Court of Appeal
Supreme Court

New South Wales

Case Name:	Trentelman v The Owners – Strata Plan No 76700
Medium Neutral Citation:	[2021] NSWCA 242
Hearing Date(s):	7, 8 July 2021
Decision Date:	13 October 2021
Before:	Bathurst CJ at [1]; Bell P at [170]; Leeming JA at [171]
Decision:	1 Trentelman v The Owners – Strata Plan No 76700; Proceedings No 2021/102010 (1) Appeal dismissed. (2) Order the appellant pay the respondent's costs of the appeal. 2 Trentelman v The Owners – Strata Plan No 76700; Proceedings No 2021/101998 (1) Appeal dismissed. (2) Order the appellant pay the respondent's costs of the appeal.
Catchwords:	ESTOPPEL – proprietary estoppel – encouragement – nature of promise – strata title – promise of easement – whether representation sufficiently clear – where representation made at general meeting – where representation did not define the interest in property the representee was expected to receive – where further documentation was required to be executed to give effect to the representation

ESTOPPEL – proprietary estoppel – encouragement – detrimental reliance – strata title – promise of easement – whether reliance was that of the owners corporation – Strata Schemes Management Act 1996 (NSW) s 21(2) – Strata Schemes Management Act 2015 (NSW) ss 8, 254

ESTOPPEL – proprietary estoppel – encouragement – detrimental reliance – strata title – promise of easement – whether the evidence indicated that the representation was such that the conduct of the lot holders was sufficiently influenced by the representation

Legislation Cited:

Body Corporate and Community Management Act 1997 (Qld)
Corporations Act 2001 (Cth)
Real Property Act 1900 (NSW)
Strata Schemes Development Act 2015 (NSW)
Strata Schemes (Freehold Development) Act 1973 (NSW)
Strata Schemes Management Act 1996 (NSW)
Strata Schemes Management Act 2015 (NSW)
Strata Titles Act 1973 (NSW)
Strata Titles Act 1988 (SA)
Strata Titles Act 1998 (Tas)
Subdivision Act 1988 (Vic)
Uniform Civil Procedure Rules

Cases Cited:

Amalgamated Investment & Property Co Ltd (in liq) v Texas Commercial International Bank Ltd [1982] QB 84
Ashton v Pratt (2015) 88 NSWLR 281; [2015] NSWCA 12
Ayerst v C&K (Construction) Ltd [1976] AC 167
Baini v The Queen (2012) 246 CLR 469; [2012] HCA 59
Bathurst City Council v PWC Properties Pty Ltd (1998) 195 CLR 566; [1998] HCA 59
Boyd v Thorn (2017) 96 NSWLR 390; [2017] NSWCA 210
Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288 (2014) 254 CLR 185; [2014] HCA 36
Campbell v Backoffice Investments Pty Ltd (2009) 238 CLR 304; [2009] HCA 25
Carre v Owners Corporation – Strata Plan 53020

(2003) 58 NSWLR 302; [2003] NSWSC 397
Cobbe v Yeoman's Row Management Ltd [2008] UKHL 55; [2008] 1 WLR 1752
Commercial Union Assurance Company of Australia Ltd v Ferrcom Pty Ltd (1991) 22 NSWLR 389
Community Association DP270447 v ATB Morton Pty Ltd [2019] NSWCA 83
Cook's Construction Pty Ltd v Brown [2004] NSWCA 105; (2004) 49 ACSR 62
Crabb v Arun District Council [1976] Ch 179
Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd (2016) 260 CLR 1; [2016] HCA 26
Delaforce v Simpson-Cook (2010) 78 NSWLR 483; [2010] NSWCA 84
DHJPM Pty Ltd v Blackthorn Resources Ltd (2011) 83 NSWLR 728; [2011] NSWCA 348
Dillwyn v Llewelyn (1862) 4 De GF & J 517
Doueihi v Construction Technologies Australia Pty Ltd (2016) 92 NSWLR 247; [2016] NSWCA 105
EB 9 & 10 Pty Ltd v The Owners Strata Plan 934 (2018) 98 NSWLR 889; [2018] NSWCA 288
Evans v Evans [2011] NSWCA 92
Flinn v Flinn [1999] 3 VR 712; [1999] VSCA 134
Giumelli v Giumelli (1999) 196 CLR 101; [1999] HCA 10
Gould v Vaggelas (1985) 157 CLR 215; [1985] HCA 75
Greater Dandenong City Council v Australian Municipal, Clerical and Services Union (2001) 112 FCR 232; [2001] FCA 349
Hanave Pty Ltd v LFOT Pty Ltd [1999] FCA 357; (1999) 43 IPR 545
Ho v Powell (2001) 51 NSWLR 572; [2001] NSWCA 168
Houghton v Immer (No 155) Pty Ltd (1997) 44 NSWLR 46
Huntsman Chemical Co Australia Ltd v International Pools Australia Pty Ltd (1995) 36 NSWLR 242
In re MF Global Australia Ltd (in liq) [2012] NSWSC 994; 267 FLR 27
Jenyns v Public Curator (Q) (1953) 90 CLR 113; [1953] HCA 2
Jones v Dunkel (1959) 101 CLR 298; [1959] HCA 8
Kakavas v Crown Melbourne Ltd (2013) 250 CLR 392; [2013] HCA 25

	Lin v The Owners – Strata Plan No 50276 [2004] NSWSC 88; 11 BPR 21,463 Maraya Holdings Pty Ltd v Chief Commissioner of State Revenue [2013] NSWCA 408 McElwaine v The Owners Strata Plan 75975 [2017] NSWCA 239; 18 BPR 37,207 Meridian Global Funds Management Asia Ltd v Securities Commission [1995] 2 AC 500 Meskovski v Director of Public Prosecutions [2018] VSCA 293 Mistrina Pty Ltd v Australian Consulting Engineers Pty Ltd [2020] NSWCA 223 Owners – Strata Plan No 43551 v Walter Construction Group Ltd (2004) 62 NSWLR 169; [2004] NSWCA 429 Rainbow v Gallagher (1994) 179 CLR 624; [1994] HCA 24 Ramsden v Dyson (1866) LR 1 HL 129 Sidhu v Van Dyke (2014) 251 CLR 505; [2014] HCA 19 Smith v Chadwick [1884] 9 App Cas 187 Smith v Chadwick (1881) 20 Ch D 27 Sullivan v Sullivan [2006] NSWCA 312 The Queen v Khazaal (2012) 246 CLR 601; [2012] HCA 26 Thorner v Major [2009] UKHL 18; [2009] 1 WLR 776 Trentelman v The Owners – Strata Plan 76700 (No 2); The Owners – Strata Plan 76700 v Trentelman (No 2) [2021] NSWSC 377 Trentelman v The Owners – Strata Plan 76700 (No 3); The Owners – Strata Plan 76700 v Trentelman (No 3) [2021] NSWSC 578 Trentelman v The Owners – Strata Plan 76700; The Owners – Strata Plan 76700 – Trentelman [2021] NSWSC 155 Vickery v The Owners – Strata Plan No 80412 (2020) 103 NSWLR 352; [2020] NSWCA 284
Texts Cited:	L Goddard, A Treatise on the Law of Easements (8th ed, Stevens and Sons Ltd, 1921) P Herzfeld and T Prince, Interpretation (2nd ed, Lawbook Co, 2020) S Worthington, “Corporate Attribution and Agency: Back to Basics” (2017) 133 Law Quarterly Review 118
Category:	Principal judgment

Parties:	Natalia Trentelman (Appellant) The Owners – Strata Plan No 76700 (First Respondent) Registrar General of New South Wales (Second Respondent)
Representation:	Counsel: M Ashhurst SC with G Farland (Appellant) E Peden SC with J Mee (First Respondent) Solicitors: Bannermans Lawyers (Appellant) Strata Advisory Services (First Respondent)
File Number(s):	2021/101998; 2021/102010
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Supreme Court
Jurisdiction:	Equity
Citation:	[2021] NSWSC 155
Date of Decision:	26 February 2021
Before:	Parker J
File Number(s):	2018/312426; 2018/328341

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

HEADNOTE

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

The appellant, Natalia Trentelman, brought this appeal from a decision of a judge of the Equity Division of the Court. His Honour rejected a claim in contract but found that the Owners Corporation had established a proprietary

estoppel warranting an easement in its favour, allowing the use of a swimming pool and associated structures on lot 53 owned by Ms Trentelman.

Ms Trentelman also appealed against the primary judge's decision to refuse to make an order in separate proceedings brought by her that a notation on the Strata Plan with respect to the pool be removed from the register.

In October 2007, an easement for the use of the swimming pool which was originally situated on lot 7 in favour of lots 9-48 of the Strata Plan was created. The easement contained a number of conditions, including that it would continue until the earlier of 10 years from the date of registration or until a further easement for the use of the pool benefitting the same lots is created.

In July 2009, Ms Trentelman and her husband, Johannes Trentelman, purchased all the lots in the Strata Plan. From September or October 2010, the Trentelmans commenced to sell individual lots in the strata scheme.

In 2014, the Trentelmans wanted to free certain lots from the restrictions of the strata scheme for the purpose of development and resale. They also devised plans for the development of lot 7 by building a group of three townhouses on it. A special resolution of the Owners Corporation was required to enable this to occur.

In that context, the Trentelmans, who at the time had control of the Strata Committee, caused the requisite resolutions to be brought forward at the Annual General Meeting of the Owners Corporation in July 2014. The notice of meeting proposed two motions, motions 10 and 11, accompanied by explanatory notes, to give effect to the proposal.

The motions, explanatory notes and plans accompanying the notice of meeting indicated that easements would exist so that owners and occupiers of lots had a continuing right to use the pool. At the meeting at which the resolutions were passed unanimously, Mr Trentelman emphasised the fact that under the proposal, lot owners would have continuing use of the pool.

In December 2014, a further plan of strata re-subdivision was drawn up by a surveyor on the Trentelmans' instructions. The plan of re-subdivision realigned the borders of lots 7 and 6, which became lots 53 and 54 in the Strata Plan.

At the 2015 Annual General Meeting of the Owners Corporation, Mr Trentelman was asked to explain what his development looked like and what impact it would have. Mr Trentelman made a number of statements pertaining to the lot holders' use of the pool, including "we will give you the swimming pool".

Thereafter, the Trentelmans set about implementing the proposal. The requisite conveyancing steps were taken to give effect to the proposal, but no provision was made for an easement permitting the lot holders to use the pool.

In about mid-2017, the Trentelmans completed the construction of the townhouses on lot 53. When the original easement expired in October 2017, they excluded from the pool area the lot owners, except those with whom they were friendly.

The main issue on appeal was whether the primary judge had erred in finding that the Owners Corporation had made out its case for relief by way of proprietary estoppel.

Did the primary judge err in finding that the Owners Corporation had made out its case for relief by way of proprietary estoppel?

i) To establish a claim of proprietary estoppel by encouragement, it must be shown that an owner of property as representor has encouraged another by way of a representation to alter his or her position in the expectation of obtaining a proprietary interest, and that the representee has to their detriment changed his or her position in reliance on the expectation, such that it is unconscionable for the representor to resile from the representation: [116]-[118] (Bathurst CJ); [170] (Bell P); [171] (Leeming JA).

Giumelli v Giumelli (1999) 196 CLR 101; [1999] HCA 10; *Dillwyn v Llewelyn* (1862) 4 De GF & J 517; *Sidhu v Van Dyke* (2014) 251 CLR 505; [2014] HCA 19; *Doueihi v Construction Technologies Australia Pty Ltd* (2016) 92 NSWLR 247; [2016] NSWCA 105; *Delaforce v Simpson-Cook* (2010) 78 NSWLR 483; [2010] NSWCA 84; *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd* (2016) 260 CLR 1; [2016] HCA 26, referred to.

ii) Discussion of the appropriateness of distinguishing between lot holders in their personal capacity and in their constitutive capacity as an organ of the owners corporation: [171]-[209] (Leeming JA).

Did Ms Trentelman make a representation?

iii) Notwithstanding the requirement that there must be certainty in the promise to give rise to the requisite expectation, an equitable estoppel can be established despite the expectation being based on a promise or representation that would not be sufficiently certain to amount to a valid contract, or is formed on the basis of vague assurances: [120] (Bathurst CJ); [170] (Bell P); [171] (Leeming JA).

DHJPM Pty Ltd v Blackthorn Resources Ltd (2011) 83 NSWLR 728; [2011] NSWCA 348; *Evans v Evans* [2011] NSWCA 92; *Flinn v Flinn* [1999] 3 VR 712; [1999] VSCA 134, referred to.

iv) A promise or representation will generally be sufficiently clear to support an estoppel if it was reasonable for the representee to interpret the promise in a particular way and to act in reliance on that assumption: [121] (Bathurst CJ); [170] (Bell P); [171] (Leeming JA).

Sullivan v Sullivan [2006] NSWCA 312; *Doueihi v Construction Technologies Australia Pty Ltd* (2016) 92 NSWLR 247; [2016] NSWCA 105; *Evans v Evans* [2011] NSWCA 92, referred to.

v) Depending on the particular context, a proprietary estoppel may be established where the promise or representation relied upon did not define the interest the party was expected to receive: [122] (Bathurst CJ); [170] (Bell P); [171] (Leeming JA).

Sullivan v Sullivan [2006] NSWCA 312; *Flinn v Flinn* [1999] 3 VR 712; [1999] VSCA 134; *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55; [2008] 1 WLR 1752, referred to.

Thorner v Major [2009] UKHL 18; [2009] 1 WLR 776, considered.

vi) A bright line cannot be drawn between categories of cases simply on the basis that some can be classified as commercial and others as domestic/family: [146] (Bathurst CJ); [170] (Bell P); [171], [209] (Leeming JA).

Cobbe v Yeoman's Row Management Ltd [2008] UKHL 55; [2008] 1 WLR 1752; *Thorner v Major* [2009] UKHL 18; [2009] 1 WLR 776; *DHJPM Pty Ltd v Blackthorn Resources Ltd* (2011) 83 NSWLR 728; [2011] NSWCA 348, referred to.

Doueihi v Construction Technologies Australia Pty Ltd (2016) 92 NSWLR 247; [2016] NSWCA 105, applied.

vii) What is important is how the representation or promise would be reasonably understood by a person in the position of the persons to whom the representation was made; [147] (Bathurst CJ); [170] (Bell P); [171] (Leeming JA).

Cobbe v Yeoman's Row Management Ltd [2008] UKHL 55; [2008] 1 WLR 1752; *DHJPM Pty Ltd v Blackthorn Resources Ltd* (2011) 83 NSWLR 728; [2011] NSWCA 348, referred to.

viii) The representations induced an expectation in the lot owners acting in general meeting that if they voted in favour of the resolutions, thereby permitting the Owners Corporation to enter into and complete the transaction, the Owners Corporation would be granted an ongoing interest in the pool for the benefit of owners or occupiers: [126], [139], [141], [148] (Bathurst CJ); [170] (Bell P); [171] (Leeming JA).

Did the Owners Corporation alter its position in reliance on the representation?

ix) The reliance can be said to be that of the Owners Corporation such that it is the proper party: [130]-[131] (Bathurst CJ); [170] (Bell P); [171] (Leeming JA).

x) Reliance is a question of fact and the onus to prove reliance at all times remains on the representee: [156] (Bathurst CJ); [170] (Bell P); [171] (Leeming JA).

Sidhu v Van Dyke (2014) 251 CLR 505; [2014] HCA 19, referred to.

xi) The question is whether the conduct was so influenced by the representation that it would be unconscionable for the representor thereafter to insist on its strict legal rights: [156] (Bathurst CJ); [170] (Bell P); [171] (Leeming JA).

Sidhu v Van Dyke (2014) 251 CLR 505; [2014] HCA 19; *Amalgamated Investment & Property Co Ltd (in liq) v Texas Commercial International Bank Ltd* [1982] QB 84, referred to.

xii) The Owners Corporation established that the lot holders in general meeting relied on the representation in voting for the resolutions: [161]-[162] (Bathurst CJ); [170] (Bell P); [171] (Leeming JA).

Has there been detrimental reliance by the Owners Corporation such that it is unconscionable for Ms Trentelman to resile from the representation?

xiii) The Owners Corporation suffered detriment as a result of the passing of the resolutions: [162]-[163] (Bathurst CJ); [170] (Bell P); [171] (Leeming JA).

xiv) It was unconscionable for Ms Trentelman to resile from the representation she made: [164] (Bathurst CJ); [170] (Bell P); [171] (Leeming JA).

Relief

xv) In the case of proprietary estoppel it is not necessary to mould the relief to reflect the minimum equity necessary to remove the detriment, provided that the relief granted was not out of all proportion to the detriment suffered: [165] (Bathurst CJ); [170] (Bell P); [171] (Leeming JA).

Giumelli v Giumelli (1999) 196 CLR 101; [1999] HCA 10; *Sidhu v Van Dyke* (2014) 251 CLR 505; [2014] HCA 19; *Delaforce v Simpson-Cook* (2010) 78 NSWLR 483; [2010] NSWCA 84; *Ashton v Pratt* (2015) 88 NSWLR 281; [2015] NSWCA 12, referred to.

Consideration, by Leeming JA, of:

xvi) the relationship between the owners corporation and the lot holders (at [182]-[195]).

xvii) whether the lot holders were necessary parties (at [196]-[203]).

xviii) the reliance on *Smith v Chadwick* (1884) 9 App Cas 187 concerning the failure to adduce evidence from all lot holders (at [210]-[214]).

JUDGMENT

1 **BATHURST CJ:** This is an appeal from a decision of a judge of the Equity Division of the Court whereby invoking the doctrine of proprietary estoppel his Honour ordered that the appellant, Natalia Trentelman (Ms Trentelman or the appellant) grant an easement in favour of the first respondent, The Owners – Strata Plan No 76700 (the Owners Corporation or the respondent), allowing the Owners Corporation the right to use a swimming pool and associated structures on lot 53 of Strata Plan No 76700 (the Strata Plan) which was owned by Ms Trentelman (*Trentelman v The Owners – Strata Plan 76700; The Owners – Strata Plan 76700 – Trentelman* [2021] NSWSC 155 (the substantive judgment)). Annexure 'A' to the judgment is the easement ordered by the primary judge. The primary judge also granted certain ancillary relief which is not necessary to set out.

2 Ms Trentelman has also appealed against the primary judge's refusal to make an order in separate proceedings brought by her that a notation on the Strata Plan to the effect the pool building and the pool itself formed part of the common property under the strata scheme (the pool notation) be removed from the register (*Trentelman v The Owners – Strata Plan 76700 (No 2); The Owners – Strata Plan 76700 v Trentelman (No 2)* [2021] NSWSC 377 (the subsequent judgment)).

The background facts

3 There was little dispute as to the primary facts, although there was considerable controversy as to the inferences and conclusions which should be drawn from them.

4 The property in question is situated at Bogangar on the far north coast of New South Wales, just inland from Cabarita Beach, midway between Byron Bay and Tweed Heads. The development on the property up to and including 2014 comprised a four-storey apartment building and surrounding land.

5 Strata Plan 76700 was registered in March 2006. Originally it included eight lots, lot 1 being the apartment building which was used as a motel. The pool the subject of the proceedings was on lot 7. Apart from the pool and its ancillary structures, lot 7 was vacant. Lots 2-6 and 8 were also vacant.

6 The registration of the Strata Plan was accompanied by a strata development contract. Such a contract was required for staged development of a strata scheme. The relevant contract contemplated the upgrading of the apartment building on lot 1, and the construction of three storey buildings, each comprising 10 two-bedroom units with basement car parking, on each of lots 2-7, with a sporting complex consisting of a tennis court, pool and recreation facilities on lot 8. The relevant contract stated that the work was to be completed by July 2011, although cl 8 of that contract specified the "Date of Conclusion of Development Scheme" as September 2010.

7 In August 2007, by Strata Plan of Subdivision No 79344, the motel on lot 1 was subdivided to create lots 9-51 in the strata scheme.

8 In October 2007, an easement for the use of the swimming pool situated on lot 7 in favour of lots 9-48 was created. It is not clear why lots 49-51 were excluded from the dominant tenement. The easement contained the following conditions:

> "The lots in 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 for the use of a swimming pool benefitting the same parcels is created in any of the other lots in SP76700."

9 In July 2009, Ms Trentelman and her husband, Johannes Trentelman (Mr Trentelman), purchased all the lots in the Strata Plan. The lots acquired by Ms Trentelman included the development lots 2-8.

10 From September or October 2010, the Trentelmans commenced to sell individual lots in the strata scheme. The primary judge found that the developed lots had a unit entitlement of 10 to 15 times the entitlement of a typical apartment, such that the owners of those lots had a substantial liability to contribute to the expenses of the Owners Corporation. However, the primary judge found, and it was not disputed that the developed lots neither contributed

to the Owners Corporations' funds, nor was their unit entitlement counted for voting purposes at general meetings of the Owners Corporation.

11 The primary judge also found that the cost of maintaining the pool was treated as an Owners Corporation expense and levies to meet these expenses were borne by all the lot owners in the apartment buildings, including those lots which were not included in the dominant tenement, namely lots 49-51. Further, the Owners Corporation made by-laws regulating the use of the pool.

12 In October 2011, the Trentelmans caused the Owners Corporation to register Strata Plan 85956 which subdivided lot 9 and which, among other things, converted the rooftop terrace on the apartment building and ground floor car park to common property.

13 In 2013, the Trentelmans determined not to pursue the proposed development the subject of the strata development contract. Having regard to the fact that the strata development contract had expired and none of the proposed work had commenced, it may be doubted that they were entitled to do so, in any event, at least without a further development consent.

14 In 2014, the Trentelmans wanted to free the development lots from the restrictions of the strata scheme so that they could be developed and sold off as ordinary *Real Property Act 1900* (NSW) lots. They also devised specific plans for the development of lot 7 by building a group of three townhouses on it.

15 To enable this to occur, the relevant lots first had to be converted to common property by way of a strata re-subdivision and then transferred back as *Real Property Act* land.

16 These steps required a special resolution of the Owners Corporation. The Trentelmans also wanted resolutions that, once the land was converted, it would be transferred back to them as *Real Property Act* land, and that the Owners Corporation would consent to the proposed development of lot 7.

17 In that context, the Trentelmans, who at the time had control of the Strata Committee, caused the requisite resolutions to be brought forward at the Annual General Meeting of the Owners Corporation in July 2014. The notice of

meeting proposed the following resolutions to give effect to the proposal. Because the proposed resolutions and the explanatory notes provided in respect of them are of critical importance in the proceedings, it is necessary to set them out in full:

> "**10. Removal of Development Lots from Scheme**
>
> **SPECIAL RESOLUTION**
>
> 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***) and 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 [(or the Strata 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***)
>
> and 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 and, further, 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,

and 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.

2. Development of Lot 7 with Scheme

UNANIMOUS RESOLUTION

That, subject to the passing of motion 10, the Owners Corporation 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***)

and that, subject to the provisions of the CLDA, Lots 2 and 3 in the Community Association both have a unit entitlement of 1 (or otherwise equal) and that Lot 3 in the Community Association be reserved for future development into no more than 3 townhouses of no more than two storeys in height to be

subdivided by registration of a neighbourhood or strata plan and that, simultaneous with the registration of such plan, an amended schedule of unit entitlements be registered for the Community Association based on the respective number and value of lots in the scheme and Lot 7 respectively (taking into account that the scheme will have a greater intensity of use of the common facilities) and otherwise subject to the provisions of the CLDA and 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 owner of Lot 7 (at the cost of the owner of Lot 7) to give effect to the proposal:

(a) preparation and registration of such deposited plans as may be required to create the Community Association;

(b) preparation and registration of a management statement for the Community Association (on terms to be approved by the Executive Committee);

(c) preparation and registration of such documents for the surrender or creation of such easements or covenants in the Community Association as may be necessary or desirable, including any section 88B instruments;

(d) preparation and registration of such development contract as may be approved by Council for the future development of Lot 3 in the Community Association; and

(e) preparation and registration of such neighbourhood and strata plan administration sheets and consents to effect registration of the neighbourhood or strata scheme on Lot 3, including an amended schedule of unit entitlement for the Community Association in accordance with the requirements of the CLDA,

(***Proposal***)

and, further, 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 Council;

(ii) community association plan administration sheets (including approved form 6) and a schedule and amended schedule of unit entitlements in accordance with the CLDA;

(ii) management statement, easements and covenants (including section 88B instruments) and development contract,

and that the Executive Committee and/or Strata Managing Agent liaise with such representatives of the owner of Lot 7 (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.

Explanatory Note – Motion 10:

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.

Explanatory Note – Motion 11:

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."

18 The notice of meeting was accompanied by plans detailing the proposed subdivision. It appears that the plans accompanying the notice of meeting received at least by some of the unit holders contained the following notation which was said to be in the writing of Mr Trentelman:

> "Current Situation
>
> DA approved 6 blocks of 10 three bedroom apartments plus Recreation Centre
>
> The motions in essence – stop all the blocks of apartments splits most of the land off away from the current 51 apartment block and limits development to only at maximum 3 (2 storey) townhouses in front of us. Pool will only be used by 51 apartments and owners of townhouses only. Other land has no access.
>
> Current block of 51 apartments."

19 It will be necessary to say more about the construction of motion 10 subsequently in this judgment, but the following matters may be noted at this stage. First, the resolution the subject of motion 10 was a composite resolution. It included not only a resolution approving the development proposal, but also a resolution to take the necessary steps to give effect to it, including taking steps necessary for the creation of such easements or covenants as may be necessary to ensure that owners and occupiers of lots within the strata scheme had a continuing right to use the swimming pool. The taking of such steps was an integral part of what was proposed by the resolution.

20 Second, as was emphasised by senior counsel for Ms Trentelman, the proposal the subject of the resolution did not specify the nature of the interest that the Owners Corporation would receive to ensure the continuing use of the pool. Rather, the Owners Corporation was directed to take such steps as may be authorised by the Strata Committee and to execute such documents as may be required to give effect to the proposal.

21 Third, the resolutions were propounded at a time when all the lot owners had access to the pool and the Owners Corporation had assumed responsibility for regulating its use and the cost of its upkeep.

22 Fourth, the explanatory notes to the motions contained in the notice of meeting stated that the motions ensured that easements exist so that owners and occupiers of lots within the scheme had a continuing right to use the swimming

pool on lot 7. The persons proposed to be entitled to the easements were not limited to the owners of the lots which had the benefit of the pre-existing easement.

23 At the meeting at which the resolutions were passed, Mr Trentelman emphasised the fact that under the proposal, lot owners would have continuing use of the pool. The primary judge summarised the affidavit evidence of the lot holders who attended the meeting in a table (at [136] of the substantive judgment), which it is convenient to set out:

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.

24 His Honour also conveniently summarised the evidence given in cross-examination on this issue (at [149] of the substantive judgment):

Witness	**Question**	**Answer**
Mr	What do you claim was	Mr Trentelman put the

Lofthouse	said in relation to the proposal by Mr Trentelman?	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 passage that I just read out to you [Motion 10]?	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 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",	He said we'd have continuous use of the pool.

	correct?	
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 them out. at page 266?	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.
Ms Chatterjee	The pool was very much a side issue at this meeting, would you agree with that? That's your recollection of what he said, that you would continue to have use of the pool?	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. Yes, correct.
	Is it possible that what was said at this meeting	Yes, there was no indication that there would be interference with the use of

	was that the proposal that was being put forward would not interfere with the then existing use of the pool?	the pool at any time.
	In fact you were told that this would not interfere with your use of the pool, weren't you?	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	No, I don’t understand that it was just referring to the easement because I read the minutes of the meeting, the proposed meeting,

	shown you?	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.

25 It should be noted Mr Kelly was not present at the meeting but had had a separate conversation with Mr Trentelman concerning the proposal. Mr Kelly's evidence was that Mr Trentelman told him that, "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." Mr Kelly said that as a result of the answer, he either appointed Mr Trentelman as his proxy or confirmed that appointment.

26 The motion was passed unanimously. Of the 113 votes in favour, 63 votes were cast by Mr and Ms Trentelman, 17 in their own right and 46 as proxy for other unit holders. Ms McConnell, who was on the Strata Committee of the Owners Corporation at the time, cast 3 votes in her own right and 8 votes as

proxy, whilst other unit holders cast 39 votes, 32 in their own right and 7 as proxy for other unit holders.

27 Thereafter, the Trentelmans, in Ms Trentelman's capacity as owner of the development lots and in their capacity as members of the Strata Committee of the Owners Corporation, proceeded with the implementation of the proposal.

28 In December 2014, a further plan of strata re-subdivision was drawn up by a surveyor, Mr Wyper, on the Trentelmans' instructions. The plan was registered with certain amendments as Strata Plan 91510. The plan of re-subdivision realigned the borders of lots 7 and 6, which became lots 53 and 54 in the Strata Plan. The plan contained the pool notation.

29 By the time of the 2015 Annual General Meeting of the Owners Corporation, the plan with the pool notation had been registered. At the meeting, in dealing with general business, Mr Trentelman was asked to explain what his development looked like and what impact it would have. The meeting was recorded, and the primary judge set out the discussion which took place as follows (at [121]-[126] of the substantive judgment):

> "[121] When Mr Trentelman had done so [explained the impact of the proposal], 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 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 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 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] … 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."

30 Thereafter, the Trentelmans, who still controlled the Strata Committee with Ms McConnell, set about implementing the proposal. On 19 November 2015, they caused the Owners Corporation to enter into a Deed with Ms Trentelman,

which obliged the Owners Corporation to first convert lots 2-5, 8 and lot 54 (the original lot 6 as realigned) to common property, then to provide Ms Trentelman with a plan of subdivision having the effect of hiving off those lots from the Strata Plan and then transferring them to Ms Trentelman.

31 The requisite conveyancing steps were taken to give effect to the proposal. They were effectively completed by February 2016. It should be noted that lot 53 remained as part of the Strata Plan and no provision was made for an easement permitting the lot owners to use the pool.

32 At the Annual General Meeting of the Owners Corporation in September 2016, the Trentelmans failed to be re-elected to the Strata Committee. The primary judge found (at [64] of the substantive judgment) that about three weeks later, the Trentelmans discovered that the existing easement was in favour of lots 9-51, rather than the Owners Corporation (in fact, it was only in favour of lots 9-48). On 8 November 2016, Mr Trentelman took over the maintenance and cleaning of the pool and erected a sign excluding everyone other than the owners of lots 9-51.

33 In about mid-2017, the Trentelmans completed the construction of the townhouses on lot 53. When the original easement expired in October 2017, they excluded from the pool area the lot owners, except those with whom they were friendly.

34 The Trentelmans also unsuccessfully sought to have the pool notation removed from the Strata Plan.

35 Thereafter, the Owners Corporation commenced the proceedings the subject of this appeal seeking, among other prayers for relief, the following orders:

> "4 In the alternative to Orders 2 and 3:
>
> …
>
> b. in the alternative to Order 4(a), a declaration that the defendant Is estopped from resiling from her representations that she would not take any step to prevent access to and use of the Pool and Structures, and would put in place permanent arrangements to allow such continuing and permanent access; and
>
> …

> d. in the alternative to Order 4(c), an order that the defendant do all things reasonably necessary at the request of the plaintiff to register an easement over the Pool and Structures, the terms of which will allow owners and occupiers of the lots within the Strata Scheme, including future owners and occupiers, to continuing and permanent access to and use of the Pool and Structures, on terms that the plaintiff pays for their upkeep;"

36 Ms Trentelman commenced proceedings seeking the removal of the pool notation.

The manner in which the case was put by the Owners Corporation

37 As I indicated at the outset of this judgment, the Owners Corporation relied on a proprietary estoppel to assert its claim. That basis first seems to have been propounded in opening submissions in the Court below. Although it was objected to by senior counsel for Ms Trentelman, the Owners Corporation was permitted to put its case on that basis. The relevant portions of the opening submissions are as follows:

> 51 The OC relies upon both promissory and proprietary estoppel to the extent that there is a difference, asserting that the Trentelmans ought not be entitled to resile from the representation/promise that the OC/owners were to receive a legal interest in the pool and facilities in return for approval of the Trentelmans' motions at the 2014 AGM (with the relevant documentation being prepared by the Trentelmans and executive committee of the OC).
>
> …
>
> 56 The OC's case is that the Court ought to find:
>
> a. The representations made by the Trentelmans at the 2014 AGM were sufficiently certain in the non-commercial circumstances with the relevant background.
>
> b. There was reasonable reliance in passing the Resolutions, and in the circumstances there ought to be a presumption of reliance – where 'inducement by the promise may be inferred from the claimant's conduct, as is the case here, the onus or burden of proof shifts to the defendant to establish that the claimant did not rely on the promise.'
>
> c. The OC and owners/occupiers clearly suffered a detriment that was not insubstantial when the Trentelmans sought to assert that the easement had expired, at least by agreeing to the removal of the development lots and the consequent loss of levies from those lots.
>
> d. It was within the capacity of the Trentelmans, who controlled the 3 person executive committee, to ensure that the relevant documentation was completed to implement the representation to give indefinite access to the Pool, by transferring the land into common property, as they had done with the rooftop, or by granting a permanent easement for the benefit of the OC and owners." (Footnotes omitted.)

Further findings of fact made by the primary judge and his conclusions

38 In addition to referring to the factual matters which I have outlined above, the primary judge referred to certain other matters which he considered relevant to the Owners Corporation's claim.

39 In that context, his Honour referred to correspondence between the solicitor for Ms Trentelman and the solicitor for one of the unitholders, Mr Luddington, who was considering purchasing lot 7. In a letter dated 8 January 2015 from the solicitor for Mr Luddington to Ms Trentelman's solicitor, she expressed the understanding that "the pool will remain on the proposed lot and our client [as purchaser] is to provide certain rights of use to the body corporate". She also sought advice of whether the contents of resolutions the subject of motions 10 and 11 of the Annual General Meeting held on 28 July 2014 "are still the proposed way moving forward", expressing the understanding that the current proposal was that the three lots "our client proposes to develop will form part of the current strata rather than a community association".

40 In response, Ms Trentelman's solicitor advised the pool would remain on the proposed lot 53 and, referring to motions 10 and 11, stated that it was resolved that the pool would become part of the common property and would remain part of the current strata. The primary judge (at [189] of the substantive judgment) rejected Ms Trentelman's evidence that her solicitor's statement was made without instructions as "far-fetched", and declined to draw an inference that the solicitor misunderstood his instructions in the absence of him being called.

41 The primary judge stated that the evidence of the lot holders who attended the meeting was entirely consistent with the documentary evidence, particularly the notice of meeting for the 2014 Annual General Meeting. His Honour rejected the submission that the failure to call five other witnesses who had given affidavits meant that a *Jones v Dunkel* inference should be drawn against the Owners Corporation (*Jones v Dunkel* (1959) 101 CLR 298; [1959] HCA 8). His Honour (at [196] of the substantive judgment) described the failure to call these witnesses as "nothing more than a commendable attempt to save time".

42 The primary judge (at [200]-[209] of the substantive judgment) also rejected the submission that the evidence of Ms Chatterjee, in which she stated that she agreed that what was being put forward was that there would not be interference with the "then existing" use of the pool, demonstrated that all that was said was that there would not be interference with the lot owners' rights under the easement, and that no promise was made about access after the easement expired. His Honour stated that the submission had a number of difficulties. His Honour said that first, it overstated the significance of Ms Chatterjee's evidence and it was never squarely put to her or any of the other witnesses the difference between a promise to respect the existing easement and a promise to give them the pool.

43 The primary judge stated that the second difficulty was that there were many other statements from the Owners Corporation witnesses which did not limit Mr Trentelman's statement in the manner suggested. His Honour said (at [204] of the substantive judgment) that the third difficulty was that it was not supported by the Trentelmans' own evidence, stating that Ms Trentelman spoke in terms of "continuing", and "unaffected", use, and the fourth difficulty was that an undertaking to allow access until the expiry of the easement was hardly worth making. His Honour also stated that the statements made by Mr Trentelman at the 2015 Annual General Meeting reinforced the point.

44 To this, it may be added that whilst Ms Chatterjee answered "yes" to the question, "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?", she went on to say in the same answer, "there was no indication that there would be interference with the use of the pool at any time". Ms Chatterjee's answer thus does not give any support to the proposition.

45 In these circumstances, the primary judge stated (at [209] of the substantive judgment) that he was satisfied that at the 2014 Annual General Meeting, Mr Trentelman made representations to the effect that "'we' would give 'you' continued use of the pool".

46 The primary judge found in these circumstances that the representations concerned continuing access into the future and were not limited to the then lot

owners. His Honour stated (at [273] of the substantive judgment) that this was reinforced by the use of the indefinite term "owners" in the notice of meeting. His Honour stated (at [274]) that there was "no real distinction between a promise in favour of the members of the [Owners] Corporation as members, and a promise in favour of the [Owners] Corporation itself". The primary judge pointed to s 8(1) of the *Strata Schemes Management Act 2015* (NSW) and its predecessor, s 11(1) of the *Strata Schemes Management Act 1996* (NSW), each of which stated that on incorporation, the members of the body corporate constituted the corporation. His Honour stated that the representations were binding on Ms Trentelman and were made in favour of the Owners Corporation.

47 However, the primary judge concluded that the passing of the resolutions did not give rise to a binding contract in the sense of an exchange of promises with immediately binding effect. In those circumstances, his Honour concluded that the Owners Corporation's contractual claim failed.

48 The primary judge stated that proprietary estoppel of the nature of that described in *Ramsden v Dyson* (1866) LR 1 HL 129 extended beyond taking possession of land and laying out money on it to other types of detrimental reliance. His Honour noted that the representation did not clearly define the interest to be received but stated that did not prevent the doctrine from operating. His Honour stated that where the nature of the interest is unclear, the Court may fashion a remedy to do justice between the parties.

49 The primary judge noted (at [291] of the substantive judgment) that it was true that the parties contemplated that "formal dispositions would be drawn up and registered". However, his Honour described the resolutions as "immediately effective to grant the necessary statutory approval" and conferred on the Strata Committee, including the Trentelmans, power to complete the transaction without reference back to the Owners Corporation in general meeting. His Honour stated that there was no relevant analogy with a representation made in the course of commercial negotiations which were conducted on the basis that neither party would be bound before the execution of a formal contract. His

Honour stated that he did not think the events which took place occurred in a "commercial context".

50 The primary judge rejected the submission that, as the five witnesses who gave evidence held only 19 per cent of the total unit entitlement and as only Ms Chatterjee expressly stated that the promise of continued access to the pool affected her vote, the Owners Corporation had not established that the representation concerning the pool had been relied upon. His Honour noted that in support of that submission, it was put that those attending the meeting could well have been influenced by other considerations, including the desirability of limiting the extent of the development on lot 7 (lot 53) and the preservation of views for the apartment building.

51 The primary judge stated that those submissions left out of account the fact that the representations about the pool were contained in the notice of meeting and presumably formed the basis of the decision of some members not to attend in person and vote by proxy. His Honour referred to his conclusion that no adverse inference should be drawn from the failure to call persons who attended the meeting as to what was said and stated that for the same reason, no adverse inference arose on the reliance issue. His Honour stated that the representations were calculated to adduce a favourable result, and a favourable result eventuated. His Honour expressed his conclusions in the following terms (at [302] of the substantive judgment):

> "[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."

52 The primary judge referred to the fact that the Owners Corporation had identified the detriment as including entry into the subsequent transactions referred to in the resolutions and, in particular, the conversion and retransfer of the lots. His Honour agreed that the immediate cause of entry into those transactions was the entry into the November 2015 Deed (see at [230 above), but stated (at [306] of the substantive judgment) that it was "artificial" to say

that the transactions did not take place as a result of reliance on the Trentelmans' representations as it was those representations which induced the passage of the resolutions. His honour stated that there was thus a direct causal link between the conversion and retransfer and the representations. In these circumstances, the primary judge concluded that the Owners Corporation had made out its case for relief by way of proprietary estoppel. His Honour concluded that the appropriate form of relief was the grant of an easement. His Honour referred to the fact that the explanatory material which accompanied the notice of meeting referred to an easement, not a transfer of the pool land into common property.

53 In dealing with the pool notation, the primary judge referred to the fact that what was sought was an order that the Registrar-General be directed to use its power to remove errors and omissions on the register by removing the pool notation.

54 The primary judge noted (at [321] of the substantive judgment) the argument by Ms Trentelman that "the December 2014 plan of subdivision (including the pool notation) was inadequate to effect the transfer of the pool land to common property". His Honour did not deal with this argument, having regard to the fact that the Owners Corporation accepted that even if its submissions were correct, it would only confer the pool as common property without the surrounding airspace and thus would provide no practical benefit to the Owners Corporation. His Honour also rejected rectification claims in respect of the pool notation raised by each of Ms Trentelman and the Owners Corporation.

55 In the subsequent judgment, the primary judge formulated the terms of the easement he proposed to order be granted. As the appeal was directed to the decision to grant an easement rather than its form, it is not necessary to refer to this judgment in any detail. However, the primary judge noted senior counsel for Ms Trentelman's contention that he should make a declaration that the pool notation was invalid. His Honour noted that he had not made a finding in Ms Trentelman's favour on the invalidity point and in those circumstances, he declined to make a declaration, stating that he would require the removal of the pool notation at the same time as the registration of the transfer granting the

easement. His Honour stated that he would ensure it did not affect the costs outcome in Ms Trentelman's proceedings.

56 In a further judgment (*Trentelman v The Owners – Strata Plan 76700 (No 3); The Owners – Strata Plan 76700 v Trentelman (No 3)* [2021] NSWSC 578 (the costs judgment)), the primary judge dealt with the cost issues in each set of proceedings. In relation to the Owners Corporation suit, his Honour made orders that the Owners Corporation receive a costs order in its favour, with the exception of costs thrown away by reason of an adjournment of the proceedings. No objection was taken to these orders if the appeal was otherwise dismissed.

57 In relation to the proceedings concerning the pool notation, the primary judge stated that Ms Trentelman's claim for removal of the pool notation, or a declaration of its invalidity, and the Owners Corporation's claim for rectification of the pool notation were "logically distinct" (at [43] of the costs judgment). His Honour rejected the proposition that Ms Trentelman's claim had "really" succeeded despite the refusal of relief, as she had failed in her claim that the pool notation was a mistake and in her claim for a declaration. In these circumstances, his Honour concluded that Ms Trentelman should bear the costs of the proceedings with the exception of those solely referable to the cross-claim brought by the Owners Corporation for rectification of the register, and that the Owners Corporation should pay Ms Trentelman's costs of defending that cross-claim.

The grounds of appeal

58 In the proceedings brought by the Owners Corporation, Ms Trentelman relied on the following grounds of appeal:

> "1 The learned primary judge erred in finding that the Respondent 'had made out its case for relief by way of proprietary estoppel' (paragraph [310] of the substantive judgment) in respect of the swimming pool the subject of these proceedings.
>
> 2 More specifically the learned primary judge made the following errors in reaching the conclusion referred to in [1] above:
>
> > (a) Concluding that the representation made on behalf of the Appellant that *'we would give **you** continued use of the pool'* was directed to the Respondent (Owners Corporation) rather than to the individual lot owners of lots 9 to 48 in Strata Plan 76[7]00 who at the

time of the meeting held an easement of use in respect of the pool (the 'Benefited Lot Owners') or (more probably) that the statement was not directed specifically or conclusively to either the Respondent or to the Benefited Lot Holders because the offer was, at this time inchoate as to whether the 'use' of the pool would be to the Benefited Lot Owners or would be to the Respondent;

(b) Further, or in the alternative to paragraph 2(a) above, concluding (paragraph [209] of the substantive judgment) that *'at the 2014 AGM Mr Trentelman did indeed make representations to the effect that "we" would "give" "you" continued use of the pool'* when the evidence did not warrant that conclusion, in the face of the variances in the statements made by each of the witnesses called by the Respondent;

(c) Misconstruing the terms of a written Proposal that had been provided to the members of the Respondent as implying a promise by the Appellant to provide the use of the pool to the Respondent when on a proper construction of the Proposal it was recording a protection of the existing use of the pool by the Benefited Lot Owners;

(d) In concluding (at paragraph [291] of the substantive judgment) that there was sufficient certainty in the representation described in paragraph [1(a)] above to found a claim of proprietary estoppel notwithstanding the conclusion (at paragraph [282] of the substantive judgment) that the Appellant '*did not define in clear terms the interest which [the Respondent] would receive'* and (at [291] of the substantive judgment) that *'the parties contemplated that formal dispositions would be drawn up and registered'* and the uncertainty as to the identity of the benefit of any beneficiary of this offer;

(e) By distinguishing the authorities of *DHJPM Pty Ltd Blackthorn Resources* (2011) 83 NSWLR 728 at [56]-[58] and [104]-[134] and *Doueihi v Construction Technologies Australia Pty Ltd* (2016) 92 NSWLR 247 at [175]-[177] on the basis (at paragraph [291] of the substantive judgment) that the act performed by the Respondent in exchange for the 'promised' interest in the pool had already been performed and on the basis that the proposed interest was not properly characterised as occurring in a 'commercial context';

(f) Notwithstanding the finding that the Respondent '*did not take possession of the pool land or lay out money on it*' (at paragraph [281] of the judgment) nevertheless finding that the vote by the members of the Respondent to approve the 'Proposal' constituted sufficient detriment or change of position in reliance on receiving this interest in the pool;

(g) Dismissing the argument by the Appellant that the Respondent's failure to call evidence that established that at least 25% of the members of the Respondent voted in favour of the proposition because (at least in part) they had relied on receiving an interest in the pool meant that the Respondent had not established reliance in the manner described in *Sidhu v Van Dyke* (2013) 251 CLR 505 at [61];

(h) Failing to conclude that as there were considerable advantages to the members of the Respondent in accepting the Proposal that were unconnected with the use of the pool, such as substantially limiting the scope of future developments on lot 7 from that for which existing development approval had occurred and the removal of the

development lots from Strata Plan 76700, then the Respondent's failure to call direct evidence of reliance meant that an inference to that effect could not be drawn in favour of the Respondent;

(i) Notwithstanding the finding at [281] of the judgment that the Respondent '*did not take possession of the pool or lay out any money on it*' nevertheless found that an act of 'reliance', sufficient to establish proprietary estoppel, was the passing of motion 10, instead of finding that at its highest the passing of this motion represented nothing more than the Respondent performing an act in return for a promise by the Appellant to offer of an interest in property that the Respondent was free to reject. That is to say the necessary requirement that the Appellant's conscience be affected by the knowledge that the Respondent had acted to its detriment in reliance on the understanding that it was receiving an interest in land was not present.

3 The learned primary judge erred in making orders in the form in which those orders were made, when the findings did not support such orders.

4 More specifically the learned primary judge made the following errors in making the orders referred to in [3] above:

(a) Making a declaration in terms of order 1, when there was no utility to such a declaration as no damages had been claimed as part of the proceedings, and the learned trial judge made no finding as to the date (in the past) at which the equitable interest arose.

(b) Making an order in the nature of an injunction, in terms of order 2, when there was no power, or cause of action on which to base the injunction, absent an existing registered easement to support such an order.

(c) making an order in terms of order 3 in the form of the obligation to grant an easement on the terms in Annexure A to the form of orders, when those terms of the easement did not arise from the findings of the learned primary judge (paragraph [314] of the substantive judgment), which required, as '*the proper form of relief ... an easement in favour of the Corporation in the same terms, or substantially the same terms,* as *the previous easement.*'"

59 In proceedings concerning the pool notation, Ms Trentelman relied on the following grounds:

"1 The primary judge erred in making orders dismissing the proceedings the subject of the Appellant's Statement of Claim, when the findings by the primary judge did not support such orders.

2 The primary judge erred in failing to make the orders sought by the Appellant, in circumstances where the primary judge found (paragraph [324] of the substantive judgment) that the First Respondent had conceded that '*the structure of the pool, without the surrounding airspace*' was of no utility to it and found at [333] that the pool notation was '*no use to the Corporation.*'

3 In the alternative to ground 2, the learned primary judge erred by failing to make a finding as to the lack of legal effectiveness of the notation on strata plan of subdivision 91510 (paragraph [318-324] of the substantive judgment)."

The submissions

a Ms Trentelman

60 Senior counsel for Ms Trentelman stated that the appeal against the decision in the proceedings brought by the Owners Corporation had two aspects. First, he submitted that the primary judge erred in inferring reliance by the Owners Corporation to establish proprietary estoppel, and second, that there was insufficient certainty as to whether any interest in the land was to be created, and if so, in whose favour to satisfy the requirements for a proprietary estoppel.

61 He contended that to succeed, the Owners Corporation had to establish two matters. First, that the respondent as distinct from the actual lot owners who were the beneficiaries of the existing easements, formed an assumption that it would receive a proprietary interest in the swimming pool, and second, that the respondent had relied on that assumption.

62 Senior counsel for Ms Trentelman submitted that when it was understood that the relevant act of reliance was the vote on motion 10, the question was whether the respondent had established by direct evidence or inference that at least 25 per cent of its members voted in favour of the resolution because they understood that the respondent, and not them personally, would be receiving an interest in land. He submitted that if any right existed, it would be in the lot owners personally who would have been the correct parties to have brought the action.

63 Senior counsel for Ms Trentelman (referring to his written submissions in reply) stated that there were eight matters which demonstrated that an inference of the type found by the primary judge could not be drawn. The first of these was that it was not obvious what the lot owners would understand from the representation found by the primary judge, “we will give you continuing use of the pool” and, in particular, whether the Owners Corporation was to be given a proprietary interest. He submitted that what was most likely to have been understood was an extension of the existing easement which would not have been for the benefit of the Owners Corporation.

64 The second matter relied upon was that as the existing easement was not in favour of the Owners Corporation but only in favour of lots 9-48, it was not

clear that members of the respondent would have understood that the Owners Corporation was receiving a proprietary interest in the pool, as distinct from their own existing easement being extended. Senior counsel in this context referred to the finding of the primary judge (at [144] of the substantive judgment) that lot owners, Mr and Mrs Lofthouse, Mr Kelly and Mr Luddington knew of the easement. Senior counsel referred to evidence given by Mr Luddington to the effect that he believed that everyone was fully under the impression that the easement would be renewed. He also referred to the evidence of Mr Kelly (see at [24] above) that he believed "we would either get the pool by common property or an extension of the easement" and that, at the time of the meeting, his understanding was that the most likely means by which the owners would get continuing use of the pool was by an extension of the existing easement. He also referred to the evidence of Mr Lofthouse that he understood there would be an extension of the existing easement so it would become indefinite.

65 He also referred to what was said in an email from Mr Kelly to other lot holders after the 2017 Annual General Meeting. The email contained the following remarks:

> "Outside of official BC business a group of owners have approached Ian McKnight of Clarke Cann Lawyers to renegotiate the pool easement so that owners can have some continuity re the use of the pool. Ian will begin those discussions with the Trentlemens [sic] along the lines that they (the Trentlemens [sic]) had previously agreed to renew this easement when they were putting together the development application for the townhouses and as per the minutes of the 2014 AGM."

66 In that context, senior counsel for Ms Trentelman referred to the terms of the existing easement and particularly the provision requiring lot owners of the dominant tenements to bear the cost of operation, repair and maintenance of the pool. He pointed out that what was proposed in the easement ordered by the primary judge was a permanent easement which he submitted raised the question of what was going to happen in respect of the capital costs of replacing the pool. He stated that there was never any discussion or vote concerning this issue.

67 The third matter relied upon was that there was no contractual obligation to offer a proprietary interest in the pool. Senior counsel for Ms Trentelman

submitted that Ms Trentelman was not obliged to proceed with the proposal. He submitted that the effect of the resolutions were that if she did proceed with the proposal, the Owners Corporation was to execute documents to give effect to the right to continued access to the pool. He submitted first, that whether that would be by means of an easement or some other way was not specified, and the reference to continuing access should be understood as continuing access to existing beneficial lot owners, not the Owners Corporation.

68 The fourth matter raised was that the primary judge should not have drawn the inference he did because of the need for formal dispositions to be negotiated and registered. Aligned to this were the fifth and sixth matters on which reliance was placed, namely, that the Owners Corporation was free to reject the easement if the consequential obligations that went with that interest, particularly the likely cost associated with the grant of such an easement, including the cost to maintain the pool and the capital costs of replacement of the pool, had not been considered by members.

69 Senior counsel for Ms Trentelman referred to the finding by the primary judge to this effect (see at [49] above) and to the fact that the witnesses who were called accepted the suggestion that documents would need to be executed and there would be negotiation of payment of expenses. He noted that as the primary judge found (at [148] of the substantive judgment), each of Mr Luddington, Ms Chatterjee and Mr Kelly accepted the possibility that lot owners could refuse the easement because of the cost, although the primary judge found that this did not cross their mind at that time. Senior counsel for Ms Trentelman submitted that it was not to the point that it did not cross their minds, but that they understood that before any interest in land could be created, there had to be an offer made that they could accept or reject, which meant that they could not reach the conclusion the Owners Corporation would necessarily receive any interest in land.

70 The seventh matter on which reliance was placed was the fact there was a significant advantage to the lot owners having a smaller scale development on lot 7.

71 Senior counsel for Ms Trentelman pointed to the conclusion reached by the primary judge, which I have set out at [46] above. He submitted that the critical part was that if continuing use was discussed, it was likely to refer to the existing easement and that contrary to the conclusion reached by the primary judge, there was a very real distinction between a promise in favour of members of the Owners Corporation and a promise to the Owners Corporation itself in the context of continuing use of an easement granted to members of the Owners Corporation.

72 The eighth matter upon which reliance was placed was that more than 75 per cent of the voting entitlement of members of the Owners Corporation did not give evidence that representations regarding the pool caused them to understand that the Owners Corporation would be receiving a proprietary interest, or that it was relevant to their decision to vote in favour of the resolutions. Senior counsel for Ms Trentelman stated that whilst he accepted statements such as those made by Ms Chatterjee could be described as "self-serving", he submitted that there was no admissible evidence of the extent the pool was used or why it was important, nor evidence as to how many lot holders used the pool regularly and what they thought of the cost of maintaining it.

73 Senior counsel for Ms Trentelman criticised the reasoning of the primary judge which I have set out at [51] above. He submitted that what he said about different reasons for voting in favour of the resolutions applied with equal force, irrespective of whether the representations were written or oral. He submitted that the conclusion that the representations may have induced the unit holders to vote by proxy was speculative.

74 In dealing with the special resolution the subject of motion 10, senior counsel for Ms Trentelman emphasised its bipartite nature. He submitted that what was being referred to in subpar (vi) was "prophylactic protection of the existing easements". He submitted that the language was not the language of the Owners Corporation accepting any easement. He referred to the words "surrender or creation of such easements", submitting it would not be

necessary to deal with the surrender of an easement if what was promised was the creation of an easement.

75 Senior counsel for Ms Trentelman accepted that the words "continuing use" could have meant the extension of the existing easement into the future. He submitted, however, that it did not refer to the "creation of some entirely new use", noting that it referred to the owners and occupiers of the lots rather than the Owners Corporation. He submitted that the effect of the resolution was that if the owner or occupier's rights to the easement or any extension was going to be affected by the parcels of land moving in and out of the common property, then the Owners Corporation was authorised to execute such documents as were necessary to protect the rights of the lot owners. He also submitted that the reference in the explanatory note to "owners and occupiers" supported what he described as the "prophylactic purpose" of the resolution.

76 Senior counsel for Ms Trentelman submitted that the remarks made by the primary judge (at [302] of the substantive judgment; see at [51] above) were what was primarily complained of on this aspect of the appeal. He submitted that it was not possible to answer the failure to call witnesses by drawing what he described as a *Gould v Vaggelas* type inference in the Owners Corporation's favour (*Gould v Vaggelas* (1985) 157 CLR 215; [1985] HCA 75 at 236). He submitted that this proposition was supported by what was said by Lord Blackburn in *Smith v Chadwick* [1884] 9 App Cas 187 at 196, and by the plurality in *Sidhu v Van Dyke* (2014) 251 CLR 505; [2014] HCA 19 at [56]-[61].

77 He submitted that in this case, any principle derived from *Gould v Vaggelas* did not mean that the Owners Corporation had established the reason why the lot holders voted was because the Owners Corporation was to receive an interest in the pool. He submitted that the principle was not available in circumstances where only five witnesses had been called, and that the inference could not be drawn because of the different reasons why the unit holders may have voted in the way they did.

78 He accepted that if the only reference in the notice of meeting to advantages to the lot owners was that if the Owners Corporation permitted the lots to be removed from the strata scheme, the Owners Corporation would have

continued use of the pool, then a *Gould v Vaggelas* inference could be drawn. He stated, however, that where there are a number of reasons why they may have voted in favour of the resolution, the principal one being that the lot owners' existing easement was being extended, or that they might get an easement contract they could accept or reject, the inference was not available, particularly when it was not established that up to 25 per cent of the unit holders would not have voted in favour of the resolution but for the representation. He submitted that this submission was supported by what was said by Young CJ in Eq in *Cook's Construction Pty Ltd v Brown* [2004] NSWCA 105; (2004) 49 ACSR 62 at [19], [23], [32]-[33] and *Greater Dandenong City Council v Australian Municipal, Clerical and Services Union* (2001) 112 FCR 232; [2001] FCA 349 at [142]-[143], [179].

79 Senior counsel for Ms Trentelman emphasised that the easement was not a gift. He submitted that the Owners Corporation was not in fact maintaining the pool, rather, they were paying the maintenance costs. With respect, this seems a distinction without a difference. He emphasised that the Owners Corporation may not have agreed to pay for the replacement costs of the pool.

80 Referring to the decision of the House of Lords in *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55; [2008] 1 WLR 1752 at [20] ("*Cobbe*"), senior counsel for Ms Trentelman also submitted that there was no evidence that the lot holders understood the Owners Corporation was to get a proprietary interest, as distinct from an offer of an easement made to them which they could either accept or reject. He submitted that the objective evidence was that the lot owners knew there was going to have to be a negotiation of terms which they could either accept or reject.

81 Senior counsel for Ms Trentelman stated that the second aspect of the appeal was that proprietary estoppel cannot lie when it is uncertain whether any interest in land was to be created as distinct from the form of the interest in land, submitting that unconscionability or unconscionable conduct by a promisor was not of itself sufficient to ground a proprietary estoppel. He referred to what was said by Lord Scott in *Cobbe* at [16]-[17] and [20]. He submitted that the Owners Corporation had not established that the lot owners

were of the view that the interest in land would be created without further negotiation and agreement, at which time the Owners Corporation could refuse to go ahead. He submitted that the lot owners must have understood that another easement could be executed and that "they [the Owners Corporation] certainly hadn't established that the lot owners were of the view that there would not be a further opportunity for further negotiations and, if the Owners Corporation was not happy with the terms of the proposed easement, not a rejection".

82 He referred to what was said by the primary judge concerning this issue, to which I have referred at [49] above. He submitted that it was irrelevant that Ms Trentelman had received the benefit of the transaction, submitting that the position was the same in *Cobbe*. He submitted that the statement by the primary judge that the representation had not taken place in a "commercial context" was not the proper issue. He described the proper issue as being whether the Owners Corporation had shown that the lot owners had formed the view that the interest would be created without further input or negotiation, stating that there was no evidence on that point. Referring to what was said by Handley AJA in *DHJPM Pty Ltd v Blackthorn Resources Ltd* (2011) 83 NSWLR 728; [2011] NSWCA 348 at [142], senior counsel submitted that even if there was an expectation that negotiations would be successful, that was not enough.

83 In submissions in reply, senior counsel for Ms Trentelman submitted that his submission that reliance could not be inferred because only 19 per cent of the unit holders who voted gave evidence to why they voted in favour of the resolutions, was not affected by the fact that Mr and Ms Trentelman cast votes as proxy for 46 other unit holders. He accepted that those unit holders received the notice of meeting and the explanatory material and submitted that that put them in no different position to every other lot holder. He submitted that the question remained whether it could be inferred from the evidence that those persons voted because they understood that the Owners Corporation, and not them personally, would receive an interest in land.

84 He also submitted that the cases relied upon by the Owners Corporation as demonstrating that so long as it was clear that a proprietary interest was to be provided, the precise details were not as important, did not extend to the absence of precise details as to who was to receive an interest in the property. He accepted that the lot owners had an interest in the common property and that if the lot owners understood that the Owners Corporation might be receiving an interest in property, then the lot owners might have a proprietary estoppel. However, he submitted that the converse did not follow.

85 In reply, senior counsel for Ms Trentelman again emphasised that the interest to be granted was a continuing right and that the most likely position was that the lot owners believed that the right they had would continue. He stated there was simply no evidence that the lot owners, having received the formal easement documentation, would ignore it and simply assume that because they had been making maintenance payments to the Owners Corporation, their right of access was because the pool was common property. He stated that one practical difference was that the Owners Corporation could make by-laws if the easement was in its favour. That ignores the fact that the Owners Corporation had already made such by laws.

86 Whilst senior counsel for Ms Trentelman seemed to accept his client's conduct was unconscionable and perhaps misleading, he stated that the remedy was not proprietary as there was simply no evidence that the lot owners had formed the view that the respondent would receive an interest in the property. He emphasised again that the email from Mr Kelly to lot holders of 17 October 2017 to which I have referred at [65] above, referred to the fact that the Trentelmans had previously agreed to renew the easement, describing that as strong evidence of what the unit holders would have understood. However, Mr Kelly's evidence in cross-examination to which I have referred at [24] above, rejected the proposition that what Mr Trentelman was referring to at the meeting was an extension of the existing easement.

87 Whilst he submitted that the proper construction of the motion and the supporting documentation was that the object was to protect the existing easement, senior counsel for Ms Trentelman also submitted that that was not

the end of the matter. The real question was how the representation would have been understood by the lot holders. He emphasised that reliance had to be proved with proper evidence and that not only did the respondent have to prove the representation induced the vote, but induced it because those voting understood that the Owners Corporation, not them personally, would be receiving the interest.

88 He referred to the Owners Corporation's argument to the effect that it had an interest in the easement by virtue of the subdivision of lot 9 which converted part of that lot to common property. He submitted that even if it followed that as a result the Owners Corporation had an interest in the easement, it did not follow that the voting on the motion was affected by this fact. He submitted that the submission in any event was incorrect as the common property was not a lot and the easement did not accommodate the common property and the rooftop terrace.

89 He also submitted that none of the strata title legislation relied upon by the Owners Corporation authorised the Owners Corporation to bring proceedings in respect of an equitable interest held by some lot owners.

90 Dealing with the appeal in respect of the pool notation, senior counsel for Ms Trentelman submitted that the notation was incapable of creating any interest in land in favour of the Owners Corporation. It is unnecessary to set out the reasoning in support of this submission.

b The respondent

91 Senior counsel for the respondent submitted that the effect of Strata Plan 85596 was that part of lot 9 became common property. She submitted that that did not mean that the part of lot 9 which became common property did not retain the benefit of the easement. She referred to s 28 of the *Strata Schemes Development Act 2015* (NSW), which provides that an owners corporation holds common property as agent for the owners, whilst s 34(1)(b) provides that the owners corporation can accept easements which benefit the common property. She pointed to equivalent legislation in the preceding Act, *Strata Schemes (Freehold Development) Act 1973* (NSW) s 20 and s 26.

92 She submitted that as a matter of construction of the easement, the clear language was that it benefitted the whole of lot 9. She submitted that common property can be accommodated by an easement and that there was nothing to suggest that owners or occupiers did not use the car park or the terrace before it became common property.

93 Senior counsel for the respondent further submitted that the benefit of the easement so held by the Owners Corporation was held as agent for all the lot owners. She also pointed to s 254 of the *Strata Schemes Management Act 2015*, which provided that in respect of common property, if the owners of lots of the strata scheme are jointly entitled to take proceedings, the proceedings may be taken by the Owners Corporation.

94 She submitted that where notice was sent to all the lot owners and it was the intention of the Trentelmans that all lot owners would receive the notice and receive the benefit of anything described in it, it was appropriate to bring the proceedings on behalf of all lot owners. That may solve any difficulties relating to the joinder of parties but it does not necessarily deal with the principal contention of Ms Trentelman that the Owners Corporation had failed to prove that the lot owners relied on the representation that the Owners Corporation would be granted an easement if they voted in favour of the motion.

95 Senior counsel for the Owners Corporation pointed out that at the time of the 2014 meeting, the Trentelmans proposing the motion could not have held the intention to only make a representation to those lot owners who had the benefit of the easement as the Trentelmans did not understand that the beneficiary of the easement was other than the Owners Corporation. She pointed out that the cost of the pool was being treated as an expense of the Owners Corporation, and whilst the Trentelmans were in control of the Strata Committee and responsible for raising levies, they were doing so through the Owners Corporation, even though, in reality, they owned the pool and the easement was restricted.

96 Senior counsel for the respondent submitted that it was irrelevant whether or not the Trentelmans still had the right to proceed with the staged development the subject of the development consent because as the primary judge found,

the Trentelmans had no interest in proceeding with it. She accepted, however, that the threat of such a proposed development had been removed, submitting that the effect of what was said in relation to the matter at the meeting was, "there was previously a development contract but what we are proposing to do and we would like you to vote in favour of is a lesser proposal which will be attractive to you and this is our proposal". She submitted that there was nothing in the language of the motion or in the explanatory material to indicate that what was proposed was a continuing right for those unit holders who had the benefit of the existing easement, pointing out that the document referred to all owners and occupiers.

97 She also submitted that what was sought by the motion was in effect that the Trentelmans as the Strata Committee would liaise between themselves and assist with the preparation and registration of all documents required to give effect to the proposal. She submitted that in all the circumstances, a reasonable person in the position of the representees, namely, the owners of small apartments, would understand that it was clear that owners and occupiers of the lots within the scheme would have a continuing right to use the swimming pool. She submitted that it was a continuing right without reference to the existing easement.

98 Senior counsel for the Owners Corporation submitted that the explanatory note was important because that was something which would be understood by the lot owners, perhaps more than the motion itself. She referred to the statement in the explanatory note to the effect that what motion 10 would do would be to remove the development lots from the scheme. She pointed out that those lots had an obligation to pay levies in an amount greater than the individual lots constituting the apartments. She pointed out that at the time of the meeting, the development lots were vacant land which needed steps to be taken to develop them. She also pointed out that when the Trentelmans had decided not to go ahead with the original development, there was a difference between those developed lots that would remain undeveloped being taken out of the strata scheme or remaining within it.

99 She pointed out that the other detriment was that if the lots were removed from the scheme, the Owners Corporation ceased to have any say in what was in fact carried out on the land and became “just a normal neighbour”.

100 Senior counsel for the Owners Corporation accepted that the explanatory note stated that there would be a benefit to the owners who would not have to contribute to the upkeep and maintenance of the additional common property that would have been created in subsequent stages of the development, but submitted that that expense was likely to occur in the future and did not appear to be an immediate benefit. She pointed out that the statement immediately following this portion of the explanatory note repeated the representation that the motion ensured that easements exist so that owners and occupiers would have continuing use of the pool. She pointed out that the final benefit referred to was the restriction of the development to three lots. She submitted that the structure of the explanatory note suggested that Ms Trentelman regarded the detail about continuing use of the pool as more important than the restriction of the size of the development to a three-townhouse development.

101 She also submitted that the handwritten notes on the plans attached to the notice of meeting forwarded to at least some of the unit holders (see at [18] above) provide further support to what she said was represented at the meeting.

102 Senior counsel for the Owners Corporation submitted that the pool notation demonstrated that the appellant’s state of mind was that what she had represented was that she would give the owners use of the swimming pool. She submitted in relation to the easement which was ordered that it was appropriate that those who were getting the benefit of the easement and use of the pool contributed to the replacement or refurbishment of the pool when it became necessary.

103 Senior counsel for the Owners Corporation submitted that the pronoun “you” in Mr Trentelman’s statement at the 2014 meeting, to the effect “we will give you use of the pool”, was referring to collective use by the lot holders. She submitted that it had to be a proprietary interest because it was continuing. She

submitted that it could not be a personal use because if an individual lot holder sold their unit, the purchaser would not get the benefit.

104 Senior counsel for the Owners Corporation accepted the way the motion was framed, that the Trentelmans had an option whether or not to take up the proposal. Referring to the fact that a development application for construction of the three townhouses on lot 53 was lodged in September 2015, she submitted that by that time the Trentelmans had decided to proceed. She described the Deed of 19 November 2015 (see at [30] above) as the deed which complied with the proposal, which was that documents needed to be created, formed and executed without reference to the Owners Corporation. She stated that the documents which were executed to give effect to the conveyancing steps were also taken without further reference to the Owners Corporation.

105 In that context she referred to the deposited plan administration sheet dealing with the creation of easements and covenants necessary to give effect to the proposal. She noted that the administration sheet referred to the resolutions of 28 July 2014 and dealt with easements, including a right of carriageway which had not been authorised. She noted that the documentation did not include the easement for the pool. She submitted that by the time the townhouses were completed in mid-2017, Ms Trentelman had achieved all she wanted to achieve from the proposal, and that the easement had not been granted.

106 Senior counsel for the Owners Corporation also referred to the correspondence between the solicitor for Ms Trentelman and the solicitor for Mr Luddington to which I have referred at [39] above and what was said at the 2015 Annual General Meeting (see at [29] above) as indicating that the Trentelmans' understanding of what was said was consistent with her submission as to the effect of the representation. She submitted that when Mr Trentelman cast his proxy votes at the meeting, he would have had a similar understanding. She also submitted that the primary judge was correct, stating that the pool notation supported this conclusion.

107 Senior counsel for the Owners Corporation submitted that the vote was unanimous, everyone being of the same mind, and in those circumstances

where the representation was so material, an inference of the nature of that referred to in *Gould v Vaggelas* could be drawn.

108 She submitted that the primary judge was correct for the reasons he gave in rejecting the submission that the representation related only to continuing use of the existing easement (see at [42]-[43] above). She submitted that at the time of the representations, the Trentelmans were not aware that the easement was only in favour of some individual lot holders, submitting that everybody proceeded on the basis that the easement was a common property asset.

109 She also submitted that the primary judge was correct in concluding that the Owners Corporation was agreeing to the proposal. She referred to the recitals in the November 2015 Deed which recited the Owners Corporation had agreed to the transfer of the property.

110 Senior counsel for the Owners Corporation submitted that it was common in proprietary estoppel cases that representations did not define in clear terms for form the proprietary interest would take. She referred in particular to *Evans v Evans* [2011] NSWCA 92 at [121].

111 Senior counsel for the Owners Corporation accepted that the primary judge found that formal dispositions would be entered into, but importantly, indicated that this would occur after the motion had been passed, which she submitted bound the Owners Corporation to do certain things without negotiation. She submitted that the primary judge was correct in stating that the case did not fall within a commercial framework.

112 In that context, she referred to the decision of the Victorian Court of Appeal in *Flinn v Flinn* [1999] 3 VR 712; [1999] VSCA 134, where Brooking JA after reviewing the authorities stated at [80] that a person may clearly promise to do something even though the something promised is not precisely defined, and at [81], that *Ramsden v Dyson* has been relied on in support of the proposition that a proprietary estoppel may give rise to an equity even though the interest to be taken is unclear. She referred in particular to *Crabb v Arun District Council* [1976] Ch 179, where an equity in respect of a right of way had arisen even though no terms had been agreed in respect of it, even as to price, and it was not clear whether what was to be granted was an easement or a licence.

113 Senior counsel for the respondent submitted that *Smith v Chadwick*, on which reliance was placed by the appellant, concerned an individual rather than an owners corporation. She stated that it did not stand for the proposition that an inference could not be drawn. She referred to a decision of this Court, *Huntsman Chemical Co Australia Ltd v International Pools Australia Pty Ltd* (1995) 36 NSWLR 242 ("*Huntsman Chemical Co*"), where a similar argument to that raised by the appellant in the present case was rejected (see *Huntsman Chemical Co* at 263-266). She stated that this was not inconsistent with what was said by the plurality in *Sidhu v Van Dyke*. She also referred to *Mistrina Pty Ltd v Australian Consulting Engineers Pty Ltd* [2020] NSWCA 223 at [89] and *Hanave Pty Ltd v LFOT Pty Ltd* [1999] FCA 357; (1999) 43 IPR 545 at [50], which she stated supported her submission. She submitted that the representation was calculated to induce a favourable result which eventuated and that was sufficient to establish reliance in fact.

114 She submitted that the pool was designed so that the apartment occupiers had use of it. She stated that there was evidence of the importance of the pool to individual lot owners. She referred in that context to the evidence of Mr Luddington stating his concern about closure of the pool facilities by the Trentelmans and a complaint received from the caretaker in respect of the closure. She also referred to the evidence of Mr Kelly who said he would not have purchased his lot had the pool not been there. She also referred to a brochure Mr Trentelman had produced at a time he was selling the apartment units. That brochure offered purchasers, among other things, exclusive use of the pool and contained a photograph of the pool captioned "Year Round Swimming Pool". She referred to the evidence of Mrs Lofthouse that she received the brochure when she purchased the lot in 2012. She adopted the proposition that the brochure implicitly treated the pool as common property.

115 It is not necessary to set out the submissions of the respondent concerning the pool notation appeal in any detail. Suffice to say that senior counsel for the respondent accepted that absent an easement, the notation did not confer any practical benefit and it was unnecessary if an easement was granted. She accepted that the proceedings could be determined on the basis that regardless of the outcome of litigation, the notation conferred no benefit on the

Owners Corporation or the lot holders. She noted that the primary judge as part of his order, ordered that the notation be removed on the grant of the easement ordered by him.

Consideration

116 In *Giumelli v Giumelli* (1999) 196 CLR 101; [1999] HCA 10, the plurality stated at [6] that the equity which founded the relief claimed in such cases as *Dillwyn v Llewelyn* (1862) 4 De GF & J 517 at 523 was founded on the assumption of future ownership of property which had been induced by representations upon which there had been detrimental reliance by the plaintiff. That reasoning was adopted by the plurality in *Sidhu v Van Dyke* at [2], see also *Doueihi v Construction Technologies Australia Pty Ltd* (2016) 92 NSWLR 247; [2016] NSWCA 105 at [131]-[136].

117 In *Delaforce v Simpson-Cook* (2010) 78 NSWLR 483; [2010] NSWCA 84, Handley AJA, in dealing with a claim of proprietary estoppel by encouragement, summarised the circumstances in which such an estoppel came into existence in the following terms (at [21]):

> "[21] The proprietary estoppel upheld by the judge was an estoppel by encouragement. Such an estoppel comes into existence when an owner of property has encouraged another to alter his or her position in the expectation of obtaining a proprietary interest and that other, in reliance on the expectation created or encouraged by the property owner, has changed his or her position to their detriment. If these matters are established equity may compel the owner to give effect to that expectation in whole or in part. The general principles governing this form of estoppel were not in dispute, here or below."

118 What needs to be added to that summary is that it must be shown that the detrimental reliance makes it unconscionable for the promisor or representor to depart from the promise or representation: see *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd* (2016) 260 CLR 1; [2016] HCA 26 at [147]-[150].

119 As can be seen from the submissions of the appellant to which I have referred, the first basis on which she seeks to challenge the conclusion of the primary judge is that the representation was incapable of creating an expectation in the Owners Corporation that the lot owners would have the use of the pool. In that context, there are a number of matters which may be noted at the outset.

120 First, notwithstanding the requirement that there must be certainty in the promise to give rise to the requisite expectation, an equitable estoppel can be established notwithstanding the expectation is based on a promise or representation that would not be sufficiently certain to amount to a valid contract, or is formed on the basis of vague assurances: *DHJPM Pty Ltd v Blackthorn Resources Ltd* at [54]; *Evans v Evans* at [121]-[125]; *Flinn v Flinn* at [80]-[81].

121 Second, and allied to the first point, as Hodgson JA pointed out in *Sullivan v Sullivan* [2006] NSWCA 312 at [85], a promise or representation will generally be sufficiently clear to support an estoppel if it was reasonable for the representee to interpret the promise in a particular way and to act in reliance on that assumption: see also *Doueihi v Construction Technologies Australia Pty Ltd* at [197]; *Evans v Evans* at [124].

122 Third, depending on the particular context, a proprietary estoppel may be established where the promise or representation relied upon did not define the interest the party was expected to receive: see *Sullivan v Sullivan* at [16] and the cases there cited, in particular *Flinn v Flinn* at [80]. In *Cobbe*, Lord Walker summarised the position in the following terms (at [68]):

> "[68] It is unprofitable to trawl through the authorities on domestic arrangements in order to compare the forms of words used by judges to describe the claimants' expectations in cases where this issue (hope or something more?) was not squarely raised. But the fact that the issue is seldom raised is not, I think, coincidental. In the commercial context, the claimant is typically a business person with access to legal advice and what he or she is expecting to get is a *contract*. In the domestic or family context, the typical claimant is not a business person and is not receiving legal advice. What he or she wants and expects to get is an *interest* in immovable property, often for long-term occupation as a home. The focus is not on intangible legal rights but on the tangible property which he or she expects to get. The typical domestic claimant does not stop to reflect (until disappointed expectations lead to litigation) whether some further legal transaction (such as a grant by deed, or the making of a will or codicil) is necessary to complete the promised title."

123 Thus, in *Thorner v Major* [2009] UKHL 18; [2009] 1 WLR 776 proprietary estoppel was said to arise in circumstances where the representation by the claimant's deceased father gave rise to an expectation that he would inherit a farm. Lord Rodger emphasised the importance of considering the effect of the statement on the representee. His Lordship made the following comments (at [26]):

> "[26] Even though clear and unequivocal statements played little or no part in communications between the two men, they were well able to understand one another. So, however clear and unequivocal his intention to assure David that he was to have the farm after his death, Peter was always likely to have expressed it in oblique language. Against that background, respectfully adopting Lord Walker's formulation, I would hold that it is sufficient if what Peter said was 'clear enough'. To whom? Perhaps not to an outsider. What matters, however, is that what Peter said should have been clear enough for David, whom he was addressing and who had years of experience in interpreting what he said and did, to form a reasonable view that Peter was giving him an assurance that he was to inherit the farm and that he could rely on it."

124 Lord Walker at [56] stated that what amounted to sufficient clarity for the purpose of a representation was usually dependant on context. His Lordship emphasised that the representation must relate to identified property, stating the position as follows (at [61]):

> "[61] In my opinion it is a necessary element of proprietary estoppel that the assurances given to the claimant (expressly or impliedly, or, in standing-by cases, tacitly) should relate to identified property owned (or, perhaps, about to be owned) by the defendant. That is one of the main distinguishing features between the two varieties of equitable estoppel, that is promissory estoppel and proprietary estoppel. The former must be based on an existing legal *relationship* (usually a contract, but not necessarily a contract relating to land). The latter need not be based on an existing legal relationship, but it must relate to *identified property* (usually land) owned (or, perhaps, about to be owned) by the defendant. It is the relation to identified land of the defendant that has enabled proprietary estoppel to develop as a sword, and not merely a shield: see Lord Denning MR in *Crabb v Arun DC* [1976] Ch 179, 187."

125 Lord Neuberger at [84] also emphasised that the effect of the words or actions must be assessed in their context. His Lordship stated that it was the context that distinguished the case from *Cobbe*, making the following remarks (at [93]-[98]):

> "[93] In the context of a case such as *Cobbe* [2008] 1 WLR 1752, it is readily understandable why Lord Scott considered the question of certainty was so significant. The parties had intentionally not entered into any legally binding arrangement while Mr Cobbe sought to obtain planning permission: they had left matters on a speculative basis, each knowing full well that neither was legally bound – see [2008] 1 WLR 1752, para 27. There was not even an agreement to agree (which would have been unenforceable), but, as Lord Scott pointed out, merely an expectation that there would be negotiations. And, as he said, at [2008] 1 WLR 1752, para 18, an 'expectation dependent upon the conclusion of a successful negotiation is not an expectation of an interest having [sufficient] certainty'.
>
> [94] There are two fundamental differences between that case and this case. First, the nature of the uncertainty in the two cases is entirely different. It is well encapsulated by Lord Walker's distinction between 'intangible legal rights' and 'the tangible property which he or she expects to get', in *Cobbe* [2008] 1

WLR 1752, para 68. In that case, there was no doubt about the physical identity of the property. However, there was total uncertainty as to the nature or terms of any benefit (property interest, contractual right, or money), and, if a property interest, as to the nature of that interest (freehold, leasehold, or charge), to be accorded to Mr Cobbe.

[95] In this case, the extent of the farm might change, but, on the Deputy Judge's analysis, there is, as I see it, no doubt as to what was the subject of the assurance, namely the farm as it existed from time to time. Accordingly, the nature of the interest to be received by David was clear: it was the farm as it existed on Peter's death. As in the case of a very different equitable concept, namely a floating charge, the property the subject of the equity could be conceptually identified from the moment the equity came into existence, but its precise extent fell to be determined when the equity crystallised, namely on Peter's death.

[96] Secondly, the analysis of the law in *Cobbe* [2008] 1 WLR 1752 was against the background of very different facts. The relationship between the parties in that case was entirely arm's length and commercial, and the person raising the estoppel was a highly experienced businessman. The circumstances were such that the parties could well have been expected to enter into a contract, however, although they discussed contractual terms, they had consciously chosen not to do so. They had intentionally left their legal relationship to be negotiated, and each of them knew that neither of them was legally bound. What Mr Cobbe then relied on was 'an unformulated estoppel ... asserted in order to protect [his] interest under an oral agreement for the purchase of land that lacked both the requisite statutory formalities … and was, in a contractual sense, incomplete' - [2008] 1 WLR 1752, para 18.

[97] In this case, by contrast, the relationship between Peter and David was familial and personal, and neither of them, least of all David, had much commercial experience. Further, at no time had either of them even started to contemplate entering into a formal contract as to the ownership of the farm after Peter's death. Nor could such a contract have been reasonably expected even to be discussed between them. On the Deputy Judge's findings, it was a relatively straightforward case: Peter made what were, in the circumstances, clear and unambiguous assurances that he would leave his farm to David, and David reasonably relied on, and reasonably acted to his detriment on the basis of, those assurances, over a long period.

[98] In these circumstances, I see nothing in the reasoning of Lord Scott in [2008] 1 WLR 1752 which assists the respondents in this case. It would represent a regrettable and substantial emasculation of the beneficial principle of proprietary estoppel if it were artificially fettered so as to require the precise extent of the property the subject of the alleged estoppel to be strictly defined in every case. Concentrating on the perceived morality of the parties' behaviour can lead to an unacceptable degree of uncertainty of outcome, and hence I welcome the decision in *Cobbe* [2008] 1 WLR 1752. However, it is equally true that focussing on technicalities can lead to a degree of strictness inconsistent with the fundamental aims of equity."

126 In the present case, I am of the view that, viewed in context, the representations were capable of inducing an expectation in the lot owners acting in general meeting that if they voted in favour of the resolutions, thereby

permitting the Owners Corporation to enter into and complete the transaction, the Owners Corporation would be granted an interest in the pool.

127 The first complaint that seems to have been made was in effect that the proceedings were deficient for want of parties as the representations were addressed to the lot holders and it was only the lot holders who could rely on them in passing the resolutions, and if any detriment was suffered, it was suffered by the lot holders rather than the Owners Corporation.

128 It is not clear whether the submission was made on the assumption that the further submission made by the appellant, namely that the representations related to continued use of the existing easement, was correct or whether, irrespective of what the representations conveyed, it was not made to the Owners Corporation or relied upon by it.

129 The context in which the representations were made was to seek the lot holders as members of the Owners Corporation to undertake a corporate act in general meeting, namely the passage of resolutions permitting alteration in the strata scheme, acquiring certain lots, converting them to *Real Property Act* land and retransferring them to the appellant. It was necessary for the relevant resolutions to be passed as special resolutions and in passing the resolutions at general meeting, the lot holders were acting as an organ of the Owners Corporation, exercising a function conferred on the Owners Corporation by s 21(2) of the *Strata Schemes Management Act 1996* (the relevant Act in force at the time the resolutions were passed).

130 In my opinion, it follows that to the extent the representations were relied upon by the lot holders in carrying out the corporate act of resolving to consent to the transaction and entering into the requisite documentation, the lot holders were acting as an organ of the Owners Corporation and to the extent the lot holders relied on the representations, the reliance can be said to be that of the Owners Corporation.

131 Further, in these circumstances, the Owners Corporation in my opinion was the proper party. As was pointed out by senior counsel for the respondent, s 8 of the *Strata Schemes Management Act 2015* constituted the owners of lots in a strata scheme as a body corporate under the name “The Owners – Strata Plan

No X", and s 254 entitled the Owners Corporation to represent the owner in proceedings relating to common property and in circumstances where the lot owners are jointly entitled to take proceedings.

132 It was next contended that the promise or representation made was not that the Owners Corporation would have an interest in the pool, but rather what was promised was the lot owners who were the beneficiaries of the existing easement would continue to have the rights conferred on them by that easement. I have summarised the appellant's submission on this issue at [74]-[75] above. Ultimately, the appellant's position seemed to be that representations related to protection of the rights under the easement during its currency rather than any extension.

133 I do not think that the promises or representations contained in the proposed motion or the explanatory note were directed solely to the unit holders who had the benefit of the easement, nor were they confined to a promise to continue the rights granted under the existing easement, whether during its currency or extended. The context is important. As I have pointed out, the costs of maintaining the pool were borne by the Owners Corporation. Further, the general meeting of the Owners Corporation on 2 July 2012 adopted a set of by-laws (registered dealing AI 523316), including a by-law regulating the use of the swimming pool, and empowered the Strata Committee to make further rules. It can readily be inferred that these by-laws were put in place with the consent of the Trentelmans, if not at their instigation. It is plain that the pool was treated as common property.

134 In those circumstances, the statement in motion 10 and the explanatory note which accompanied it that owners or occupiers would have a continuing right to use the swimming pool on lot 7, would have been read by the lot owners as not being confined to the beneficiaries of the existing easement, nor limited by its terms.

135 That conclusion is reinforced by the terms of motion 11 which envisaged the pool being common property or, if not, owners or occupiers within the scheme having a continued right to use it "by way of easement or similar".

136 This was reinforced by what was said in the explanatory notes. The explanatory note in respect of motion 10 refers to ensuring that easements exist so that owners and occupiers have continuing right to use the pool, and the reference in the explanatory note to motion 11 that the arrangement envisaged in that proposal would allow the creation of community association property (being the swimming pool and/or common roadways) which would be shared between the scheme and lot 7 (to become the development lot).

137 That that was the effect of the representations or promises contained in the documentation is supported first by the notes made by Mr Trentelman on the plan which accompanied the notice of meeting to which I referred at [18] above, and the evidence of what Mr Trentelman said at the meeting to which I referred at [23]-[24] above.

138 Further, having regard to the correspondence between the solicitors for Ms Trentelman and Mr Luddington to which I have referred at [39] above and the evidence of what Mr Trentelman said at the 2015 Annual General Meeting (see at [29] above), it was evident that the Trentelmans had the same understanding. It is also clear from the pool notation, which as his Honour found, was inserted by the surveyor on the instruction of the Trentelmans. That material is relevant in assessing what was intended to be conveyed. As was elegantly put by Lord Hoffmann in *Thorner v Major* at [8] in the context of reliance:

> "[8] I do not think that the judge was trying to pin point the date at which the assurance became unequivocal and I think it would be unrealistic in a case like this to try to do so. There was a close and ongoing daily relationship between the parties. Past events provide context and background for the interpretation of subsequent events and subsequent events throw retrospective light upon the meaning of past events. The owl of Minerva spreads its wings only with the falling of the dusk. The finding was that David reasonably relied upon the assurance from 1990, even if it required later events to confirm that it was reasonable for him to have done so."

139 In these circumstances, the representations were not in my opinion limited to continued use of the pool through the existing easements or an extension of those easements. Rather, they were designed to represent to all lot owners that they would have ongoing use of the pool if the development proposal by Ms Trentelman proceeded.

140 However, the appellant further submitted that the statements made in the motions, the explanatory notes and by Mr Trentelman at the meeting were not capable of conveying a representation that the Owners Corporation would have an interest in the pool. This is essentially for two reasons. First, it was not clear that the representations would have conveyed whether the interest in the pool would be held by the lot owners themselves or the Owners Corporation.

141 I have substantially dealt with this submission in dealing with the submission that what was represented was that there would be a continuation of the existing easement. The context in which the representations were made, particularly the fact that the pool was treated as common property, the fact that the scheme proposed in motion 11 envisaged the pool becoming part of community property and the fact that there was no reference to existing easements made it relatively clear in my view that the lot holders who voted on the motions would have had the expectation that any interest to be granted in the pool would be granted to the Owners Corporation. To this may be added that each motion required the documents to give effect to the proposal, including the surrender or creation of easements, be executed under seal by the Owners Corporation. There was no suggestion that the lot owners individually were required to agree to or execute any documents.

142 The other and perhaps more substantial submission was that there was no certainty that any interest in the pool would be granted. The appellant submitted that documentation had to be negotiated and executed to give effect to the proposal and indeed, that there was no requirement for the Trentelmans to go ahead with it.

143 In making this submission the appellant relied in particular on the proposition that where it was held the representations could only be interpreted as giving rise to an expectation that a contract to grant an interest in land would be negotiated as distinct from an expectation that an interest in land would be granted, no proprietary estoppel could arise. As I indicated, the appellant relied in particular on the speech of Lord Scott in *Cobbe*. His Lordship made the following remarks (at [20]):

> "[20] Lord Kingsdown's requirement that there be an expectation of 'a certain interest in land', repeated in the same words by Oliver J in the *Taylors*

> *Fashions* case, presents a problem for Mr Cobbe's proprietary estoppel claim. The problem is that when he made the planning application his expectation was, for proprietary estoppel purposes, the wrong sort of expectation. It was not an expectation that he would, if the planning application succeeded, become entitled to 'a certain interest in land'. His expectation was that he and Mrs Lisle-Mainwaring, or their respective legal advisers, would sit down and agree the outstanding contractual terms to be incorporated into the formal written agreement, which he justifiably believed would include the already agreed core financial terms, and that his purchase, and subsequently his development of the property, in accordance with that written agreement would follow. This is not, in my opinion, the sort of expectation of 'a certain interest in land' that Oliver J in the *Taylors Fashions* case or Lord Kingsdown in *Ramsden v Dyson* had in mind."

144 What was of importance in *Cobbe*, as pointed out by Lord Neuberger in *Thorner v Major* in the passage which I have set out at [125] above, was that first, each party knew they were not legally bound, second, there was total uncertainty as to the nature of the benefit, third, the relationship was entirely arm's length and commercial, and fourth, the person raising the estoppel was a highly experienced businessman.

145 In *DHJPM Pty Ltd v Blackthorn Resources Ltd*, Meagher JA, with whom Macfarlan JA agreed, stated at [56] that whether a representation or promise created an expectation which if relied upon could give rise to an estoppel depends on the circumstances, including the nature of the relationship between the parties and whether they contemplated that any interest to be granted is to be created by a binding contract. His Honour pointed out that in *Cobbe*, the equitable estoppel was relied upon in a commercial context in contrast to *Thorner v Major*. His Honour emphasised at [67] that a "hope" or "confident expectation" was insufficient to give rise to an estoppel. Acting Justice Handley noted at [105] that "In domestic or family cases, the parties are not at arm's length and usually have no intention of entering into a contract or formalising their expectation." In *Doueihi v Construction Technologies Australia Pty Ltd*, Gleeson JA stated at [173] that "The dichotomy between arms-length/commercial cases and domestic/family cases is not to be seen as fragmenting equitable principles." His Honour stated at [176] that what is important is "the focus of the assumption", and at [178], that so long as it is appreciated that the dichotomy is not universal or finite, no difficulty arises in using these labels to describe different classes of case.

146 I agree with Gleeson JA. I do not think that a bright line can be drawn between categories of cases simply on the basis that some can be classified as commercial and others as domestic/family. The present case presents a good illustration of why this is so. Although it involved a commercial development which required relevantly complex conveyancing steps, on the other hand it involved representations concerning the provision of an amenity to a group of owners of relatively small apartments in a Strata Plan.

147 What is important in my opinion is how the representation or promise would be reasonably understood by a person in the position of the persons to whom the representation was made. If the representation was only that a contract would be negotiated which may result in the grant of an interest in land (*Cobbe* and *DHJPM Pty Ltd v Blackthorn Resources Ltd*), then the necessary preconditions for the grant of a propriety estoppel have not been made out. On the other hand, if a recipient would understand the representation was that an interest in land was to be granted, a proprietary estoppel could arise even where the precise form of the interest was not identified and/or there were various conveyancing steps which were required to be taken to give effect to the interest.

148 In the present case, in my view, the representations made would have led the recipients, namely lot holders in an apartment building in the north coast of New South Wales, to believe as part of the proposal that their Owners Corporation would receive an interest in the pool for the benefit of owners or occupiers. No doubt those who voted had varying degrees of commercial sophistication, but more importantly, promises were not made in the context of ongoing commercial negotiations but rather as part of a proposal put forward as being for the mutual benefit of the Trentelmans on the one hand, and the lot owners on the other. It seems to me that the lot holders who voted in favour of the motions were entitled to believe that if the project proceeded, part of it would be that the Owners Corporation would hold an interest in the pool for their benefit.

149 Much reliance was placed by the appellant on the need for further negotiations and agreement in the finalisation of the proposal, submitting that there was

nothing to suggest that the lot owners had formed the view that the right to use the pool would be secured without further input and negotiations as to its terms, coupled with the possibility that the easement to be offered to the Owners Corporation might be unacceptable to it.

150 I am unable to agree. First, there is nothing in the motions or the explanatory notes which would suggest that further negotiations in respect of any part of the transaction, including the use of the pool, were intended or necessary. The notice of meeting merely referred to the execution of all necessary documents to give effect to the proposal. It does not seem to me that it envisaged there would be any further negotiation.

151 Second, the resolutions were passed in circumstances where the Trentelmans were in control of the Strata Committee. They were entrusted with implementing the proposal. It was not envisaged that the documents prepared by or on their behalf would be brought back to the Owners Corporation for approval. In fact, they were not. The fact that the Trentelmans unconscionably completed that part of the proposal which was to their benefit while not conferring the promised interest does not alter that position.

152 So far as the costs were concerned, the Owners Corporation was already paying for maintenance costs. There is nothing to suggest that at the time the representations were made, any consideration was given to the cost of replacing the pool. It may have been an issue had it been thought of. It was not.

153 For these reasons, the fact that further documentation was required to be executed to give effect to the proposal would not affect the raising of a proprietary estoppel if it could be established that the Owners Corporation relied on the representation and suffered a detriment by doing so, and that it was unconscionable for Ms Trentelman to resile from the representation.

154 It was next submitted that it was not established that the Owners Corporation relied on the representation. This was put on the basis that as only 19 per cent of the lot holders who voted at the meeting gave evidence, it followed that more than 75 per cent of the voting entitlements of members of the Owners Corporation did not give evidence that they understood the Owners

Corporation would be receiving a proprietary interest, or that it was a relevant factor which caused them to vote in favour of the resolutions. It was submitted that only Ms Chatterjee said expressly that she voted in favour of the resolutions because of the representation made in respect of the pool.

155 In particular, the appellant submitted that what was said by Wilson J in *Gould v Vaggelas* at 236 to the effect that if a material representation is made which is calculated to induce the representee to enter into a contract and that the person in fact enters into the contract, there is a fair inference of fact that he was induced to do so by the representation, did not apply in the present case. This was because there were other factors which may have motivated the lot holders to enter into the transaction.

156 It is correct, as the appellant pointed out, that reliance is a question of fact and the onus to prove reliance at all times remains on the representee: *Sidhu v Van Dyke* at [58], [61]. However, the plurality emphasised in that case at [71]-[73] that it was not necessary that the conduct of the party estopped need be the sole inducement. They accepted that the question was whether the conduct was so influenced by the encouragement or representation that it would be unconscionable for the representor thereafter to insist on its strict legal rights: citing *Amalgamated Investment & Property Co Ltd (in liq) v Texas Commercial International Bank Ltd* [1982] QB 84 at 104-105 per Robert Goff J.

157 That is not to suggest that in an appropriate case an inference cannot be drawn. The question is what inference can be drawn from all of the evidence, including the evidence given in cross-examination, and in considering the drawing of the inference by virtue of the process of reasoning suggested by Wilson J in *Gould v Vaggelas*, the Court must attend closely to all the evidence that is adduced that bears upon the question : *Sidhu v Van Dyke* at [64], citing *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304; [2009] HCA 25 at [143].

158 In my opinion, the evidence indicated that the representations were such that it could be inferred that even though there may have been other reasons to vote in favour of the proposal, the lot holders were sufficiently influenced by the

promise of the use of the pool in voting for the resolutions that it would be unconscionable for Ms Trentelman to resile from her promise.

159 First, it can be inferred that the pool would be regarded as an important amenity in quasi-resort style accommodation on the north coast of New South Wales. Indeed, as I have pointed out it, it was marketed as such. Second, the explanatory note to motion 10 stated that it ensured easements exist so that the owners and occupiers had a continuing right to the pool. Third, that was reinforced first by the notes put by Mr Trentelman on the plans which accompanied the notice of meeting (see at [18] above) and second, from the evidence of lot holders of what was said at the meeting, which I referred to at [23]-[24] above, and the evidence of Mr Luddington and Mr Kelly, which I have referred to at [114] above. It is clear that it was being emphasised to lot holders that it was an important benefit that they would receive.

160 If there was any doubt concerning the materiality of the representation, its importance to the lot holders was confirmed by what occurred at the 2015 Annual General Meeting. As Lord Hoffmann pointed out in *Thornton v Major* in the passage to which I have referred at [138] above, subsequent events can shed light on the issue of reliance. The transcript of that meeting demonstrates the importance of the pool to the unit holders and the concern that Ms Trentelman may be resiling from the promises which were made.

161 In those circumstances, I am of the view that the Owners Corporation has established that the lot holders in general meeting relied on the promise.

162 The question remains whether the Owners Corporation acted to its detriment in reliance on the promise. In my opinion it did so.

163 Although it may be correct that the Owners Corporation received the benefit of the assurance that the development on lot 7 (lot 53) was to be substantially less than that originally envisaged and was relieved of the burden of contributing to the maintenance of any common property that would be developed, it lost the entitlement to receive the benefit of levies from any of the developed lots whose unit entitlement and hence their liability to contribute to the Owners Corporation expenses was significantly greater than that of the individual apartments. More importantly, the Owners Corporation lost a

significant measure of control that it would have had over the manner in which the undeveloped lots were developed and the right to regulate their use by the imposition of by-laws. In the circumstances, it suffered detriment as a result of the passing of the resolutions.

164 In all the circumstances, it was in my view unconscionable for Ms Trentelman to resile from the promise she made. Indeed, her counsel conceded as much whilst submitting that the unconscionability did not give rise to a proprietary estoppel.

165 Notwithstanding it seemed to have been raised in the notice of appeal, no submission was made that if the primary judge was correct in his conclusion that the elements of proprietary estoppel were made out, he erred in the relief granted. It is now clear that in the case of proprietary estoppel, it is not necessary to mould the relief to reflect the minimum equity necessary to remove the detriment, provided that the relief granted was not out of all proportion to the detriment suffered: *Giumelli v Giumelli* at [41]-[48]; *Sidhu v Van Dyke* at [85]; *Delaforce v Simpson-Cook* at [56]-[57]; *Ashton v Pratt* (2015) 88 NSWLR 281; [2015] NSWCA 12 at [142].

166 It was not suggested that the relief granted fell into that category.

167 It follows that the appeal against the orders made in the proceedings brought by the Owners Corporation should be dismissed.

168 So far as the pool notation proceedings were concerned, the primary judge did not err in declining to grant any relief in those proceedings. Having regard to the fact that there was no appeal from his Honour's dismissal of both parties' claims for rectification of the pool notation, and the fact that his Honour ordered that the pool notation be removed on the grant of the easement, the primary judge was correct in his conclusion that a declaration or any ancillary relief had no utility. This appeal should also be dismissed.

Orders

169 I would make the following orders:

1 Trentelman v The Owners – Strata Plan No 76700; Proceedings No 2021/102010

(1) (1) Appeal dismissed.

(2) (2) Order the appellant pay the respondent's costs of the appeal.

2 Trentelman v The Owners – Strata Plan No 76700; Proceedings No 2021/101998

(1) (1) Appeal dismissed.

(2) (2) Order the appellant pay the respondent's costs of the appeal.

170 **BELL P:** I agree with the reasons of the Chief Justice and the additional reasons of Leeming JA.

171 **LEEMING JA:** I have had the considerable advantage of reading the judgment of the Chief Justice in draft. I agree with his reasons and the orders he proposes. In deference to the quality of the parties' submissions, I would add the following, which presupposes familiarity with the Chief Justice's reasons.

172 Ms Trentelman's submissions did not challenge the large majority of findings of primary fact. That reflected the conclusions of the primary judge that he was "generally unimpressed with the reliability of the Trentelmans' evidence" (at [171]) and "left with the impression that [Ms Trentelman] had little if any actual recollection of events": at [174]. I do not doubt that Ms Trentelman appreciated the difficulties confronting appellate challenge to findings to which demeanour had contributed. Instead, Ms Trentelman's submissions focussed upon the inchoateness of the proposal put forward by the Trentelmans, the difference between a property right owned as common property by the owners corporation and a property right owned by individual lot holders, the owners corporation's failure to call more than a minority of lot holders to explain why they voted in favour of the proposal in July 2014, and the absence of the lot holders as parties to the litigation.

173 The matters raised by Ms Trentelman may be analysed on at least two levels. I think the correct level is reflected in the parties' detailed submissions, which I shall address below. But at a higher level, it is as well to bear in mind that the owners corporation is an artificial person, that the meeting giving rise to the estoppel found by the primary judge was that artificial person's annual general meeting, and that the distinction between property owned by the owners corporation as agent for the lot holders and property owned by individual lot holders directly is a fine one, as a result of all of which there is a degree of

artificiality in seeking to propound the distinctions on which Ms Trentelman relies.

174 As the Chief Justice explains, the Trentelmans wanted to secure the passage of a special resolution, involving a strata re-subdivision and then a transfer of common property to themselves. The ability of lot holders to withhold their consent to the resolutions propounded by the Trentelmans was, unquestionably, a valuable right (see for example *Houghton v Immer (No 155) Pty Ltd* (1997) 44 NSWLR 46 at 59). On the other hand, the lot holders wanted to enjoy the continuing use of the swimming pool, which, at the time, was achieved by registered easement over the land occupied by the pool in favour of nearly all other lots, but which expired in October 2017.

175 The primary judge found (at [209]), after a careful examination of documentary and testimonial evidence (at [178]-[208]), that at the 2014 annual general meeting Mr Trentelman represented that "We will give you continued use of the pool". The documents circulated for the purpose of the resolution left the details for subsequent negotiation. There were a number of ways of conferring a secure entitlement on the part of lot holders to use the swimming pool. One was for there to be an easement in favour of the lots, as was the case at the time the representations were made; in that case, the entitlement to enjoy the pool flowed directly from the easement. Another was for the swimming pool to become part of the common property.

176 There is a measure of artificiality in a submission which seizes upon the need to join the lot holders, as opposed to the owners corporation, in order to enforce and vindicate a right. If the submission were well-founded, it would have been cured by a representative order under UCPR r 7.6. Further, for many decades, rules of court have provided that no proceeding has been defeated merely because of misjoinder or non-joinder: see *Boyd v Thorn* (2017) 96 NSWLR 390; [2017] NSWCA 210 at [96]-[99]; the current rule is UCPR r 6.23.

177 There is also a measure of artificiality in a submission that it was "not sufficiently clear objectively (both as to whom the representation is being made and as to the legal form of the 'use')" so as to found an estoppel. The clarity

and precision now emphasised contrasts with the position in 2014 on both counts. In terms of the "legal form of the use", the primary judge found at [42] that lot holders were charged maintenance costs for the swimming pool as if it were on common property, although (most) lot holders' rights were based on an easement entitling them to use the pool on Ms Trentelman's privately owned land, and although lots 49, 50 and 51 did not enjoy the benefit of an easement at all. There was thus at the time of the annual general meeting a blurring of the distinction between common property and private lot. In terms of "as to whom the representation is being made", the submission leads to an even more artificial distinction. How does the Court identify whether the people who actually heard the Trentelmans speak at the annual general meeting and read the documents circulated by them did so in their personal capacity as lot holders or in their constitutive capacity as an organ of the owners corporation – assuming (favourably to Ms Trentelman) that the distinction is one which is has legal significance, bearing in mind that the lot holders collectively constituted the owners corporation?

178 Corporations act through agents. A representation made to a corporation is made to one or more natural persons whose understanding of the representation is imputed to the corporation. If a corporation relies on a representation, it is because one or more natural persons rely on it and their reliance is treated as that of the corporation. Normally, before analysing whether an act or state of mind of a natural person is to be treated as that of the corporation, one asks what is the purpose of the inquiry. That was the point emphasised in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 at 507 when Lord Hoffmann stated that the question was "Whose act (or knowledge, or state of mind) was *for this purpose* intended to count as the act etc of the company?" (original emphasis), a point reiterated by Professor Worthington, "Corporate Attribution and Agency: Back to Basics" (2017) 133 *Law Quarterly Review* 118 at 118-120 and 124-131. There may be a question whether all aspects of the principles governing corporate attribution apply to a general meeting. I pass over that question for the purposes of this appeal; all that matters is that the starting point remains to

consider why it is necessary to impute an act or knowledge or state of mind to the corporation.

179 Often these questions arise when statute imposes civil or criminal liability upon a company which turns on a mental state. In the present case, the purpose of the inquiry was proprietary estoppel in equity. Equity's regard for substance over form causes me to doubt the submissions which turn on the fine distinctions on which Ms Trentelman relies. It is useful to bear in mind the illustration of the administration of equitable principle given by a unanimous High Court in *Jenyns v Public Curator (Q)* (1953) 90 CLR 113 at 119; [1953] HCA 2:

> "A court of equity takes a more comprehensive view, and looks to every connected circumstance that ought to influence its determination upon the real justice of the case."

180 That is not to deny the significance of the distinct legal personality of the owners corporation, or the real juristic difference between treating the land on which the swimming pool was built as common property as opposed to easements over that land benefitting the individual lots. Nor is it an invitation to depart from orthodox legal analysis; the "real justice of the case" is not to be understood as some subjective evaluation of injustice or unfairness. As was said in *Jenyns* itself, and more recently emphasised in *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392; [2013] HCA 25 at [18], "The invocation of the conscience of equity requires 'a scrutiny of the exact relations established between the parties' to determine 'the real justice of the case'." I shall attempt to analyse the exact relations between the parties below, although that is not without its difficulty. But the result of the analysis in the parties' detailed submissions is to confirm the tentative working assumption which flows from what has already been said: both procedurally and substantively, the rather technical objections advanced by Ms Trentelman do not carry weight.

181 I shall deal with each aspect of the submission in turn. But it is convenient first to analyse "the exact relations" established between lot holders and the owners corporation in relation to the common property under a strata scheme.

The relationship between owners corporation and lot holders

182 The legislative regime creating the individual lots, the common property and the owners corporation is now somewhat different from that in place when the owners corporation was created.

183 Strata Plan 76700 was registered in 2006. At that time, s 11(1) of the *Strata Schemes Management Act 1996* (NSW) provided that the owners of the lots from time to time constituted a body corporate under the name "The Owners – Strata Plan No 76700". The legislation provided (in Schedule 2) for meetings of lot owners at which ordinary and special resolutions of the body corporate could be passed, but made further provision for the owners corporation to act by an executive committee. Such a committee was mandatory (s 16), and its decision was (speaking generally) "taken to be the decision of the owners corporation": s 21(1). The owners corporation and all owners, lessees and occupiers were bound by the by-laws "as if the by-laws had been signed and sealed by the owners corporation and each owner and each ... lessee and occupier": s 44(1). The by-laws thus resembled the deemed contract binding members of companies to which the *Corporations Act 2001* (Cth) applied but went further insofar as they also bound lessees and occupiers (the *Corporations Act* did *not* apply to the body corporate created by s 11(1), by dint of s 11(2) read with s 5F of the *Corporations Act*).

184 Section 20 of the *Strata Schemes (Freehold Development) Act 1973* (NSW) vested the common property in the body corporate "as agent" for the proprietors of the lots as tenants in common in shares proportional to their unit entitlements. Section 24(2) of the latter statute provided that "[t]he beneficial interest of a proprietor of a lot in the estate or interest in the common property, if any, held by the body corporate as agent for that proprietor shall not be capable of being severed from, or dealt with except in conjunction with, the lot".

185 A series of decisions culminating in *Owners – Strata Plan No 43551 v Walter Construction Group Ltd* (2004) 62 NSWLR 169; [2004] NSWCA 429 at [42]-[45] held that the word "agent" in ss 20 and 24 was not used in the technical sense of the law of agency at common law, that the owners corporation was not the beneficial owner of the common property and that the lot owners had a

beneficial interest in the common property as tenants in common with other lot owners. To the same effect, in *EB 9 & 10 Pty Ltd v The Owners Strata Plan 934* (2018) 98 NSWLR 889; [2018] NSWCA 288 at [31], Barrett AJA with the agreement of Meagher and Gleeson JJA endorsed what had been said by White JA in *McElwaine v The Owners Strata Plan 75975* [2017] NSWCA 239; 18 BPR 37,207 at [37]:

> "The interest of a lot owner in the common property is an equitable interest as a tenant in common with other lot owners. The relationship between the owners corporation as legal owner of the common property and the lot owners as beneficial tenants in common is that of trustee and beneficiary or analogous thereto."

186 All those proceedings concerned the earlier legislation. Indeed, in *EB 9 & 10 Pty Ltd* there was immaterial error by the trial judge in treating the proceedings as arising under the *Strata Schemes Management Act 2015* (NSW): see at [5].

187 The current form of the legislation (the *Strata Schemes Development Act 2015* (NSW) and the *Strata Schemes Management Act 2015* (NSW)) is slightly different. So far as I can see, nothing turns on the fact that the owners corporation originally constituted under s 11 of the 1973 Act is now taken to have been constituted under s 8 of the *Strata Schemes Management Act 2015* (by virtue of Schedule 3 cl 5). Potentially more significant is the altered language defining how the owners corporation holds common property. Section 20 and s 24(2) of the *Strata Schemes (Freehold Development) Act 1973* appear to have been re-enacted as ss 28(1) and (2) of the *Strata Schemes Development Act 2015*:

> "**28 Holding common property and dealing with lots and common property**
>
> (1) The owners corporation of a strata scheme holds the common property in the scheme as agent for the owners as tenants in common in shares proportional to the unit entitlement of the owners' lots.
>
> (2) An owner's interest in the common property cannot be severed from, or dealt with separately from, the owner's lot."

(Subsection 28(3), which concerns dealings or caveats relating to an owner's lot affecting the owner's interest in the common property without express references, is similar to s 24(1) of the *Strata Schemes (Freehold Development) Act 1973*.)

188 Thus the language of the owners corporation holding "as agent" is continued, but the reference to "beneficial interest" in former s 24(2) has been replaced by "interest". The separation of legal and beneficial interest is a hallmark of the splitting of legal and equitable title which occurs in a trust, and in the decisions mentioned above, the language of "beneficial" interest was explicitly relied upon in order to characterise the relationship between owners corporation and lot holders as a trust or analogous to trust: see *Carre v Owners Corporation – Strata Plan 53020* (2003) 58 NSWLR 302; [2003] NSWSC 397 at [29]; *Lin v The Owners – Strata Plan No 50276* [2004] NSWSC 88; 11 BPR 21,463 at [7]; *Owners – Strata Plan No 43551 v Walter Construction Group Ltd* at [42]. The same difference appears in the *Community Land Development Act 1989* (NSW) and the *Community Land Management Act 1989* (NSW); I adverted to the difference without expressing a view as its effect in *Community Association DP270447 v ATB Morton Pty Ltd* [2019] NSWCA 83 at [84]-[85]. It may be noted that in *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* (2014) 254 CLR 185; [2014] HCA 36 at [152] Crennan, Bell and Keane JJ said that the position was "debatable".

189 What is the legal effect of a substantial re-enactment of the provisions governing how the owners corporation holds common property, but deleting the word "beneficial"? Does it mean that common property is no longer owned by the owners corporation as a trustee or in a way which is analogous to a trustee?

190 On the one hand, it might seem to be a strange result if doing so effected a substantive alteration to the way in which owners corporations held common property, such that the beneficial interests of individual lot holders upheld in the decisions referred to above altered upon the commencement of the 2015 statutes. It might also be a strange result if the interests of individual lot holders under a strata scheme registered prior to the commencement of the 2015 statutes were in a different position from lot owners whose strata schemes came into existence under the current legislation.

191 On the other hand, it would also seem strange if no significance was attributed to the Legislature's decision to replace "beneficial interest" by "interest". The

prima facie position is that the re-enactment of statutory language in altered form after it acquires a settled meaning is to be taken to have a different meaning: see *Maraya Holdings Pty Ltd v Chief Commissioner of State Revenue* [2013] NSWCA 408 at [78]-[79] and *Meskovski v Director of Public Prosecutions* [2018] VSCA 293 at [92]-[95], both referring to *Baini v The Queen* (2012) 246 CLR 469; [2012] HCA 59 at [43], and P Herzfeld and T Prince, *Interpretation* (2nd ed, Lawbook Co, 2020), pp 170-171. As the latter work observes, the strength of the presumption will depend on the circumstances.

192 Little assistance is gained by examining the counterpart legislation in other Australian jurisdictions, although they were influenced by the New South Wales innovations (the background is described in *Vickery v The Owners – Strata Plan No 80412* (2020) 103 NSWLR 352; [2020] NSWCA 284 at [125]). Section 10 of the *Strata Titles Act 1988* (SA) expressly provides that the common property is held by the strata corporation in trust for the unit holders, as does s 10 of the *Strata Titles Act 1998* (Tas). In Queensland and Victoria, common property is vested by the lot owners as tenants in common in shares proportionate to their lot entitlements: *Body Corporate and Community Management Act 1997* (Qld), s 35; *Subdivision Act 1988* (Vic), s 30. Not only is there variety in the statutory regimes, but the differences illustrates how the basal legislative purpose of giving a form of direct or indirect co-ownership, whereby the lot owners can share the benefits and burdens of the common property, can be effected in a number of ways.

193 It is quite possible to place too much store on abstract questions such as that posed above, although to my mind at least it is the natural starting point. Even if the Legislature had used the word “trust”, that would not necessarily determine the precise issue that arose in a particular case. The word “trust” is generally but not invariably taken to be used in its technical sense, as was noted in *Bathurst City Council v PWC Properties Pty Ltd* (1998) 195 CLR 566; [1998] HCA 59 at [45] and as the outcome of that appeal confirms.

194 A very similar issue arose in *Ayerst v C&K (Construction) Ltd* [1976] AC 167. There, Lord Diplock writing for the House of Lords explained at 180-181 that references in statutes to “beneficial owner” and “beneficial ownership” did not

necessarily connote a trust. By way of further example, in *In re MF Global Australia Ltd (in liq)* [2012] NSWSC 994; 267 FLR 27 at [149], Black J considered that the statutory trust created by s 981H of the *Corporations Act* did not entail the ordinary right of indemnity enjoyed by a trustee. Those examples illustrate the truth that often the relevant question is one which is less general and less abstract and is closely connected with the precise context in which the question arises.

195 Ultimately it may not much matter whether the owners corporation owns common property as a trustee, or in a way that is analogous to a trustee, as an abstract legal proposition. What is required is an analysis of the relationship between owners corporation, lot owners and common property in the particular context in which the issue arises. The three matters identified above arising from Ms Trentelman's submissions concern the procedural law as to necessary parties, and the elements of proprietary estoppel concerning the certainty of representations and establishing reliance upon them.

Absence of the lot holders as necessary parties

196 The primary judge had regard to the constitution of the litigation when ordering an easement in favour of the owners corporation (which was a party) rather than the lot owners (who were not). Ms Trentelman contended that the lot owners personally should have been parties to the litigation. That submission was advanced both at trial and on appeal.

197 This problem is created by statute creating an artificial person which owns the common property. It is also solved by statute. Section 254 of the *Strata Schemes Management Act 2015* (NSW) provides as follows:

> "**254 Owners corporation may represent owners in certain proceedings**
>
> (1) This section applies to proceedings in relation to common property.
>
> (2) If the owners of the lots in a strata scheme are jointly entitled to take proceedings against any person or are liable to have proceedings taken against them jointly, the proceedings may be taken by or against the owners corporation.
>
> (3) Any judgment or order given or made in favour of or against the owners corporation in any such proceedings has effect as if it were a judgment or order given or made in favour of or against the owners.
>
> (4) A contribution required to be made by an owner of a lot to another owner in relation to the judgment debt is to bear the same proportion to the judgment

> debt as the unit entitlement of the contributing owner bears to the aggregate unit entitlement."

198 Such a provision has been present in the legislation since at least 1973 (see s 147 of the *Strata Titles Act 1973* (NSW)).

199 Mr Ashhurst conceded, very properly, that Ms Trentelman's proceedings concerning the notation were proceedings in relation to common property within the meaning of s 254(1). However, he said that the proprietary estoppel claim was not.

200 There are two answers to that submission. The first is that, as it happens, the owners corporation itself was, as owner of the common property, one of the dominant tenements of the existing easement. This came about because of the subdivision of what had been lot 9 into the caretaker's unit and the car park and the rooftop veranda in circumstances where lot 9 had been one of the dominant tenements of the easement as originally created. This gave rise to a debate about the application of the principles stated in *Rainbow v Gallagher* (1994) 179 CLR 624 at 632-634; [1994] HCA 24, as to the circumstances in which the benefit of an easement enures when the land benefited by it is subdivided. The general rule is that the benefit enures to all of the subdivided lots, unless the distribution of the benefit of the easement would be at variance with the actual or presumed grant under which the right was acquired, to pick up the language of Goddard, *A Treatise on the Law of Easements* (8th ed, Stevens and Sons Ltd, 1921), p 392 which was endorsed in *Rainbow v Gallagher*. Applying that rule, the newly created lot which became owned by the owners corporation obtained the benefit of the existing easement, which was expressed generally, with the dominant tenement described as "[Lots] 9-48/sp79344" and on terms that "The lots in 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". I would add that there is no reason to doubt that the land occupied by the car park, which was after all immediately adjacent to the swimming pool, was not continuing to enjoy the benefit of the easement.

201 That first answer to the submission comes about by the happenstance that one of the lots benefitted by the existing easement had been subdivided, and part of the land had become common property.

202 The second answer is that s 254 is engaged directly, irrespective of the subdivision referred to above. The reasoning leading to that conclusion may be summarised as follows.

(1) The primary case advanced by the owners corporation in its proceedings was a claim in contract. It sought a declaration that the pool and structures were part of the common property of the strata scheme as its first prayer for final relief. It sought consequential orders (involving the execution and administering of documents) in order to achieve the result in that declaration. That claim failed and was not reagitated on appeal.

(2) I am inclined to think that the claim in contract of itself would suffice to engage s 254(1), even if the alternative claim in estoppel was unconnected to common property. After all, whether or not s 254(1) is satisfied does not turn on the particular causes of action advanced in a proceeding, but on the character of the proceedings. That is the force of s 254(1) providing that the section applies if the "proceedings" are in relation to common property.

(3) But in any event, the estoppel claim also falls within the description of being "in relation to common property" for the purposes of s 254(1). The owners corporation's fallback case in estoppel was pleaded on the basis that for some years Ms Trentelman and the lot owners adopted a common position that the pool would be permanently accessible by owners and occupiers of lots by (a) using the pool, (b) including the notation, and (c) representing that lots had such a continuing entitlement. The notation was on the plan of subdivision that "the inground pool and auxiliary structures (shed, concrete, fencing etc) located within lot 53 cubic space are common property". One of the prayers for relief based on the claim for estoppel was that Ms Trentelman do all things reasonably necessary "to ensure that the Pool and Structures, including the land and airspace above and below them to an unlimited height and depth, become common property".

(4) Of course, the contract case failed and was not re-agitated in this Court, and there was and is a dispute as to whether the estoppel is made out and if so what relief is appropriate. But whether or not s 254 applies does not turn on the outcome of the litigation. How could it? The question of parties is to be addressed when proceedings are commenced, not after they have been determined. The matter may be tested this way. Suppose an owners corporation brought proceedings saying that a particular parcel of land was part of the common property, but was unsuccessful. That failure would not prevent the proceedings from being "in relation to common property", nor would it prevent the

operation of s 254(3) binding individual lot holders to the result achieved by that judgment. Whether proceedings are "in relation to common property" turns on the parties' *claims*, not the outcome of the litigation.

(5) Finally, s 254 serves a beneficial purpose of providing a straightforward means of prosecuting litigation which affects the common property and therefore, indirectly, all of the lot owners. The legal meaning of the words "in relation to common property", no differently from any other relational term, turns on the statutory context and purpose: *The Queen v Khazaal* (2012) 246 CLR 601; [2012] HCA 26 at [31]. No narrow construction should be given to the relationship required by those words in the present context, which are applicable to thousands of strata schemes, in which hundreds of thousands of people live and enjoy the use of common property.

203 In short, the effect of s 254 is that the lot owners are bound by the litigation, but they were neither necessary nor proper parties.

Uncertainty of the representation

204 The gravamen of these submissions was that there was vagueness in the terms of the promise, which expressly contemplated further details being agreed, and which extended to uncertainty as to whether the continued enjoyment of the swimming pool would be effected by an extension of the existing easements benefitting lot holders, as opposed to the easement benefitting the owners corporation ordered by the primary judge.

205 Mr Ashhurst contended that "proprietary estoppel cannot lie when it is uncertain as to whether any interest in land is to be created as distinct from uncertainty as to the form of the interest in land". He prayed in aid Lord Kingsdown's (influential albeit dissenting) speech in *Ramsden v Dyson* (1866) LR 1 HL 129 at 170 with its reference to a verbal agreement for "a certain interest in land". As the Chief Justice explains, neither side to this litigation had an especially precise understanding of the legal relationships or conveyancing concepts. The issue is resolved by looking at the substance of what was said to the particular audience and what would have been understood by that particular audience.

206 Much the same point was made in this Court's decision in *Evans v Evans* [2011] NSWCA 92 at [116], on which the owners corporation relied, in circumstances where as here a precise legal analysis would be both difficult and foreign to those relying on the estoppel:

> "While professional training would impel a lawyer to seek to impose a legal categorisation on the $200 per week, Peter was a builder and Sophie was a clerk in an accountant's office - there was no reason to expect them to think like lawyers. Accordingly, their understanding was not in terms that they had been given an '*absolute beneficial interest*' - that is lawyers' language, and foreign to their way of thinking. The upshot of their evidence is that their understanding was that they had been given the house, and that they had the obligation to make the payments. They organised their lives around that understanding for decades. It would be belittling for a lawyer to denigrate or deny the reality of their understanding on the basis that it did not fit into a lawyer's categories of analysis. An equity concerning proprietary estoppel arises by virtue of the expectations that the plaintiffs actually had, that were induced or encouraged by the defendant and on which the plaintiffs actually acted to their detriment. Those are questions of fact, not of legal analysis." (original emphasis)

207 When the 2014 annual general meeting took place, it would be quite difficult to give a complete legal analysis of the way in which lot holders enjoyed a right to use the swimming pool. A complete analysis would require accounting for the facts that the costs were charged as if the pool were common property, and were charged not merely to lots owners whose lots enjoyed the benefit of the easement, but also to the owners of lots 49, 50 and 51. The representation "we will give you continued use of the pool" clearly and unequivocally conveyed a continuation of the status quo, and did not descend to the details of how that would be effected. I do not think it is useful to inquire into the distinction between the formal ownership of the swimming pool as common property of the owners corporation as agent for lot holders (which approximated the current position in practice) or a continuation of easements directly in favour of individual lots, presumably extended to include lots 49, 50 and 51 (which was the formal position). Either approach achieved the same end. The fact that the words spoken by Mr Trentelman, and the essence of the inducement offered in exchange for passage of the special resolution did not descend to the details does not stand in the way of an estoppel. The Chief Justice has summarised many of the authorities establishing that the certainty required by the law of contract is not necessary. As Brooking JA observed in *Flinn v Flinn* [1999] 3 VR 712; [1999] VSCA 134 at [95], after extensive reference to the authorities,

> "Time and again an equity has been held to exist where no contract had arisen, the court often going a long way in giving effect to what the law of contract would ignore as an impossibly loose arrangement. The present case lies within the reach of the long and flexible arm of equity."

208 Ms Trentelman correctly accepted that the present case was something of a hybrid between what might be described as a "commercial" case as opposed to a "domestic" case. There were no familial relationships involved, yet the representations concerned what for some lot holders was their home, and a relatively unsophisticated approach appears to have been taken. I accept Mr Ashurst's submission:

> "[W]e say that sometimes … talking about whether it's a commercial or a domestic relationship sometimes obscures the real point. The real point being, did they understand that there had to be further negotiations and a formal creation of documentation before their interest was created?"

209 This accords with Gleeson JA's observation in *Doueihi v Construction Technologies Australia Pty Ltd* (2016) 92 NSWLR 247; [2016] NSWCA 105 at [178] as to the limitations of the distinction between commercial and domestic relationships, and the importance of examining the circumstances of the particular case, rather than relying on a shorthand label. As the Chief Justice explains, in this particular case, the point that aspects of the promised entitlement to use the pool remained to be settled does not stand in the way of an estoppel. That was not reflected in the tenor of the documents presented at the meeting and is inconsistent with the reality that the Trentelmans controlled the Strata Committee.

Reliance

210 I only wish to add to what the Chief Justice has said in relation to one aspect of this part of the appeal. Ms Trentelman placed reliance upon Lord Blackburn's speech in *Smith v Chadwick* (1884) 9 App Cas 187, especially at 196:

> "And whenever that is a matter of doubt I think the tribunal which has to decide the fact should remember that now, and for some years past, the plaintiff can be called as a witness on his own behalf, and that if he is not so called, or being so called does not swear that he is induced, it adds much weight to the doubts whether the inference was a true one."

211 *Smith v Chadwick* is far removed from the present case. Mr Smith brought proceedings for deceit based upon a statement in the prospectus, namely, that "the present value of the turnover or output of the entire works is over £1,000,000 sterling per annum". The trial before Fry J was conducted over some five days, during which an interrogatory administered to Mr Smith was

tendered. Its effect may be seen from what is recorded in the decision of the Court of Appeal:

> "That being so, I come to consider this: What does the Plaintiff tell us as to the effect of the representations on his mind? Here we have an answer to the interrogatories, and I must say it is not the answer I should have expected to get from a man who comes into Court and says, I have been deceived by false representations, and thereby induced to enter into a contract. I should expect him to say: 'I was deceived by such and such false representations.' But he will not say it. He is interrogated as to what he understood the thing to mean, and this is his answer. Having given a long string of alleged misrepresentations, he says: 'As to each and every of the allegations of misrepresentations contained in the statement of claim, First, I understood the meaning of such misrepresentations respectively to be that which the words composing them obviously convey, and I am unable to express in any other words what I understood to be the meaning thereof.' Is a man to come into Court with such a statement as that? It means this, 'You please to find out what the words mean, and that is how I understood them.' I must say that I do not think that is dealing fairly with the Court, nor is it dealing fairly with the Defendants. I agree that if there are any obvious misstatements he is entitled to rely upon them, but he is not to tell us in this way, 'I relied on a misrepresentation according to what the words obviously convey, and I will not tell you what that is; I am unable to express in any other words what I meant.' So that we are dealing with a Plaintiff who says he has been deceived, but will not condescend to particulars, and will not tell us in what respect he was deceived": (1881) 20 Ch D 27 at 48-49.

212 That was the context in which the Master of the Rolls said, at 61, that the hardest question in the case was the meaning of the line in the prospectus, of which he said:

> "The Plaintiff will not tell us how he read it. He says he read it for what it obviously means."

213 That explains what Lord Blackburn had in mind when saying that Mr Smith was a man who, although called as a witness, did not swear that he was induced by the representation. In the passage on which Ms Trentelman relies, his Lordship was rejecting the submission that had been made (by Romer QC and Cozens-Hardy QC recorded at 9 Appeal Cases at 188) that "[i]t would not have been admissible for the plaintiff's counsel to ask [Mr Smith] that question in examination in chief" but that "[t]he defendant's counsel should have asked the plaintiff in cross-examination what meaning he put upon the representation".

214 Further, as Ms Peden observed, the passage in Lord Blackburn's speech continues with the important qualifying words: "I do not say it is conclusive". That confirms the importance of attending to the circumstances relating to the

failure to call a witness. The primary judge made an express finding about this. His Honour found that that the appropriate inference was that the decision not to call further witnesses, including five witnesses whose affidavits had been served, was "nothing more than a commendable attempt to save time": at [196]. If a submission was to be put that there were especially probative witnesses, or potentially damaging witnesses, who were not called, then it was open to the appellant to adduce evidence of that (for example, by tendering the affidavits or witness statements that had been served). This was not done. Indeed, there was no challenge to the explanation expressed by the primary judge for the decision not to call further witnesses. It follows that there was no occasion for the drawing of inferences as considered by Handley JA in *Commercial Union Assurance Company of Australia Ltd v Ferrcom Pty Ltd* (1991) 22 NSWLR 389 at 418-419, as was explained by Hodgson JA in *Ho v Powell* (2001) 51 NSWLR 572; [2001] NSWCA 168 at [16]-[17].

Costs

215 Finally, I note for completeness that the appellant flagged that she would amend her notice of appeal to challenge the exercise of the discretion to award costs in the most recent judgment of the primary judge. That did not happen. This was squarely raised in oral address by the respondent. Even so, no application was made to amend. This Court accordingly cannot alter the costs orders made in the third judgment. In any event, there is no occasion in light of these reasons to interfere in the exercise of costs which, in relation to Ms Trentelman's case, was principally determined by reference to her failure on rectification and mistake: [2021] NSWSC 578 at [44].

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Annexure A ATTACH TO JUDGMENT (71460, pdf)