this matter. We will forward this to you as soon as it becomes available.

131 On 11 May, Mr McKnight responded on behalf of the Strata Corporation. He stated (emphasis added):

> The matters raised by you are of serious concern. In particular, the third matter of complaint, the sewer line that services the swimming pool, must be addressed as a matter of urgency. As you would be aware, an Owners Corporation is ordinarily responsible for proper maintenance and repair of common property. Pipes, wires, cables or ducts are usually part of common property unless they are for the exclusive benefit of one lot. In this regard you are referred to the definition of "lot" and "common infrastructure" in section 4 of the *Strata Schemes Development Act* 2015. ***As you are aware, the swimming pool is located within lot 53 in Strata Plan 91510. The sewer pipe servicing the same is clearly a pipe for the exclusive benefit of lot 53.That being so, and subject to confirmation by way of reference to conditions of development consent and plans, its repair would be the responsibility of the owners of that lot.*** As we understand it, your clients own that lot and are currently developing the same.

132 Ms Byrne replied later the same day (emphasis added):

> ***We confirm and accept your statement in the penultimate paragraph of your correspondence, that the Swimming Pool is for the exclusive use and benefit of one lot, that lot being Lot 53 in Strata Plan 915610***.
>
> Our client has a separate storm water system benefiting [sic] exclusively to their [sic] lot 53 SP91510.

> Similarly, owners of lots 10-52 of SP79344, are responsible for the repair of storm water pipes benefiting exclusively their lots and currently the subject of this correspondence for which our client request [sic] urgent remediation.

133 There was some further evidence about the surrounding events in the supplementary affidavits, which I discuss below. Even so the upshot is unclear. There is no evidence that the report and quote from the plumber to which Ms Byrne referred was ever supplied to the Strata Corporation. Instead the works appear to have been paid for by Mrs Trentelman (indeed the evidence suggests that the work was actually done by her plumber before Mr McKnight's response was received and perhaps even before Ms Byrne's letter was sent); later some of the cost may have been claimed back from the Strata Corporation.

Testimony from Strata Corporation's witnesses

134 Five of the Strata Corporation witnesses (Mr Lofthouse, Mr Luddington, Mr Flynn, Ms Chatterjee and Mrs Lofthouse) did attend the 2014 AGM on 28 July 2014. All of them stated that, as well as reading out motions 10 and 11, Mr Trentelman addressed the meeting and answered questions about the Trentelmans' proposal. In the course of the discussion Mr Trentelman put forward a number of selling points in support of the proposal. One was that the development on lot 7 would involve only three units (at most) and would be limited in height. Another was that the apartment lot owners would have continued use of the swimming pool.

135 According to three of the witnesses, the possibility of the Strata Corporation buying lot 7 was raised in the course of the meeting, but Mr Trentelman stated that unanimous consent of the lot owners would be required. One of the lot owners stated that he would not agree and Mr Trentelman then said that that issue was closed. Mrs Lofthouse's version of this conversation was:

> Another owner: Can we buy the land?
>
> Mr Trentelman: Yes, you can, but it has to be 100%.
>
> Owner: How much do you want?
>
> Mr Trentelman: $300,000.00. But it must be unanimous. Is there anyone here who does not want to buy it?
>
> Spindler: No, I would not want to buy it.
>
> Mr Trentelman: Well that's that. You haven't got 100%. That's the end of that.

136 The form of Mr Trentelman's alleged statements about the pool varied somewhat as between the witnesses. As recounted in the witnesses' affidavits, they are set out in the following table (emphasis added):

Witness	Quote (Mr Trentelman)
Mr Lofthouse	I would like to build 3 townhouses on those remaining lots. In exchange for that we will not be building the bigger building which we can do and we will give you the use of the pool forever.
	I am giving you the pool. The views of the lake will not be badly affected. I have had the townhouses designed so that there will be views between them. There will be views in the corridors between the townhouses. You will all have indefinite access to the pool and the townhouses will share it as well.
Mr Luddington	If owners do give permission, then they will have continued use of the pool. The 51 owners of the current apartments in the strata will have access to the pool. They will not lose their views.
	Your remaining choices are to accept the proposal of the three, two storey townhouses and the removal of the undeveloped land within our strata. This is on the basis that you will have ongoing access to the pool.
Mr Flynn	If you agree to the change in development, I will ensure that owners will have continued use of the pool. I want this to be a painless exercise and I do not want owners disadvantaged. I want the views maintained so far as is practical by the development of the townhouses.

	There will be continued use of the pool. I do not want owners disadvantaged by this development.
	I wish to keep the goodwill in this complex. The current enjoyment of the pool will continue.
Ms Chatterjee	The current development proposal is to develop a high rise building, however, I now wish to construct and build three townhouses. You will still have access to the pool and your view.
	In any development of the area, you will all have continued use of the pool.
	In exchange for action to remove these Lots, the redevelopment of the lot of which the pool is situated will be limited to three townhouses and you will have continued access to the pool.
Mrs Lofthouse	I want permission to remove the development lots from the strata scheme. If you give me the permission the use of the pool for all owners will be renewed indefinitely.
	It is two levels total. If you approve this, you will get the pool indefinitely.

137 In his affidavit, Mr Flynn stated that after the AGM had finished he had a meeting with Mr Trentelman to discuss the proposal further. According to Mr Flynn, in the course of that meeting Mr Trentelman said (emphasis added):

> What I said at the meeting was correct. I wish to build three townhouses in the area north of the pool. ***People will still be able to use the pool.*** As to views of the lake I believe it will have minimal impact for most owners. Where your units are positioned I believe you will still have very good views as there will be quite a bit of distance between each of the townhouses and the buildings are restricted to two levels.

138 Mr Kelly did not attend the 2014 AGM but in his affidavit he stated that he had a private meeting with Mr Trentelman the previous Friday (25 July) to discuss the Trentelmans' proposal. In the course of that meeting Mr Trentelman gave him an assurance about the pool which led him to appoint Mr Trentelman as his proxy for the meeting, or confirm that appointment. According to Mr Kelly, in the course of the meeting Mr Trentelman said (emphasis added):

> As well as getting a more attractive development, which wouldn't in any way affect the value of the properties, owners will have continued access to the swimming pool. ***The tenants will be able to use the pool as well***.

139 The affidavits of Mr Luddington, Mr Flynn, Ms Chatterjee, Ms Lofthouse and Mr Kelly were all made in December 2019. In March 2020, three months later, a supplementary affidavit was made by Mr Luddington and Mr Lofthouse made his affidavit. Both Mr Luddington and Mr Lofthouse referred in their March affidavits to the 2015 AGM which had been recorded by Mr Lofthouse.

140 Mr Luddington attached to his supplementary affidavit a transcript he had prepared of the events of the meeting. It contained the statements by Mr Trentelman about giving "you" the pool in substantially the same form as in the agreed transcript which was ultimately admitted. Mr Lofthouse stated in his affidavit:

> During the course of the meeting during the time I was there, I recall Mr Trentelman saying words to the following effect:
>
> We have said, we are giving you the pool.
>
> On a number of occasions I heard Mr Trentelman say:
>
> We will give you the pool.

141 As one would have expected, in cross-examination, counsel for the Trentelmans pursued a number of themes with each of the witnesses. All the witnesses who attended conceded that they did not take any notes of what Mr Trentelman said about the pool. They only set out to recall what he said shortly before they prepared their affidavits. This was more than five years after the event.

142 Apart from making these points, counsel's challenge to the witnesses' account was a limited one. Counsel did put to two witnesses (Ms Chatterjee and Mr Lofthouse) the proposition that the only mention of the pool at the AGM was in

the part of motion 10 (quoted at [77]-[81] above) read out by Mr Trentelman. But both of them said that the pool was mentioned in the course of the general discussion as well. Counsel did not take the point further. Nor did counsel put the proposition to the other three witnesses who attended the AGM.

143 Counsel's line of attack focused on the easement. Counsel suggested that the witnesses' understanding was only that the easement would be extended. Nothing explicit was said to the effect that the extension would be forever, or for any specific period. Also, the extension would require the execution of formal documents the details of which were never discussed.

144 Not all of these suggestions were fully accepted by the witnesses. Mr and Mrs Lofthouse agreed that they were aware of the easement before the meeting and that it lasted only until 2017 (in fact Mrs Lofthouse seems to have been the first person to discover this, as Mr Trentelman said at the 2015 AGM: see [124] above). Mr Kelly was aware of the easement but was not specifically asked about its term. Mr Luddington also knew of the easement. But Ms Chatterjee and Mr Flynn both said they were not aware of it.

145 The witnesses who were aware of the easement accepted that, on their understanding, it was that easement which underpinned the use of the pool. With Mrs Lofthouse, counsel went further and suggested that her understanding was that the easement was limited to the owners of lots 9 to 48, and not the Strata Corporation. Mrs Lofthouse, however, denied any such understanding and pointed out that the costs of the pool were paid for through the Corporation. This issue was not specifically raised with the other witnesses.

146 Counsel put to the witnesses who accepted that they were aware of the easement that their understanding was that continued access to the pool would be provided by way of extension of the easement. But Mr Flynn and Mr Kelly both said that they believed, based on the terms of motion 11, that the pool would be turned into common property. They accepted however that this was not specifically mentioned at the meeting. Mr Luddington said that at the 2014 AGM he believed there would be an extension to the easement but he later came to believe that the pool would be made common property.

147 All the witnesses who were asked accepted counsel's suggestion that documents would have to be executed and there would have to be negotiations about paying for expenses. They agreed that there was no discussion of these details at the meeting.

148 Counsel put to Mr Luddington, Ms Chatterjee and Mr Kelly the possibility that lot owners could refuse to accept the easement, perhaps because it would involve a cost. Each of them accepted the proposition. But it was clear from their evidence that this did not cross their minds at the time and there was no suggestion that it was mentioned.

149 In the course of answering questions, most of the witnesses re-stated their evidence that Mr Trentelman made promises about the pool. What they said is summarised in the following table:

Witness	Question	Answer
Mr Lofthouse	What do you claim was said in relation to the proposal by Mr Trentelman?	Mr Trentelman put the proposal through to us that he would incise what he called were development blocks. He would leave three blocks with the strata, that he would build two 2 storey townhouses on. In exchange, he would give us the pool forever. We already had it until 2017, so that's why he was stressing the forever.
	When you say that Mr Trentelman said he was going to give you the pool, you're referring to that	To that passage and the talk that was after the passage. He, he read out that passage, and then he went on to talk to us in

	passage that I just read out to you [Motion 10]?	layman terms, bearing in mind I'm an upholsterer et cetera he turned and then went on to explain it in layman's terms when he made it quite clear that he'll give us the pool forever and that would be an obvious thing to do. As I said, we already had the pool to 2017, sir.
	In layman terms, what he said to you was that, "This proposal would not interfere with your use of the pool", correct?	He said we'd have continuous use of the pool.
Mr Flynn	Is it possible that what Mr Trentelman said at this meeting about the pool is that the owners corporation would be authorised to sign such documents for the surrender or creation of such easements or covenants - I withdraw that. If you just have a look at the words at VI, it might be easier rather than me reading	So, so my understanding of the meeting is that he was offering up the pool to be part of the, of the strata plan and it would be put in as common property and any of the paperwork required and costs associated would be borne by him and done by him, and he was the executive part of the owners corp.

	them out. at page 266?	
Ms Chatterjee	The pool was very much a side issue at this meeting, would you agree with that?	Yes, because we were told quite certainly that we would have continued access to the pool. The new complexes and our existing complex would form one strata and share the pool.
	That's your recollection of what he said, that you would continue to have use of the pool?	Yes, correct.
	Is it possible that what was said at this meeting was that the proposal that was being put forward would not interfere with the then existing use of the pool? In fact you were told that this would not interfere with your use of the pool, weren't you?	Yes, there was no indication that there would be interference with the use of the pool at any time. Correct.

Mrs Lofthouse	So what you understood was being discussed at this meeting was the extension of the easement that's at page 443?	No it’s not - it wasn't like that. It's not the extension. The deal that was given to us is we're going to have the swimming pool indefinitely in return for the three townhouses instead of those six by ten apartments and the excision of those vacant lots which carries 310 unit entitlements which they never paid levies anyway. That was the deal.
Mr Kelly	Did you understand, firstly, that to be a reference to a continuation of the easement that I’ve just shown you?	No, I don’t understand that it was just referring to the easement because I read the minutes of the meeting, the proposed meeting, which indicated that the pool would be transferred to common property.
	You understood that on that page that “explanatory note, motion 11” was an alternative way that may not occur? Please.	Correct. Can I explain? As I was not at that meeting, the meeting I had with Mr Trentelman was designed to give my own peace of mind in relation to the future development and the ongoing use of the

		swimming pool. I saw - in the wording of those 15 minutes and the explanatory notes, I saw that we would either get the pool by common property or an extension of the easement.

150 Counsel asked Mr Lofthouse and Mr Luddington whether, before preparing their affidavits, they had listened to the recording of the 2015 AGM. Both Mr Lofthouse and Mr Luddington said that they had. Counsel suggested that this might have influenced their recollection of events at the meeting the previous year.

151 Neither witness accepted this. In Mr Luddington's case, at least, I consider it unlikely. Mr Luddington's account of what Mr Trentleman said at the 2014 AGM appeared in his December 2019 affidavit. I infer from the sequence of events that the Strata Corporation's legal advisers were not aware at that time, and that the recording only surfaced later, which was why it was referred to in the supplementary affidavit made by Mr Luddington in March 2020. Of course, given the terms of the transcript, counsel did not challenge either Mr Luddington or Mr Lofthouse about the statements they attributed to Mr Trentelman about the pool at the 2015 AGM itself.

Testimony from Mrs Trentelman's witnesses

152 According to Mr Trentelman's affidavit, after he read out the motions, there was discussion about motion 10. That discussion was short. In the course of it, the question of the Trentelmans selling lot 7 was raised but dismissed. Mr Trentelman was concerned about being misinterpreted. He therefore said nothing about the pool beyond repeating the terms of motion 10 (see [76]-[85] above). Mr Trentelman denied that he made any of the further statements attributed to him by the Strata Corporation witnesses about use of the pool.

153 The affidavit evidence from Mrs Trentelman was to similar effect. She conceded that her husband might have said that the development of the

townhouses would not affect access to the pool in answer to a question She denied that he said anything about the lot owners getting the pool forever.

154 Ms McConnell's affidavit evidence was that she had no recollection of Mr Trentelman mentioning the pool. To the best of her recollection Mr Trentelman did not make the statements alleged by the Strata Corporation's witnesses about the pool.

155 In his affidavit Mr Trentelman also denied the representation about the pool allegedly made to Mr Kelly in their meeting on the Friday before the AGM. Mr Trentelman could not recall meeting Mr Flynn. In fact he said Mr Flynn had told him several years later that he (Mr Flynn) could not recall what had been said at the 2014 AGM.

156 In her affidavit, Mrs Trentelman touched briefly on the strata re-subdivision. There was little detail to her evidence. She said that Mr Wyper was retained "in or about August/September 2014" in response to a request from Mr Luddington for a boundary adjustment between Lots 7 and 6. She referred to receiving the draft plan of subdivision sent by Mr Wyper on 15 December ([95] above), but did not mention the earlier correspondence in which Mr Trentelman was involved ([91]-[92] above).

157 Nor did Mrs Trentelman refer to Mr Wyper's subsequent letter of 18 December enclosing the revised version of the strata plan of re-subdivision and providing instructions on execution of the relevant documents ([100]-[105] above). She stated that when she signed the strata administration sheet for the 18 December plan she believed it was the same as the one sent on 15 December. She never discussed transferring the pool with anyone from the Strata Corporation and believed that the inclusion of the pool notation was a mistake.

158 There was no evidence from Mr Trentelman about the re-subdivision in his affidavits. Ms McConnell's evidence was that she could not recall the Pool Notation.

159 In cross-examination, counsel for the Strata Corporation suggested to Mrs Trentelman that at the 2014 AGM she had already decided to leave lot 7 in the strata scheme. Mrs Trentelman accepted this. Motion 10, which provided for all

of the development lots, including Lot 7, to be converted into ordinary RPA lots, was, counsel suggested, therefore incorrect. Mrs Trentelman accepted this, and she accepted that she did not correct it when the motion was read, but was not asked to provide any further explanation.

160 Mrs Trentelman continued to deny that, in the discussion at the 2014 AGM after her husband read the motions, he said that the lot owners would have the pool indefinitely or forever. She said he “never said that”. She then gave the following evidence in answer to questions asked by me:

> Q. What did he say about the pool, according to your recollection? This is after he'd read out the resolution.
>
> A. Your Honour, I, I can recall that somebody asked, like, "With your development, with proposed development, we will continue" - no, "We will - there will be no changes how we swimming in the pool?"
>
> Q. Okay. That's a question--
>
> A. "There will be any changes?"
>
> Q. All right. That's a question that was asked, was it?
>
> A. Yes, correct. And he said that there will be no changes.

161 Mrs Trentelman was asked about the statements made by Mr Trentelman at the 2015 AGM. She gave this evidence:

> Q. You recall that in the 2015 meeting, your husband said to the meeting “We will give you the pool.” Do you recall that?
>
> A. No, it’s not correct. Absolutely not correct. He never said it at AGM.

162 Counsel then asked Mrs Trentelman about the transcript of the recording made by Mr Lofthouse. Mrs Trentelman said that she had read the transcript and listened to the recording as well. She referred to corrections which Mr Trentelman had proposed to the transcript. But her counsel intervened and indicated that an agreed transcript could be tendered in due course. No further explanation was given for the evidence I have quoted.

163 In cross-examining Mr Trentelman, counsel put to him a series of statements he allegedly made at the 2014 AGM about the pool, including “we are giving you the swimming pool”. Each of these alleged statements was denied by Mr Trentelman. Counsel then elicited the following evidence about the 2015 AGM:

> Q. You've listened to the tape recording of the 2015 AGM made by Don Lofthouse, haven't you?

A. Yes.

Q. Having listened to that tape recording, do you adhere to your evidence that you've given now?

A. Yes.

164 This was as far as counsel went. At no stage did counsel actually clearly put to Mr Trentelman that he said "we will give you the pool" at the 2015 AGM. Nor did counsel put to Mr Trentelman that that statement reflected his state of mind at the 2014 AGM, the year before.

165 But at the end of Mr Trentelman's cross-examination, the issue came up again. Counsel challenged Mr Trentelman's evidence that he was later told by Mr Flynn that he (Mr Flynn) could not remember anything being said about the pool. Mr Trentelman initially maintained his position. But then the following exchange occurred:

Q. In fact Mr Flynn remembered that you had made statements to the 2014 - I withdraw that. In fact Mr Flynn told you that he remembered you saying that there would be a continued use of the pool, didn't he?

A. Yes. We, we, we were prepared to give them continued use of the pool, yes.

166 Turning to the December 2014 plan of strata re-subdivision, counsel asked both Mr and Mrs Trentelman about the statement in Mr Wyper's email of 3 December about pegging the boundaries ([92] above). Counsel suggested that Mr Wyper was referring to a boundary alteration which would transfer the pool area to the common property. This was denied by Mr Trentelman; Mrs Trentelman said she did not know. No alternative explanation was offered by either of them.

167 Mr Trentelman was not asked anything more about the issue. Mrs Trentelman was taken through the documents sent by Mr Wyper on 15 and 18 December ([95] and [100]-[105] above). She said that she gave the instruction to reduce the unit entitlements for lots 53 and 54 to 15 each ([102] above), and did so because she was no longer going to be developing the lots in accordance with the original development contract.

168 Apart from this, Mrs Trentelman did not accept any responsibility for the content of the plan or the administration sheet (or the other documents lodged with the Council). She said she did not read the documents carefully (or in

some cases, at all). Counsel put to her that she trusted her husband and Mr Wyper. Her response was that Mr Trentelman had nothing to do with it, but she trusted Mr Wyper.

169 Mrs Trentelman was cross-examined about Mr Saddington's answers on her behalf to Ms Flood's requisitions ([110]-[111] above). She said that the answers were not based on any instructions from her.

170 In their cross-examination, both of the Trentelmans denied that they made decisions jointly. I also found this evidence unconvincing. In evidence both of them regularly slipped into using the first person plural when talking about events at the meeting and subsequent registration of the strata plan. It is clear enough from the documents that Mr Trentelman dealt with professional advisors (such as Mr Wyper) and with the other lot owners on Mrs Trentelman's behalf, with her evident approval. Also, Mrs Trentelman was present at both the 2014 and 2015 AGMs and made no attempt to correct anything he said.

171 The cross-examination left me generally unimpressed with the reliability of the Trentelmans' evidence. Their affidavit evidence that Mr Trentelman only read out (or repeated) the terms of motion 10 about the pool was not correct. It was contradicted by their own admissions in cross-examination ([160] and [165] above) that something else was said. Furthermore, as discussed below, I am satisfied that promises about the pool were made by Mr Trentelman substantially in accordance with what was alleged by the Strata Corporation witnesses.

172 The transcript of the 2015 AGM shows that Mr Trentelman did indeed say, on two separate occasions, "we are giving you the pool". Mrs Trentelman's denial of this was flatly incorrect. It makes it difficult to accept her evidence on other issues.

173 As I explain in more detail below, the fact that Mr Trentelman said at the 2015 AGM that "we are giving you the pool" does not necessarily mean he said the same thing at the 2014 AGM. As we have seen, Mr Trentelman was not asked whether he denied making those statements in 2015. Nor was he asked to

reconcile them with his evidence about the 2014 AGM. But for reasons I have already given, that evidence did not inspire confidence.

174 Overall, I was sceptical of Mrs Trentelman's evidence about the Pool Notation. As I already noted, it was light on detail. Mrs Trentelman did not refer at all to Mr Trentelman's involvement. I was left with the impression that she had little if any actual recollection of events. This may be because Mr Trentelman dealt with Mr Wyper and Mrs Trentelman had no real involvement beyond signing the documents.

175 I was also unimpressed by Ms McConnell's evidence. It is possible that she paid little attention to the pool and that this explains her evidence that she could not recall it being mentioned. But given the other evidence which establishes that it was mentioned, relying upon her reported recollections would obviously be unsafe.

176 Counsel put to Ms McConnell that she simply did what the Trentelmans (and Mr Trentelman in particular) told her to do. She denied this but I think it was probably true. I have no confidence that she gave any real consideration to whether what she was asked by Mr Trentelman to sign on behalf of the Strata Corporation actually reflected the terms of the motions passed at the 2014 AGM, or that she considered the interests of the Strata Corporation in what she did.

Conclusions

177 **Alleged promise at 2014 AGM**: Counsel for the Strata Corporation submitted that the proper finding on the evidence was that at the 2014 AGM Mr Trentelman made a representation on behalf of Mrs Trentelman to the effect that the Strata Corporation or the lot owners would be given permanent access to the pool. In this section of the judgment, I consider the factual question of what was said at the meeting. I deal with the legal issues such as the construction of any promise made, and the identity of the parties to that promise, when I address the legal issues in a later part of the judgment.

178 In addressing the factual issue, I will first consider the documentary evidence. I will then consider the testimonial evidence from the Strata Corporation's witnesses and Mrs Trentelman's witnesses.

179 The first piece of documentary evidence is the notice of meeting for 2014 AGM. I have set out the terms of the notice at [77]-[85] above. For present purposes, the critical elements are resolution 10.2, under which the Strata Corporation was to "agree" to the Proposal, as defined; and resolution 10.4, under which the Strata Corporation was to execute such documents as might be required to give effect to the Proposal.

180 The drafting of resolution 10.2 was clumsy. The term "Proposal" was in part defined by reference to what the resolution refers to as "the proposal" (see subparagraph (c)), which was not further described. But as defined the Proposal clearly involved at least the following elements:

(1) conversion of the development lots (including lot 7) into common property by means of a "deposited" (i.e. registered) plan: subparagraphs (a) and (b);

(2) transfer of the newly created lots back to the former proprietor of the development lots (Mrs Trentelman): subparagraph (c);

(3) construction on lot 7 of not more than three townhouses, not exceeding two storeys in height: subparagraph (d).

181 Resolution 10.4 was the only part of motion 10 to mention the pool. The Strata Corporation was to execute documents to meet various requirements. One of those requirements was to ensure "a continuing right to use the swimming pool" for "the owners and occupiers of lots within the scheme".

182 It is notable that resolution 10.4 was not just an authorisation which permitted the Strata Corporation to negotiate such a continuing right. The resolution required the Strata Corporation to execute such documents as were required to give effect to the Proposal, "including but not limited to" the documents about the pool. As a matter of language, the Strata Corporation was obliged to ensure such access.

183 The definition of "Proposal" did not expressly include the grant of a right of continuing access to the swimming pool. But the effect of clause 10.4 was that implementation of the Proposal expressly required the grant of such a right. The overall effect, by implication, was that it was part of the Proposal (or at least part of the agreement being made by the Strata Corporation to implement

the Proposal) that the lot owners would receive such a continuing right. This is of course supported by the explanatory note which accommodated motion 10.

184 Motion 11 spoke of the pool forming part of community property. But the terms of the motion made it clear that this was only one possible outcome. It did not oblige the Strata Corporation, or contemplate that the Trentelmans would be obliged, to carry the idea into effect. This was stated in terms in the accompanying explanatory note.

185 Motion 11 thus takes matters no further. But in my view motion 10 does implicitly promise that as part of the Trentelmans proposal the lot owners were to have a continuing right, attached to their lots, to use the pool. In other words, the promise was implicit in the notice of meeting itself.

186 The second relevant piece consists of the Pool Notation itself and the surrounding correspondence which shows the circumstances in which it was prepared and signed. Motion 10 said nothing about actually transferring ownership of the pool land. But transferring the land to the lot owners or the Strata Corporation was one way in which the continuing right of access contemplated by motion 10 could have been achieved.

187 I discuss in more detail below the specific inferences which can be drawn concerning the preparation of the Pool Notation. But for present purposes it is enough to observe that the Pool Notation cannot have been created randomly. Whoever did create it must have done so for some purpose. The natural inference is that the purpose was linked to the resolution at the 2014 AGM.

188 The third piece of documentary evidence is the letter from Mrs Trentelman's conveyancer in response to the requisitions from Mr Luddington's solicitor in January 2015 ([111] above). Mr Saddington's response to the requisition concerning clause 36 was garbled but his response concerning due diligence expressly stated that at the AGM it had been resolved "that the pool becomes part of the common property" on the subdivision of lot 7 once the development had been completed.

189 On the face of it, this is a statement made on behalf of Mrs Trentelman which supports the Strata Corporation's case. The suggestion made by Mrs

Trentelman in cross-examination that this statement might have been made by Mr Saddington without any instructions (either from her, or perhaps more likely, from Mr Trentelman on her behalf) is far-fetched. Counsel for Mr Trentelman did not seek to support it in final submissions. Instead he suggested that it might have been based on a "misreading" (in fact, for reasons I have given, I think it would have been a correct reading) of the notice of meeting for the 2014 AGM, or the minutes of that meeting. That is a possibility, but I do not see why I should draw that inference affirmatively in Mrs Trentelman's favour when she has not called Mr Saddington as a witness or explained his absence.

190 Finally, I come to the transcript of the 2015 AGM. That transcript records Mr Trentelman saying twice that "we have said we will give you the pool". The use of the past tense shows that the "gift" had already been made. The natural reading of it is that Mr Trentelman was referring to what had happened at the 2014 AGM. This is supported by the intervention from Ms McConnell about "the meeting last time".

191 This brings me to the testimony from the Strata Corporation witnesses. Counsel submitted that this testimony was an unreliable basis for making a finding, at least in any specific terms, about Mr Trentelman having made a promise about the swimming pool. Counsel reminded me of the well-known statement of principle by McClelland CJ in Eq in *Watson v Foxman* (1995) 49 NSWLR 315 at 318-319. Counsel emphasised that the witnesses were giving evidence in their own interests, and long after the events in question.

192 If the Strata Corporation's witnesses' testimony stood alone there would be some force in these submissions. But it does not stand alone. It is entirely consistent with the documentary evidence, and in particular the notice of meeting circulated before the 2014 AGM. That notice of meeting was prepared under the Trentelmans' instructions. Undoubtedly it reflected their understanding on what they were "offering" in exchange for approval at the meeting. There is every likelihood that in addressing the meeting Mr Trentelman would have expressed himself in substantially the same terms, as the Strata Corporation witnesses claim.

193 Counsel for the Trentelmans pointed out that initially the Strata Corporation had intended to rely on evidence from five further witnesses about events at the meeting. Counsel submitted that the failure to call these witnesses gave rise to a *Jones v Dunkel* (1959) 101 CLR 298 inference against the Corporation.

194 It is often said that a *Jones v Dunkel* inference does not arise from a failure to call merely cumulative evidence. The authorities were discussed by Campbell JA in *Manly Council v Byrne* [2004] NSWCA 123 at [61]-[67].

195 As his Honour's discussion shows, no absolute statement of principle which will resolve every case is possible. Where multiple witnesses are available to a party, and that party calls only a second-string witness, withholding the testimony of an obviously more significant witness, an inference may still be drawn. But in general, it seems that if the party has more than one witness of equal significance, then it is sufficient to call one of them. It must also be remembered that, in any event, even if an adverse inference is open, that does not mean that the Court must act on it.

196 In the present case, there is no reason to think that the witnesses who were not called by the Strata Corporation were necessarily more reliable than the witnesses who were. On the face of it, the failure to call those witnesses appears to have been nothing more than a commendable attempt to save time. There is no reason to think that the witnesses would have damaged the Strata Corporation's case. In my view the failure to call them has no significance for the factual issue with which I am concerned.

197 As already noted, the affidavit evidence from Mrs Trentelman's witnesses about events at the 2014 AGM did not survive cross-examination. By the end of their testimony both Mr Trentelman and Mrs Trentelman had made concessions that something was said about the pool beyond reading out the motions. Mrs Trentelman accepted that in response to a question about the development affecting the use of the pool, her husband said "there will be no changes". Mr Trentelman conceded that he said that there would be "continued use of the pool".

198 In the end, counsel for Mrs Trentelman accepted that something had been said about the pool beyond what had been said in the notice of meeting. Counsel's submission focused on what was said.

199 Counsel's submission relied on a passage of Ms Chatterjee's evidence in cross-examination set out in the table at paragraph [149] above. For convenience, I repeat it here:

> Q. Is it possible that what was said at this meeting was that the proposal that was being put forward would not interfere with the then existing use of the pool?
>
> A. Yes, there was no indication that there would be interference with the use of the pool at any time.
>
> Q. In fact you were told that this would not interfere with your use of the pool, weren't you?
>
> A. Correct.

200 Counsel started with the concession made by Mrs Trentelman about a statement by her husband in answer to a question about the development effecting the use of the pool. Counsel seized on Ms Chatterjee's affirmative answer to the first question, which asked her whether anything was said about interference with the "then existing" use of the pool. Counsel argued that all Mr Trentelman said was that the construction of the townhouses would not interfere with the lot owners' rights under the easement. No promise had been made about access rights after the easement was to expire in 2017.

201 In my view there are four difficulties with this submission.

202 First, I think it overstates the significance of Ms Chatterjee's first answer as quoted above. Although Ms Chatterjee started by saying "yes" I do not think she was alive to the subtle implication upon which counsel relies. I think that is shown by the rest of her answer and her answer to the following question. Counsel never squarely put to Ms Chatterjee (or any of the other witnesses) the difference between a promise to respect the lot owners' existing easement rights (but no more) and a promise to "give" them the pool.

203 The second difficulty is that there are too many other statements from Strata Corporation witnesses which do not limit Mr Trentelman's statements to a response to a question about the effect of the development on the use of the

pool, and which are not limited to the "then" usage. These are set out in the tables at [136] and [149]. They include statements by Ms Chatterjee herself in her affidavit and in other passages of her cross-examination.

204 Thirdly, the contextual limitations are not supported by the Trentelmans' own evidence. Mrs Trentelman spoke in terms of "continuing", not "unaffected", use. Mr Trentelman spoke likewise, and his concessions did not refer to a question about the effect of the development as part of the context.

205 The fourth difficulty is that an undertaking to allow access until expiry of the easement, but only until then, would hardly have been worth making. The easement obliged the Trentelmans not to interfere with access anyway. It is hard to see what they could have hoped to gain from making the existing legal position (but no more) an explicit part of their pitch to the lot owners.

206 The statements by Mr Trentelman at the 2015 AGM reinforce the point. To say that the Trentelmans would "give" the swimming pool to the lot owners is quite inconsistent with some sort of limited promise to respect the easement until it expired.

207 Counsel for the Trentelmans accepted that these statements amounted to admissions on Mr Trentelman's part, but submitted that they were only one part of the evidence. They did not compel the Court to find in favour of the Strata Corporation: *The Nominal Defendant v Gabriel* (2007) 71 NSWLR 150 at 172. The suggestion was that Mr Trentelman might himself have forgotten by then exactly what had been said at the 2014 AGM.

208 Counsel's submission that Mr Trentelman's admission in 2015 is only one piece of evidence is correct so far as it goes. Again, had the admission stood alone the submission might have had more force. But the evidence on the issue is all one way.

209 For these reasons, I reject counsel's submission. I am satisfied that at the 2014 AGM Mr Trentelman did indeed make representations to the effect that "we" would give "you" continued use of the pool.

210 **Pool Notation**: The contention for Mrs Trentelman was that the inclusion of the Pool Notation in the plan of re-subdivision was a mistake on her part. Again in

this section of the judgment I will deal with the factual issues which arise, leaving the legal consequences of the findings I make to be dealt with in a later part of the judgment. Once again, I will also deal first with the documentary evidence before returning to the relevant witness testimony.

211 The documentary evidence shows that Mr Wyper must have introduced the Pool Notation at some point between sending out the 15 December version of the plan and the final, 18 December, version of it. The evidence does not show why he did so. But it can only have been a conscious and deliberate step on his part. The natural inference is that it was the result of instructions which he had received.

212 Mr Wyper may have received such instructions in various ways. Most obviously it could have happened in discussions following his email of 15 December. In that email he specifically asked for the Trentelmans to consider the unit entitlements of the new lots being created, and implicitly sought comment on the draft plan. But Mr Wyper could also have picked up the idea from the 2014 notice of meeting or the minutes of that meeting (if he was provided with them).

213 The evidence of the subsequent communications between Ms Flood and Mr Saddington in January 2015 does not take matters further. Mr Saddington's response to Ms Flood's requisitions does not refer to the Pool Notation. But that does not seem to me to be significant, because Mr Saddington may not have been aware (or at least consciously aware) of the Notation. Even if he had, he may not have seen it as necessary to mention it by way of response to Ms Flood.

214 There is no express reference in the transcript of the 2015 AGM to the Pool Notation. The lot owner called Malcolm, with Mr Trentelman's subsequent approval, spoke of the Trentelmans having given the pool to the lot owners. But Mr Trentelman himself referred to the Trentelmans having said that they would give the pool to the owners. This suggests, albeit far from conclusively, that Mr Trentelman may have thought at the time that the gift had not yet been made. That in turn would suggest that he may not have seen the Pool Notation (which by then had been registered) as having effected the gift.

215 But even if so I think this is of little significance. Mr Trentelman might have seen the Pool Notation as an acknowledgement of the obligation but not as itself giving effect to it. He may himself not even have been conscious of the Pool Notation at that point. As he did not give any evidence on the subject, the Court has no way of knowing.

216 Counsel for Mrs Trentelman recognised that the absence of Mr Wyper potentially gave rise to a *Jones v Dunkel* issue. But counsel submitted that on analysis no adverse inference arose.

217 Counsel's argument was that the relevant issue was Mrs Trentelman's state of mind. Counsel submitted that Mr Wyper could not give evidence on this question, and accordingly the failure to call him could not give rise to an adverse inference.

218 I do not accept the premise of counsel's argument. It is clear that Mr Wyper prepared both the plan and the administration sheet. In doing so he was effectively acting for both Mrs Trentelman and the Strata Corporation, who were the parties to the dispositions in those instruments. On the evidence no independent thought was brought to bear by Mrs Trentelman or Ms McConnell when they executed the documents. Both of them were in effect content to proceed with whatever Mr Wyper had included in them.

219 It follows that the relevant state of mind, both for the Strata Corporation and for Mrs Trentleman, was that of Mr Wyper. But even if the relevant state of mind was that of Mrs Trentelman, it would be natural to suppose that Mr Wyper could have given evidence about the instructions he received, whether from Mrs Trentelman herself or from Mr Trentelman on her behalf. Mrs Trentelman was apparently unable herself to recall those instructions. I think that on any view the failure to call Mr Wyper does lead to the inference that his evidence would not have assisted Mrs Trentelman's case.

220 Nor do I accept that, as Mrs Trentelman stated in cross-examination, Mr Trentelman's position was irrelevant. The evidence suggests to me that he was probably involved in instructing Mr Wyper. Indeed, he may well have played a greater part in doing this than Mrs Trentelman herself.

221 I have already referred to the misgivings I have about the credibility of Mrs Trentelman's evidence generally. I am not inclined to accept that the inclusion of the Pool Notation was a mistake just on her say-so; and in the absence of evidence from Mr Wyper (and Mr Trentelman) I am not prepared to draw inferences in her favour on this question. I am not satisfied that the inclusion of the Pool Notation resulted from a mistake on her part.

Post-hearing affidavit evidence

222 The supplementary evidence began with an affidavit served on behalf of the Strata Corporation in July 2020 from Barrie Richard Green. Mr Green is a registered surveyor. He was retained by the Strata Corporation after the June hearing to prepare a survey of the pool area to be incorporated in the orders sought by the Strata Corporation (including the orders to be sought by the Strata Corporation on its proposed cross-claim in Mrs Trentelman's lawsuit). As I will describe in more detail below, Mr Green put forward two alternative plans.

223 Mrs Trentelman's first contention was that leave to bring the cross-claim should be refused, and the affidavit should be rejected for that reason. There were fall-back objections to parts of Mr Green's affidavit in which he stated what the effect of registration of his plans would be.

224 In case Mrs Trentelman's blanket objection should fail, an affidavit from her was lodged in response. That affidavit set out numerous complaints by Mrs Trentelman about the practical consequences of Mr Green's plans. Although initially the affidavit was presented purely as a response to Mr Green, as matters developed leave was sought to reopen Mrs Trentelman's case and read the affidavit in any event.

225 Mrs Trentelman's affidavit was objected to in whole by counsel for the Strata Corporation. Again, should that objection not succeed, a whole list of specific objections was formulated. Counsel also sought, in the event that Mrs Trentelman's affidavit was permitted, to read further affidavit evidence from Mr Green, Mr Luddington and Luke Patterson.

226 Mr Green's further affidavit evidence responded to Mrs Trentelman's affidavit on a surveying level. Mr Luddington responded on a factual level, focusing in particular on issues Mrs Trentelman had raised about the provision of services.

Mr Patterson is an electrician who gave evidence about electricity supply issues. Lodgement of these affidavits provoked a series of blanket objections, together with a lengthy list of individual objections by way of fall-back from counsel for Mrs Trentelman.

227 It is regrettable that this process should have generated so much objection and occupied so much time. Much of the evidence was defective in form but had it been read at a hearing many of the objections would have provoked questions from me about whether there was any genuine dispute about what was said. As will be seen, I do not propose to deal individually with all of the objections although I will state some general conclusions.

228 The first question is whether I should refuse to permit any of this evidence at all. I do not think that I should. The Strata Corporation was given leave to prepare a survey plan (although not, formally, to provide the additional commentary from Mr Green). The plans prepared by Mr Green are relevant to (indeed they have now been incorporated into) the relief sought by the Corporation on its existing claims. Many of Mrs Trentelman's complaints raise factual matters which are relevant to working out the precise terms of the orders which would be made if the Corporation is successful. Some factual reply from the Corporation was therefore legitimate.

229 I appreciate that leave was sought to rely on Mrs Trentelman's evidence not merely by response to Mr Green's survey plan, but as evidence in the case generally. Strictly speaking, counsel for the Strata Corporation were correct to point out that this evidence could have been presented at the May hearing. In fact, the evidence supplements some of the written evidence which was admitted at that hearing.

230 But that in itself, I think, makes the receipt of the evidence desirable, so as to allow Mrs Trentelman to present her complete case. There is no prejudice to the Strata Corporation. The supplementary evidence does not give rise to any issue of credit, nor was it suggested that Mrs Trentelman needed to be recalled.

231 This leaves the specific objections. There were objections as to relevance, and some of the material in the affidavits was argumentative, but I do not stay to

consider objections of that character. I will deal with other specific objections in the course of summarising the evidence, to which I now turn.

232 Annexed to Mr Green's July affidavit were three plans, designated A, B and C. Each plan excises an area surrounding the pool which it designates as common property, leaving the residue of lot 53 as a new lot 55. In Plan A (which seems to be the same as Plan C) the residual area of lot 53 is 1185 square metres. Plan B excises a slightly larger area, leaving a residue of 1146 square metres.

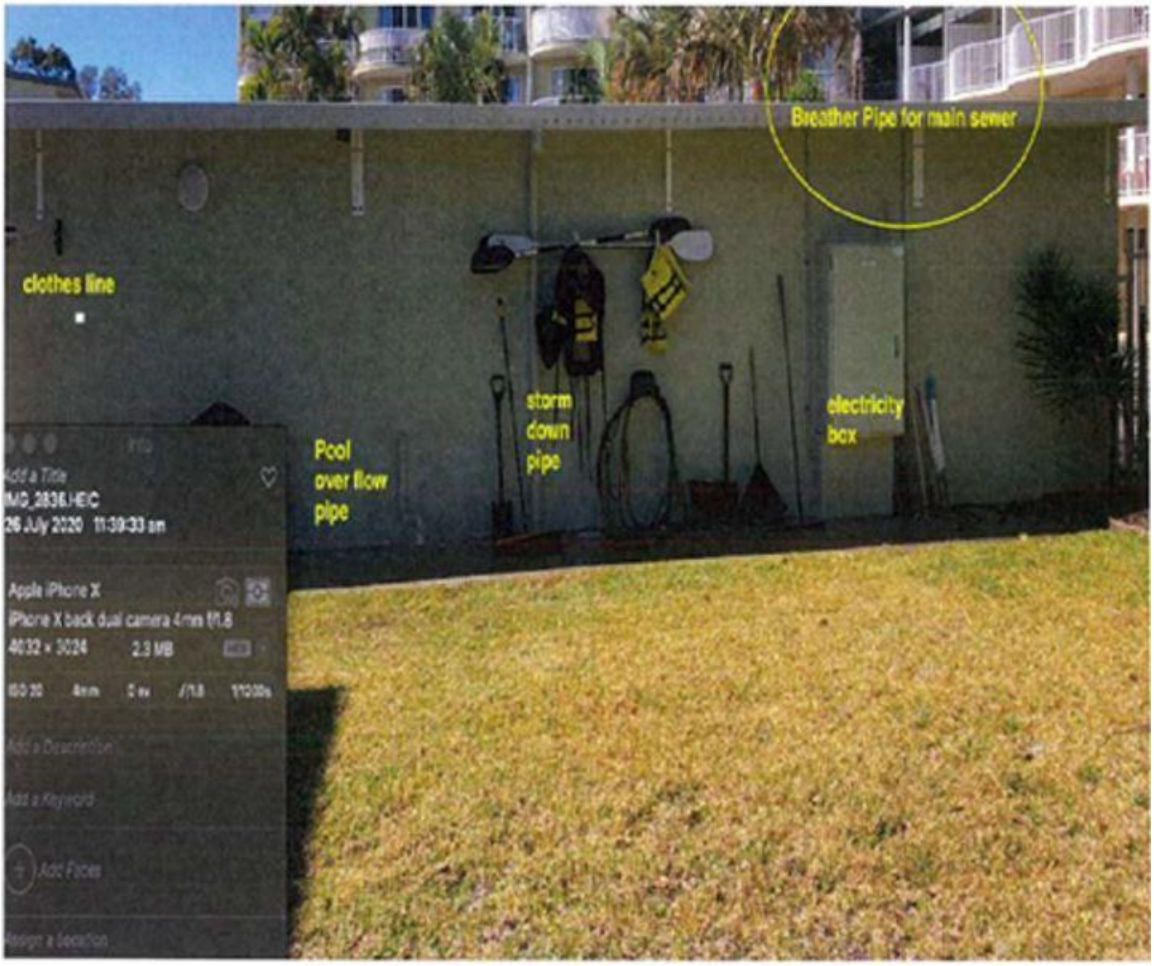
233 In order to understand Mrs Trentelman's complaints, it is necessary to go into some more detail about the construction and location of the pool and its associated structures. Reproduced below is a photograph showing lot 53 after the construction of the three townhouses:

234 Reproduced below is another photograph from a similar angle which shows the pool area in more detail:

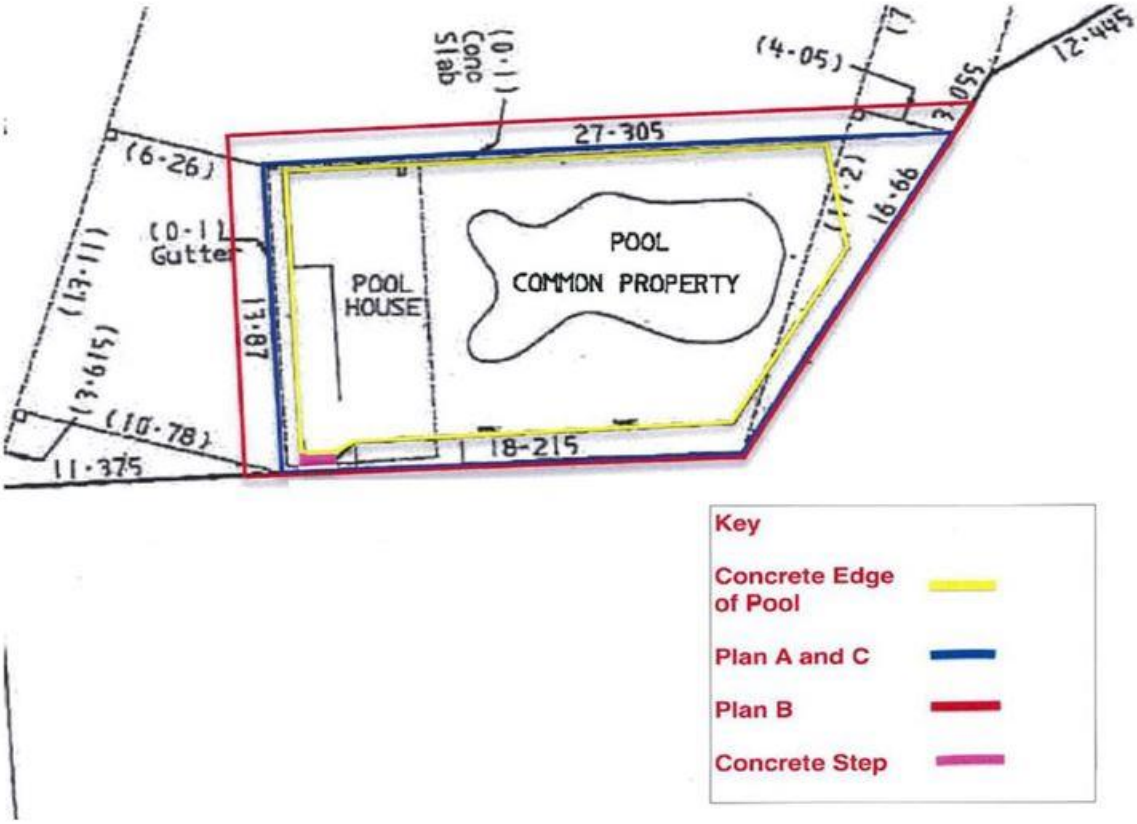
235 The pool is surrounded by a concrete slab which can be seen, coloured pinkish, in the photographs. The slab's northern and southern edges are parallel except in the south western corner where the slab extends southwards and abuts a concrete step which leads down to the boundary with the carpark.

236 The northern, eastern and southern sides of the slab is surrounded by a metal fence, painted white, which can be seen in the aerial photographs. There is a gate at the south western corner providing access. The pool building itself is obscured in the photographs by the roof which extends out beyond it. It is however clear from the photographs that the southern wall of the building is set back some distance, allowing for access to the pool via the gate without going into the building itself.

237 On the western edge of the slab is a wall which runs for the most of that edge. Running along most of the wall is a pavement which is roughly the same width as the roof overhang. To the west is an area of lawn on lot 53 which can be seen in the aerial photographs. A view of the wall from the lawn area is reproduced below:



238 Reproduced below is part of Mr Green's drawing, showing the edge of the slab (yellow) and Mr Green's proposed excisions from lot 53 (blue and red):



239 The essential difference between the plans is that in Plans A and C the northern and western boundaries of the area to be excised are 0.1 metres outside the edge of the pool structures (the slab and the roof of the pool house) whereas in Plan B the area excised extends for 1 metre beyond the pool structures. This is to provide access for maintenance purposes.

240 The issues raised by Mrs Trentelman can be grouped into two. The first group relate to the boundaries in Mr Green's plans.

241 The first issue in this group concerns access. The edge of the concrete step is 0.1 metres from the boundary with the carpark. As I understand Mrs Trentelman's position, she does not accept that if there is to be any designation of common property at all, it should extend beyond the edges of the pool structures. On this view, therefore, even if the pool structures were converted to common property an easement would still be required to allow residents and their guests to cross the 0.1 metre airspace between the carpark and the step.

242 No easement is necessary under Mr Green's plans, because the land between the southern and eastern edges of the pool structures and the southern and

eastern boundaries of lot 53 is to be designated as common property. This gives rise to Mrs Trentelman's second issue. On the southern and eastern sides of the pool this area is occupied by a garden. Mrs Trentelman says that this garden is on her land and it is of value to her, providing screening and amenity. Mr Green points out that it also provides screening for the pool itself, and that if Mrs Trentelman desires that it be retained as a garden this could be achieved by way of covenant.

243 The third issue concerns the roof of the pool house. It overhangs the pool house structure itself. Mrs Trentelman suggests there will be a need for an easement. Mr Green says another alternative would be to define the three dimensional space occupied by the roof as part of the common property.

244 The fourth issue concerns Mr Green's proposal for a one metre buffer on the northern and western sides of the area to be excised, to facilitate maintenance. Mrs Trentelman objects to this. She points out that it would involve expropriating part of the lawn to the west and part of the driveway to the north which belong to her. She would be unable to fence up to the boundary of the pool structures and, in theory, would be at risk of the Strata Corporation building a wall or some other structure on its boundaries. On the northern side this would cut into the area used as a driveway and interfere with parking and manoeuvring. That can clearly be seen in the aerial photographs.

245 In response, Mr Green acknowledges that the one metre area is probably not needed on the northern side, as access for maintenance purposes can be obtained from the pool slab itself. As I understand him, he suggests that a clearance of one metre should still be allowed on the western side of the pool house wall to provide for maintenance, rather than some sort of easement being granted.

246 The second group of issues raised by Mrs Trentelman concern the services to the pool structures. The pool of course has had stormwater, sewerage, water and electricity connections since it was built (which appears to have been in the 1980s). But as a result of the construction of the townhouses on lot 53 the position has become more complicated.

247 The external plumbing work for the construction of the townhouses was done for the Trentelmans by Richard Smythe, a local plumber. The work appears to have been done between January and April 2017, shortly before the townhouse development was completed. Mrs Trentelman annexed to her affidavit a brief letter obtained from Mr Smythe about the work he did on the pool at that time. There was no objection to this letter as a matter of hearsay or form.

248 I will deal first with the stormwater drainage. According to Mrs Trentelman, the pre-existing stormwater pipes drained (and continue to drain) from the roof of the pool building and from the concrete area from around the pool. Mr Smythe's letter states that he disconnected the pool's stormwater drainage from its existing discharge pipes (he does not say where they went). He connected the pool's stormwater to the stormwater system which was constructed for lot 53 as part of the townhouse development.

249 In her affidavit, Mrs Trentelman raises two issues. The first is that the stormwater from the pool drains to her "private" stormwater system. She asserts that should the pool area become common property, the Strata Corporation would be obliged to connect the stormwater from the pool into its own stormwater system. She states that this would require development approval from the Council because it would involve connecting a private stormwater system to a public one.

250 Mrs Trentelman's second point concerns drainage generally. She says that the stormwater drainage is inadequate and occasionally results in flooding of lot 53 in the general area of the pool land. She states that the runoff comes not only from the pool but also from the driveway and the apartment building.

251 In saying this Mrs Trentelman is implicitly making assertions as to how stormwater flows into, and is discharged from, the stormwater system. Counsel for the Strata Corporation took a point by way of objection that Mrs Trentelman does not necessarily have direct knowledge of this. Her evidence was stated in conclusory form and may be based on supposition or assumption, or what someone else has told her, about how the stormwater system operates.

252 The point was reinforced by the evidence given by Mr Luddington in response to Mrs Trentelman. He stated that at least part of the stormwater system on lot 53 (servicing the easternmost of the three townhouses) in fact drains to a stormwater pit constructed by the Strata Corporation under the carpark in 2019. He also stated that stormwater flooding does not occur solely in one direction. When the lake floods, according to Mr Luddington, stormwater discharged from lot 53 to the north backs up and surface water flows southwards from lot 53 back onto the common property.

253 But Mr Luddington's affidavit contained conclusory statements just as Mrs Trentelman's did. Counsel for Mrs Trentelman took the same type of objections back against Mr Luddington's affidavit as had been taken by counsel for the Strata Corporation against Mrs Trentelman's.

254 I think that, strictly speaking, these objections are sound. There were photographs and (in Mr Luddington's case) plans attached to the affidavits which will be admissible; but I do not propose to go through the evidence line-by-line for the purpose of trying to work out what the admissible evidence proves about the stormwater system. As will be seen, in the end it is sufficient for my purposes to note the positions of the parties as disclosed by the affidavits without resolving the disagreement. I will take the same position for the other services, for which the same objection was also taken.

255 The second relevant service is sewerage. According to Mr Smythe, in April 2017 he discovered that the sewerage discharge from the pool building is actually connected (illegally) to a septic tank on an adjoining property. Mr Smythe states that he connected the pool sewerage to the sewerage system built on lot 53 as part of the Trentelmans' townhouse development.

256 In her affidavit, Mrs Trentelman stated that the pool or sewerage effectively forms part of her "private" sewerage system. She pointed out that there is a breather pipe on the western side of the pool building, which forms part of the land which would be transferred (this is shown in the photograph of the western wall of the pool building above). She says that the pipe operates as the breather pipe for her entire system.

257 For his part, Mr Luddington acknowledges that the pool sewerage flows into the system on lot 53, but states that the lot 53 system in turn drains back to the main sewerage system used by the apartment building which is then connected to the sewer main. In other words, Mrs Trentelman's so-called private system is only part of a much bigger system covering the strata property as a whole.

258 Thirdly, there is the water supply. Mrs Trentelman says that it comes to the pool building from the south-west, cutting off underneath the corner of her garden. There is no diagram of the pipes in evidence, and again, this may be correct but it is not established on the existing evidence.

259 Fourthly, there is the electricity for the pool. An invoice attached to Mrs Trentelman's affidavit shows that in 2017 her electrical contractors did some work on the electrical supply to the pool. According to Mrs Trentelman, the result is that since then the pool electrical system has been fed from the electrical system serving the townhouses and the rest of lot 53. The result is that Mrs Trentelman is paying for the electricity for the pool. There is no separate metering.

260 The response to Mrs Trentelman's evidence on this point came from Mr Patterson. Although his expertise was accepted, there was still objections to some part of his opinion on the basis that they constituted inadmissible opinion, lacking in supporting reasoning.

261 From the photographs attached to Mr Patterson's affidavit, it seems that originally the electricity for the pool did indeed go through the main circuit board in the apartment building, and that has been disconnected. Mr Patterson suggested that there were two ways in which the problem of pool electricity being charged to lot 53 could be overcome. One way would be to install a new circuit from the apartment building to the pool connecting with it. Another would be to install a new meter specifically for the pool on lot 53. The cost of this would be about $5,000. The cost of the new circuit would be $10,000.

262 The final issue raised by Mrs Trentelman concerns the clothesline for one of the townhouses. The development consent required that a clothesline be provided for each townhouse. One end of the clothesline for one of the

townhouses is fastened on one of the walls of the pool building (as shown in the photograph of the western wall of the pool building, above). Mrs Trentelman said that this was a problem. For his part, Mr Luddington pointed out that the Strata Corporation has its own clothesline which is available to lot members.

263 I should note that in her affidavit Mrs Trentelman referred to the correspondence between her solicitor Ms Byrne and Mr McKnight in May 2017 ([128]-[132] above). Mrs Trentelman attached to her affidavit various invoices for works done on sewerage and stormwater. She stated that in reliance on an understanding that she was the owner of the pool lot she had incurred significant expenditure.

264 As counsel for the Strata Corporation pointed out, the invoices are for work that was done before Mr McKnight's letter of 11 May. They therefore cannot have been influenced by the content of that letter. Counsel for Mrs Trentelman replied that this was to misunderstand the significance of the evidence. The point was said to be that the correspondence demonstrated that Mrs Trentelman at all times believed that she was the owner.

265 I have already taken the correspondence into account in my findings on Mrs Trentelman's state of mind when she signed the plan of subdivision which created the pool notation. I am not satisfied that she had any such conscious understanding at the time. The evidence has no further relevance in this case.

Representations at 2014 AGM

Contract

266 The Strata Corporation's first contention is that the representations made at the 2014 AGM, coupled with the resolutions by the Corporation, resulted in a contract between Mrs Trentelman and the Strata Corporation under which Mrs Trentelman was to give the Corporation continuing access to the pool. The Strata Corporation claims to be entitled to a transfer of the pool land by way of specific performance.

267 Mrs Trentelman denies that any contractual obligation was created. Alternatively, she contends that any such obligation is unenforceable under the statute of frauds (*Conveyancing Act 1919* (NSW), s 54A). In reply, the

Corporation contends that the statute is inapplicable and, in the alternative, relies on the doctrine of part performance.

268 On my findings, representations were made both in the notice of meeting (implicitly) and by Mr Trentelman at the AGM itself (explicitly) that under the proposal which was the subject of motion 10 “we” would give “you” continued access to the pool. Counsel for Mrs Trentelman submitted, however, that even on these findings, the parties to the representations were unclear. Counsel submitted that no representation was made by Mrs Trentelman herself and also that any representation made was in favour of the lot owners (or some of them), not the Corporation.

269 Identifying the parties to the representations is a matter of construction. It involves undertaking an objective analysis, from the point of view of a hypothetical bystander aware of the whole factual matrix.

270 Mrs Trentelman was the owner of the development lots and therefore one of the proponents (if not the proponent) of the Proposal which was the subject of motions 10 and 11. For this reason alone, I consider that the representation implicit in the notice of meeting was a representation by Mrs Trentelman.

271 On my findings, Mr Trentelman used the first person plural in making the oral representations at the AGM. Plainly the other person to whom he was referring apart from himself was Mrs Trentelman. She, being present, took no steps to disassociate herself from what he said. In my view, Mr Trentelman’s oral representations were made on her behalf.

272 Turning to the identity of the representee, counsel for Mrs Trentelman emphasised that the notice of meeting referred to the “owners and occupiers of lots within the scheme” having a continuing right to use the swimming pool. Counsel pointed out that elsewhere the notice of meeting referred to the Corporation, rather than the lot owners.

273 On my findings, the representation concerned continuing access indefinitely into the future. Plainly it could not be understood as limited to the then lot owners, and this is reinforced by the use of the indefinite form “owners” in the notice of meeting. Equally plainly, the oral representations made by Mr

Trentelman were not limited to those owners who attended the meeting. They were made in favour of all of the lot owners, past and future.

274 There is no real distinction between a promise in favour of the members of the Corporation as members, and a promise in favour of the Corporation itself. The collective body of members *is* the Corporation. On incorporation, the members of a body corporate "constitute" the corporation: SSDA, s 8(1) (the same provision appeared in the predecessor legislation: *Strata Schemes Management Act 1996* (NSW), s 11(1)).

275 This analysis is supported by the reference at the meeting to the purchase of lot 7. In the discussion (set out at [135] above) the purchaser (which was plainly the Corporation) was referred to as "we" by the lot owner who proposed the idea and as "you" by Mr Trentelman.

276 For these reasons I reject the submissions for Mrs Trentelman on this issue. The representations were binding on Mrs Trentelman and were made in favour of the Strata Corporation. But there are still difficulties with analysing the representations in contractual terms.

277 The resolutions spoke of the Strata Corporation agreeing to the Proposal. But this was not an agreement in the sense of an exchange of promises on defined terms with immediately binding effect. The Proposal was approved, but only in principle. Mrs Trentelman was not, or at least not clearly, obliged to proceed with it. What the resolutions were saying was that if she did, the Corporation was to execute documents giving effect to the elements of the Proposal, which were to include provision for continued access to the pool. Whether that was to be achieved by means of an easement or in some other way was not specified.

278 For these reasons I consider that the Strata Corporation's contractual claim fails. It is unnecessary to consider the application of the statute of frauds or the question of part performance.

Equitable estoppel

279 The Strata Corporation relies on equitable estoppel to claim an interest in the pool land, either by the transfer of ownership of the land to it as common

property, or by the grant of an easement over the land. The Corporation relies both on proprietary and promissory estoppel.

280 It is sufficient for the purposes of this judgment to refer to proprietary estoppel, and in particular that branch of the doctrine known as estoppel by encouragement. The doctrine was stated by Lord Kingsdown in *Ramsden v Dyson* (1866) LR 1 HL 129 at 170:

> If a man, under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land; with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a Court of equity will compel the landlord to give effect to such promise or expectation.

281 In the present case the Strata Corporation did not take possession of the pool land or lay out money on it. But estoppel by encouragement has expanded to cover other types of detrimental reliance: see for example *Crabb v Arun District Council* [1976] Ch 179; *Riches v Hogben* [1985] 2 Qd R 292.

282 The representations made on behalf of Mrs Trentelman did not define in clear terms the interest which the Corporation was to receive. But it is well established that this does not necessarily prevent the doctrine from operating. Where the nature of the interest is unclear (or, if clear, cannot be fulfilled) the court may fashion a remedy to do justice between the parties: see *DHJPM* below at [54].

283 Counsel for Mrs Trentelman argued however that this does not apply where the representation is made in a "commercial context", as opposed to a "domestic or family context". This is a distinction drawn by Lord Walker of Gestingthorpe in his concurring opinion in *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55 at [65]-[68]. His Lordship noted that it is "not enough to hope, or even to have a confident expectation, that the person who has given assurances will do the proper thing" and stated that this point is "made most clearly" in cases "with a commercial context".

284 In support of their argument, counsel referred me to the decision of the Court of Appeal in *DHJPM Pty Ltd v Blackthorn Resources Ltd* (2011) 83 NSWLR 728. That case concerned proposed leasing arrangements for office premises. The

plaintiff was proposing to take a lease of the premises and to sub-lease part of them to the defendant. The plaintiff was told by the defendant that it would proceed with a sub-lease. The plaintiff proceeded with the lease and fitting-out of the premises. The defendant then refused to proceed, at which point there were still terms of the proposed sub-lease to be agreed. The plaintiff's claim to equitable compensation on the basis of estoppel failed.

285 The leading judgment was given by Meagher JA, with whom Macfarlan JA agreed. His Honour treated the case as one of equitable estoppel, and did not distinguish in his reasoning between proprietary and promissory estoppel. At [56]-[58] he quoted from Lord Walker's judgment in *Cobbe* and contrasted it with the "domestic or family" case of *Thorner v Major* [2009] UKHL 18. His Honour stated that, in deciding whether an estoppel arises, the relevant circumstances include "the nature of the relationship between the parties and whether they contemplate that any interest to be granted or promise to be performed is to be created by a binding contract". At [67] he referred to the defendant's representations that it would proceed with a sub-lease and continued:

> These were promises but there was not in the circumstances any objective basis for concluding that there was a binding contract. Nor was there any communication by which [the defendant] indicated that it regarded itself as bound to proceed notwithstanding that there was no agreement as to all of the relevant commercial terms of any right of occupation. In the language of Mason CJ and Wilson J in *Waltons Stores v Maher* (at 406), the "something more" was not present. To adopt the words of Lord Walker in *Cobbe v Yeoman's Row Management Ltd* at [65], all that [the defendant] encouraged [the plaintiff] to have was a "hope" or "confident expectation". Neither was sufficient to give rise to an equitable estoppel.

286 Handley AJA delivered a concurring judgment, in which he expressed the view that only proprietary estoppel was available in the circumstances of the case. Both Macfarlan JA and Meagher JA expressed agreement with his Honour's proprietary estoppel analysis.

287 Handley AJA reviewed the "commercial context" cases, including *Cobbe*, at [104]-[134]. He concluded that the plaintiff's expectation that the negotiations with the defendant and a contract would come into existence "could not support a proprietary estoppel".

288 A common feature in “commercial context” cases is that the parties are engaged in commercial negotiations. Such negotiations are usually conducted on the basis that the parties will not be bound until execution of a formal document. Up to that point it is understood that either is free to withdraw.

289 In such circumstances, an informal representation that an interest will be conveyed by one party to the other will usually be understood as being conditional on the execution of formal documents. A plaintiff who incurs expenditure in anticipation of receiving the interest cannot reasonably claim to have done so in reliance on the informal representation.

290 The decision in *DHJPM* was referred to in the subsequent Court of Appeal decision in *Doueihi v Construction Technologies Australia Pty Ltd* (2016) 92 NSWLR 247. In that case, the plaintiff, a commercial business, had family connections to the landlord. Representations were made about an informal leasing arrangement, but it was understood on both sides that no formal lease would be executed. The doctrine was held applicable despite what was arguably a “commercial context”.

291 It is true that in the present case the parties contemplated (expressly, in motion 10) that formal dispositions would be drawn up and registered. These negotiations were to take place after the motions had been passed. But the motions were immediately effective to grant the necessary statutory approval (or at least that was the assumption on which the case was conducted). They also had the immediate effect of conferring on the executive (including the Trentelmans themselves) power to complete the transaction without reference back to the Corporation in general meeting. There is no relevant analogy with a representation made in the course of commercial negotiations between two parties which are conducted on the basis that neither of them will be bound before execution of a formal contract. In any event I do not think that the events of the present case are properly characterised as having occurred in a “commercial context”.

292 I have already explained why I consider that the representations were made to the Strata Corporation. But counsel for Mrs Trentelman contended that it was

also necessary to prove reliance by the Corporation, as a corporate body, not just by the lot owners individually.

293 Counsel pointed out that the five witnesses called by the Corporation who attended the meeting held only twenty-two unit entitlements between them, nineteen per cent of the total. Of those witnesses, only Ms Chatterjee expressly stated that the promise of continued access to the pool affected her vote. Counsel contended that the Corporation had not established that, had the representation concerning the pool not been made, the result would have been different.

294 In developing this contention, counsel submitted that the other members who attended the meeting could well have been influenced by other considerations, such as the desirability of limiting the scale of the development on lot 7 and preserving views from the apartment building. Counsel also submitted that a *Jones v Dunkel* inference should be drawn against the Corporation on this issue as a result of its failure to call the witnesses who attended the meeting.

295 I think that there is some artificiality in these submissions. They leave out of account the fact that the representation about the pool was also contained in the notice of meeting, which was circulated beforehand and presumably formed the basis for the decision of some members not to attend in person and to vote by proxy.

296 I have already explained why I consider that failure by the Corporation to call all of the witnesses in its camp who attended the meeting does not give rise to an adverse *Jones v Dunkel* inference about what was said. For essentially the same reasons I think no adverse inference arises on the reliance issue. I do not believe that the reason the Corporation did not call the witnesses at trial is because of a concern about what they might say on this issue.

297 Counsel relied on *Sidhu v Van Dyke* (2014) 251 CLR 505. In that case the Court of Appeal had held that the onus lay on the defendant, once representation was established, to demonstrate that there had been no reliance. The High Court decisively rejected that view and reaffirmed that the onus of demonstrating reliance lies on the plaintiff. At the same time, however, the Court reaffirmed that the onus could be discharged by inference and that if

the representation is material, the Court may infer that the representee did in fact act on it. The Court also reaffirmed that a particular representation need not be the exclusive reason for incurring the detriment; it need only be a "contributing cause" or a "contributing factor".

298 Counsel for the Trentelmans submitted that a representation can only be a "contributing cause" if it satisfies the "but for" test of causation. Counsel relied on Gageler J's concurring judgment in *Sidhu* (see at [91]). But the majority judgment was not as explicit as this.

299 In *Sidhu* the relevant state of mind was that of the individual plaintiff. How reliance is to be determined when the state of mind is that of a collective body was not under consideration.

300 The present case illustrates the practical difficulties in stark terms. Taken to its logical conclusion, the argument from counsel for Mrs Trentelman would mean that the Corporation must fail unless it can satisfy the Court that a sufficient number of individual members would have voted against motion 10 if that motion did not contain, or was not accompanied by, the representation about continued use of the pool. The states of mind of the individual members in July 2014 would have to be analysed and reconstructed. This would require a series of counterfactual findings about the form of the notice of meeting, the grant of proxies and the course of the meeting itself.

301 I do not propose to undertake this task. Indeed, I was not presented with submissions from the parties about the counterfactual findings required to do so.

302 Plainly the Trentelmans decided in advance of the meeting to offer access to the pool as a "sweetener". In fact, although they did not expressly say this to the meeting, they had decided not to proceed with the original development anyway. Presumably they judged that they needed to make a more substantial concession to the owners, and offered continuing access to the pool for that purpose. The representation was thus calculated to induce a favourable vote, and a favourable vote eventuated. I think that it is sufficient to establish an inference of reliance in fact.

303 That was not the end of the debate on detriment. Counsel for the Strata Corporation in their submissions referred to the Corporation's detriment as including entry into the subsequent transactions referred to in the resolution. Counsel identified this as: (1) the preparation and registration of the December 2014 plan of subdivision; and (2) entry into the November 2015 deed which provided for the conversion of Mrs Trentelman's lots into common property and the transfer of the lots back to her as ordinary RPA lots.

304 As already stated, the Trentelmans attributed the plan of subdivision to a boundary adjustment. While the inclusion of the Pool Notation may have gone further (a topic I discuss below) there is no reason to doubt that the purpose of preparing the plan was to adjust the boundaries between lot 6 and 7. That was not a transaction contemplated by motion 10 or motion 11. In fact, as already stated, the boundary adjustment was never approved by the Strata Corporation in general meeting at all.

305 The conversion and retransfer of the lots was, however, squarely identified in motion 10. But counsel for Mrs Trentelman submitted that this was not enough. Senior counsel said:

> You've got to be able to point to conduct. Usually you bring along someone who is responsible for the conduct who says, I did these things understanding that we were going to receive this interest in property, or at the very least that the acts themselves are of such a type that a clear inference can be drawn that that must have been the reason why those acts were being performed. But that's not here. The clear inference that ought to be drawn about those acts [the conversion of the development lots into ordinary RPA lots] is that they were being performed because that had been a resolution that was passed.

306 I agree that the immediate cause of entry into the November 2015 deed was the passage of the motions, and specifically motion 10. But I think it is artificial to say that these were not in reliance on the Trentelmans' representations about continued use of the pool. On my findings, those representations induced the passage of the motions. There is a direct causal link between them and the subsequent action by the Corporation to convert the development lots into RPA lots.

307 Following the hearing on 11 June, I received an email from junior counsel referring to the submission by counsel for the Strata Corporation about detriment to which I have referred at [303] above. The Corporation had

consented to the email being sent on the basis that it would be entitled to reply. The email stated that Mrs Trentelman's case had been prepared on the basis that the Corporation's alleged detriment was limited to passing the motions. It stated that Mrs Trentelman strongly objected to detriment being put on a wider basis.

308 There was no further response to this email in the subsequent submissions by the Strata Corporation. I was left uncertain about the email's significance. Senior counsel had dealt with the point without apparent difficulty at the hearing on 11 June, and had in fact invited me to find that the passage of the motions was the cause of the subsequent conversion of the development lots. It was not clear to me what prejudice could possibly be suffered by Mrs Trentelman in acknowledging that fact.

309 As at present advised, I do not see the protest in the email as having any significance for my resolution of the case. But in view of the uncertainty I will give Mrs Trentelman's legal representatives a further opportunity, once I have delivered my reasons, to make further submissions on this question should they wish to do so.

310 Subject to any such submissions, the Strata Corporation has made out its case for relief by way of proprietary estoppel. The remaining question is the nature of the relief which the Court should grant.

311 The choice is between the grant of an easement and an order for transfer of the pool land. There is little practical difference between the two options, and in my view either method could be used to satisfy the equity. But on balance I consider that the grant of an easement is more appropriate.

312 I am not satisfied that any mention was made at the 2014 AGM of converting the pool land into common property. There was no such implication from motion 11, which referred to community property and was in any event expressly stated to be only one possible future option. In my view the natural interpretation in the context for "continuing access", was access in accordance with the then existing basis, namely, by way of easement.

313 Furthermore I think it is permissible for this purpose to take into account the statements made at the 2015 AGM, where there was explicit reference to the easement and its impending expiry. In that context a reference to continued access or "giving you the pool" would even more clearly suggest an indefinite extension of the existing easement.

314 This does not of course mean that the benefit of the relief to be granted should be confined to the lots benefited by the previous easement. For reasons I have already given the representation was made in favour of, and the reliance was by, the Strata Corporation. In my view the proper form of relief is an easement in favour of the Corporation in the same terms, or substantially the same terms, as the previous easement. I will leave the precise terms of the new easement and its commencement date to consultation between, and, if necessary, further submissions from, the parties.

Pool Notation

315 In her lawsuit, Mrs Trentelman seeks an order removing the Pool Notation from the December 2014 plan of strata subdivision as registered (SP 91510). She claims that:

(1) the Pool Notation was legally ineffective to create any common property interest in favour of the Strata Corporation; and

(2) even if effective, its registration was a mistake on her part.

316 Mrs Trentelman relies on RPA s 12(1)(d):

> (1) The Registrar-General may exercise the following powers, that is to say:
>
> …
>
> (d) The Registrar-General may, subject to this section and upon such evidence as appears to the Registrar-General sufficient, correct errors and omissions in the Register.

317 The power under s 12(1)(d) is conferred on the Registrar-General, not the Court. But the case was conducted on behalf of Mrs Trentelman on the basis that, if satisfied that a correction should be made, the Court would direct the Registrar-General to make it. In the end there seemed to be no dispute from the Strata Corporation (or the Registrar-General) that the Court had power to proceed in this way. On my conclusions, it is not necessary to consider this any further.

Legal effectiveness

318 The parties agreed that the legal effect of the December 2014 subdivision was to be decided by reference to SSFDA and the Strata Schemes (Freehold Development) Regulation 2012 (NSW) ("SSFDR") made under that Act. SSFDA relevantly permitted a subdivision altering the boundaries of a strata lot so as to create a different lot and an area of common property: s 5(7)(b).

319 The subdivision of development lots was dealt with in SSFDA s 8A, with s 9 dealing with lots other than development lots. The parties agreed that s 9 was the applicable provision, because of the previous expiry of the development contract. In any event no material difference was identified between ss 8A and s 9.

320 The effect of s 9 was that lots other than development lots might be subdivided by registering a plan of subdivision (sub-s (1)) which was to consist of a floor plan, and, if required by the Registrar-General, a location plan. The definition of the term "floor plan" relevantly provided (s 5(1)):

> ***floor plan*** means a plan, consisting of one or more sheets, which:
>
> (a) defines by lines (in paragraph (c) of this definition referred to as base lines) the base of each vertical boundary of every cubic space forming the whole of a proposed lot, or the whole of any part of a proposed lot, to which the plan relates,
>
> (b) shows:
>
> (i) the floor area of any such cubic space, and
>
> (ii) where any such cubic space forms part only of a proposed lot, the aggregate of the floor areas of every cubic space that forms part of the proposed lot, …

321 Counsel for Mrs Trentelman submitted that the December 2014 plan of subdivision (including the Pool Notation) was inadequate to effect the transfer of the pool land to common property of the Strata Corporation. This was for two reasons.

322 The first reason was that the plan did not define the vertical boundary of the pool land. The version of the December 2014 plan as originally lodged did not purport to show the pool land by means of surveyed lines (as required by sub-paragraph (a) of the definition in SSFDA, s 5(1); see also SSFDR, cl 7(1)(a)) and the registered version completely omitted any indication of the pool land.

The second reason was that the plan did not show the floor area of the pool land. This is a requirement of SSFDA, s 5(1)(b).

323 I did not understand the submission to be disputed by counsel for the Strata Corporation. Instead counsel contended that the effect of the Pool Notation was to convert the pool structure, considered as a "structural cubic space" (see the definition in SSFDA, s 5(1)), into common property. Counsel submitted that this did not require the use of lines and a floor area as is required for an ordinary strata lot.

324 This contention led to a complex argument concerning the interpretation of the SSFDA and SSFDR provisions. I do not propose to resolve this argument. Counsel for the Strata Corporation accepted, as I understood them, that even if the argument succeeded it would only confirm the structure of the pool, without the surrounding air space, as common property. As already noted, this would provide no practical benefit to the Corporation.

Mrs Trentelman's rectification claim

325 My findings on the mistake claim are set out at [210]-[221]. I have concluded that the operative state of mind was Mr Wyper's. The inclusion of the Pool Notation appears to have been deliberate on his part, even if it was ineffective to achieve any useful purpose. And even if Mrs Trentelman's was the relevant state of mind, I am not satisfied that there was any mistake on her part. On these findings, her rectification claim fails.

Strata Corporation's rectification claim

326 I have described the proposed cross-claim at [26] above. In essence the Strata Corporation's contention is that the Pool Notation involved a mistake, but not the mistake alleged by Mrs Trentelman. Rather, according to the Corporation, the mistake was the failure to draw the plan in such a way so as to convert both the pool structures and the surrounding air space to common property.

327 Counsel for Mrs Trentelman resisted granting the Corporation the necessary leave to file the cross-claim. But I am satisfied that leave should be granted. The Corporation's contention arises directly out of the rectification claim by Mrs Trentelman; it picks up her allegation that there was a mistake but asserts that the actual mistake was different. The Corporation did not seek to lead any

further evidence. There is no prejudice in allowing it to put its own interpretation on the facts established by the existing evidence.

328 As I have already stated, including the Pool Notation was clearly conscious and deliberate. It is impossible to accept that Mr Wyper intended an outcome under which, at best, the notation created an ownership of the pool structure only, which was of no practical benefit to the Corporation. In that sense, the plan must have involved a mistake on his part.

329 The more difficult question is what mistake Mr Wyper made. It seems unlikely that he intended the plan to convert the pool land into common property in the conventional way. Had he done so he would presumably have complied with the SSFDA requirements concerning lines and areas, as he did for the boundary adjustment between lot 6 and lot 7. Yet that is the rectification sought by the Corporation, in the form of Mr Green's substitute plan.

330 The jurisdiction to rectify documents is not confined to contracts; it extends to a wide array of other instruments: see Heydon, J D, M J Leeming and P G Turner, *Meagher, Gummow and Lehane's Equity Doctrines and Remedies* (5th ed, 2015, LexisNexis Butterworths) at [27-005]. But rectification of a survey plan creates special challenges. In the present case rectification of the plan would not just require drawing lines around the pool land as Mr Green has done. In order to draw those lines Mr Green has presumably had to undertake his own survey. I cannot be satisfied on the evidence that Mr Wyper ever surveyed the boundaries to the pool land; if he did, there is no evidence of it. The debate about the boundaries of the pool land (see [166] and [240]-[245] above) also indicate how Mr Green has had to confront issues which Mr Wyper did not.

331 In my view this is a case where mistake is established but the Court cannot be satisfied what was intended instead: see *Slee v Warke* (1949) 86 CLR 271 at 281. The Corporation's rectification case fails.

Conclusions and orders

332 I have concluded that:

(1) the Strata Corporation is entitled by way of proprietary estoppel to an easement in its favour over lot 53 in substantially the same terms as the pool easement which expired in 2017;

(2) Mrs Trentelman's claim for rectification so as to delete the Pool Notation from the December 2014 plan of subdivision fails;

(3) the Strata Corporation should have the leave required to file its cross-claim for rectification of the plan of subdivision, but that claim also fails.

333 The effect of this decision is to leave the Pool Notation on the register without deciding its validity, and in circumstances where, even if valid, it is of no use to the Corporation. It would seem to be in the interests of both parties to agree to remove the Notation from the register.

334 It will be necessary to draw up orders to give effect to my conclusions. I will stand the proceedings over to allow that to happen. Any debate about costs should take place at the same time.

335 Conclusion (1) is subject to the possibility of further submissions from Mrs Trentelman (see [309] above). More generally, the hearing and submissions have been disjointed and have taken place over a long period of time (I do not intend this as a criticism of the parties). If any party considers that there is something I have overlooked in this judgment, that should be raised with me before any orders are made.

336 The orders of the Court are:

(1) Adjourn the proceedings to 9.30am on 16 March 2021 or such other time as may be arranged with my Associate.

(2) Direct that the parties confer on the form of orders to be made to give effect to this judgment and to deal with costs, and, no later than 24 hours before the adjourned hearing, submit proposed orders for this purpose.