Supreme Court

New South Wales

Case Name:	Walker Corporation Pty Ltd v The Owners - Strata Plan No 61618
Medium Neutral Citation:	[2022] NSWSC 1246
Hearing Date(s):	15 August 2022
Date of Orders:	16 September 2022
Decision Date:	16 September 2022
Jurisdiction:	Equity - Expedition List
Before:	Parker J
Decision:	See [177]-[178]
Catchwords:	LAND LAW – strata title – leasehold development scheme under Strata Schemes Development Act 2015 – building subdivision includes part strata parcels – building management committee appoints managing agent – building's strata management statement and constituent strata scheme by-laws require constituent owners' corporations to "appoint and retain" building managing agent as strata managing agent for constituent strata schemes – validity – uncertainty – ultra vires – inconsistency with Strata Schemes Management Act 2015
Legislation Cited:	Australian Constitution, s 109 Companies Act 1929 (19 & 20 Geo 5 c 23) Companies Act 1936, s 22 Contracts Review Act 1980 Conveyancing Act 1919 Conveyancing Amendment (Building Management Statements) Act 2001 Conveyancing (Strata Titles) Act 1961, s 13 Joint Stock Companies Act 1856 (19 & 20 Vict c 47), ss 9, 10

Joint Stock Companies Winding-up Act 1848 (11 & 12 Vict c 45)
Joint Stock Companies Winding-up Amendment Act 1849 (12 & 13 Vict c 108)
Real Property Act 1900
Strata Schemes Development Act 2015, ss 3, 99, 100, 101, 102, 103, 104, 105, Sch 4 cll 1, 2, 3, 4
Strata Schemes (Freehold Development) Act 1973
Strata Schemes (Leasehold Development) Act 1986
Strata Schemes Management Act 1996, ss 27, 28
Strata Schemes Management Act 2015, ss 8, 9, 10, 11, 13, 15, 42, 49, 50, 52, 54, 58, 59, 60, 71, 72, 135, 136, 137, 138, 139, 146, 147, 148, 150, 226, 232, 237, 260
Strata Titles Act 1973, s 78
Strata Titles (Leasehold) Act 1986
Strata Titles (Leasehold Part Strata) Amendment Act 1992
Strata Titles (Part Strata) Amendment Act 1992

Cases Cited:

Australian Coal & Shale Employees' Federation v Smith (1937) 38 SR (NSW) 48
Bailey v New South Wales Medical Defence Union Limited (1995) 185 CLR 399
Buck v Robson (1870) LR 10 Eq 629
Cooper v Owners – Strata Plan No 58068 (2020) 103 NSWLR 160
Ferdinands v Commissioner for Public Employment (2006) 225 CLR 130
Fitzgerald v Masters (1956) 95 CLR 420
Gillett v Halwood Corporation Ltd [1998] NSWCA 281
Italian Forum Ltd v Owners – Strata Plan 60919 [2012] NSWSC 895
National Roads and Motorists' Association v Parkin (2004) 60 NSWLR 224
Noon v Owners – Strata Plan No 22422 [2014] NSWSC 1260
North Wind v Proprietors – Strata Plan 3143 [1981] 2 NSWLR 809
Owners of Strata Plan No 3397 v Tate (2007) 70 NSWLR 344
Robinson's Executor's Case (1856) 6 De GM & G 572; 43 ER 1356
Scott v Frank F Scott (London) Limited [1940] Ch 794
Westfield Management Ltd v Perpetual Trustee

	Company Ltd (2007) 233 CLR 528 White v Betalli (2006) 66 NSWLR 690 White v Betalli (2007) 71 NSWLR 381
Texts Cited:	Pearce, DC and Argument, S, Delegated Legislation in Australia (LexisNexis Butterworths, 5th ed, 2017) Sealy, LS, Cases and Materials in Company Law (Butterworths, 5th ed, 1992)
Category:	Principal judgment
Parties:	Walker Corporation Pty Limited (Plaintiff) The Owners - Strata Plan No 61618 (First Defendant) Robert Edmund Quickenden (Second Defendant) Jeffrey Kent Smoot (Third Defendant) Alexander Peter Kathestides (Fourth Defendant) Cynthia Jean Jackson-Nagy (Fifth Defendant) Fotoulla Lazaridis (Sixth Defendant) Paul Margolin (Seventh Defendant) Vivian Paraskevi Mavrocordatos (Eighth Defendant) The Owners - Strata Plan No 61770 (Ninth Defendant) Annabelle Romaine Warren (Tenth Defendant) Laslo Abonyi Nagy (Eleventh Defendant) Lilting House Pty Limited (Twelfth Defendant) The Owners - Strata Plan No 61619 (Thirteenth Defendant) Douglas Thomas Dean (Fourteenth Defendant) Schielang Pty Limited (Fifteenth Defendant) Anthony Mervyn MacDonald Miller (Sixteenth Defendant) Hall Plain Superannuation Fund Pty Limited (Seventeenth Defendant) Christopher William Townsend (Eighteenth Defendant) McCormacks NSW Pty Limited (Nineteenth Defendant) Strata Choice Pty Limited (Twentieth Defendant) First Cross-Claim Robert Edmund Quickenden (First Cross-Claimant) Walker Corporation Pty Limited (First Cross-Defendant) The Owners - Strata Plan 61771 (Second Cross-defendant) The Owners - Strata Plan 61620 (Third Cross-defendant) The Owners - Strata Plan 71494 (Fourth Cross-defendant)

	The Owners - Strata Plan 73154 (Fifth Cross-defendant) Ovolo Woolloomooloo Pty Limited (Sixth Cross-defendant) Transport for NSW (Seventh Cross-defendant) Second Cross-Claim The Owners - Strata Plan No 61618 (First Cross-claimant) The Owners - Strata Plan No 61770 (Second Cross-claimant) The Owners - Strata Plan No 61619 (Third Cross-claimant) Walker Corporation Pty Limited (First Cross-defendant) The Owners - Strata Plan 61771 (Second Cross-defendant) The Owners - Strata Plan 61620 (Third Cross-defendant) The Owners - Strata Plan 71494 (Fourth Cross-defendant) The Owners - Strata Plan 73154 (Fifth Cross-defendant) Ovolo Woolloomooloo Pty Limited (Sixth Cross-defendant) Transport for NSW (Seventh Cross-defendant)
Representation:	Counsel: J Giles SC/H Mann (Plaintiff/First Cross-Defendant) JS Emmett SC/J Jaffray (First, Third to Eleventh, Thirteenth, Fourteenth and Sixteenth Defendants) D Ward (Second Defendant/First Cross-Claimant) Solicitors: Clayton Utz (Plaintiff/First Cross-Defendant) Gilchrist Connell (First, Third to Eleventh, Thirteenth, Fourteenth and Sixteenth Defendants) Fitzpatrick Solicitors (Second Defendant/First Cross-Claimant) Submitting appearances: Strata Choice (Gilchrist Connell)
File Number(s):	2022/176310

Publication Restriction: Nil

JUDGMENT

1 The Finger Wharf which juts out into Woolloomooloo Bay is a well-known piece of Sydney's maritime history. Following its redevelopment about twenty-five years ago it remains a prominent landmark. These proceedings arise out of a dispute among the residents and occupants of the Wharf about its management.

2 The history of the Wharf and its redevelopment was summarised in the following affidavit evidence, which was not contentious:

> The Woolloomooloo Wharf, often called the Finger Wharf, was constructed in about 1915 and was the longest timber-piled wharf in the world. It served for many decades as a wool storage and cargo facility, was used during the war years for the movement of troops, and was employed for the arrival of large numbers of post-World War II migrants. A passenger terminal was added in the 1950s but by about 1987, containerization and increased air travel had made the wharf redundant, and it had fallen into disrepair. It was saved from demolition by community action, but approval for its redevelopment was finally given in 1996. It was redeveloped between about 1998 and 2000.
>
> While retaining its historically significant form and many of its historical industrial features, it was redeveloped as a mixed-use harbourside facility comprising 345 apartments, a 104-room hotel, restaurants, retail space, a marina and a carpark. Essentially, the restaurants and commercial areas are on the waterfront with the business and residential development behind them.

3 The Wharf structures (including the associated marina) are subdivided into eight three-dimensional lots. Of these lots, seven are themselves subdivided by way of strata plan and constitute independent strata title schemes. Each of these lots is, in accordance with its strata plan, in turn made up of common property and lots capable of individual ownership. Each has its own owners' corporation ("OC") and by-laws. The remaining lot has not undergone a strata subdivision and is held under *Real Property Act 1900* ("RPA") title by its registered proprietor.

4 Set out below is a table summarising the features of the eight lots into which the Wharf is subdivided:

Component	**Lot Type**	**Description**

Residential North	Strata	10 residential lots and 20 carparking spaces
Residential South	Strata	212 residential lots
The Promenade	Strata	88 residential lots
Carpark Wharf	Strata	165 carparking spaces
Berthing Facility East	Strata	34 marine berths
Retail Lot	Strata	8 retail tenancies
Hotel Lot	Stratum	104 room boutique hotel
Commercial Lot	Strata	4 commercial tenancies

5 The subdivision of the Wharf was effected under State legislation which provides for the three-dimensional subdivision of buildings, or parts of buildings, for the purpose of strata title development. I will refer to such a subdivision as a "building scheme". The legislation has a somewhat complicated history, as I discuss in more detail below. For convenience, I will refer to the current version of the legislation, and its predecessor legislation in force when the Wharf was developed, as the "Development Act".

6 The Development Act permits both freehold and leasehold building schemes. The Wharf is a leasehold property: the harbour bed and the foreshore areas on which the Wharf structures stand, and therefore the Wharf structures themselves, are owned by a State government instrumentality. At the time of the redevelopment of the Wharf and its subdivision, that instrumentality was the Marine Ministerial Holding Corporation ("MMHC"). It is currently Transport for NSW ("TfNSW").

7 The Development Act refers to three-dimensional lots which cover only part of a building, and have undergone strata subdivision, as "part strata parcels". I will

refer to them, consistently with terminology used in these proceedings, as "strata lots". Lots which have not undergone strata subdivision and which remain under RPA title, will be referred to as "stratum lots".

8 To address management issues which arise from the fact that the whole of the building is not under common ownership, the Development Act requires registration of a set of management rules for the building scheme. This set of rules is called a "Strata Management Statement" ("SMS"). The rules are administered by a Building Management Committee ("BMC"). In a leasehold scheme such as the Wharf, the members of the BMC are the OCs for the strata lots; the leaseholders of the stratum lots; and the registered proprietor of the fee simple.

9 The Development Act does not deal with the management and operation of individual strata schemes within the building scheme. That is left to the separate legislation which applies to all strata schemes. This legislation likewise has a complicated history and I will refer to the current and previous versions of it as the "Management Act".

10 The starting point under the Management Act is that management of a strata scheme takes place through the OC by the lot owners themselves (or in some instances, office bearers elected by the lot owners). But the Act contemplates that functions of the OC can be delegated to a strata managing agent. It is also possible to retain a building manager. The Act prescribes what can be delegated and how the appointments of strata managing agents and building managers can be made.

11 The SMS for the Wharf duly provides for the establishment of a building management committee ("Wharf BMC"). The committee members are the seven strata lot OCs; the leaseholder of the hotel stratum lot; and TfNSW as the owner of the fee simple.

12 The Wharf SMS also provides, as is contemplated by the Development Act, for the Wharf BMC to appoint a "managing agent". A licensed strata agency company called McCormacks (NSW) Pty Limited ("McCormacks") is (or at least purports to be) the incumbent managing agent. The Wharf BMC appointed (or

purportedly appointed) McCormacks as such in March 2019 and extended (or purported to extend) the appointment in December 2021.

13 The dispute between the parties centres on a provision in the SMS (article 8.11) which provides that each of the OCs for the seven strata lots is to appoint as its strata managing agent the managing agent appointed by the BMC for the Wharf as a whole.

14 For more than twenty years there has been no dispute about aligning the management of the Wharf with the management of the strata schemes. Following McCormacks' appointment as managing agent for the Wharf by the Wharf BMC that company was duly appointed as strata managing agent for each of the seven strata lot schemes.

15 This year, the position changed. Three of the strata lot OCs (Residential South, Promenade, and Carpark Wharf) have, by resolutions carried by majority of the members in general meeting, purported to appoint another strata management company, Strata Choice Pty Limited ("Strata Choice") in McCormacks' place. These resolutions were passed on 30 May (in the case of Residential South and the Carpark) and 9 June (in the case of the Promenade).

16 The SMS contains a further provision requiring the OCs to ensure that their by-laws conform with the SMS. The by-laws for both the Residential South and Carpark Wharf strata schemes contain a provision requiring the OC to appoint as its strata managing agent the managing agent appointed by the Wharf BMC, in accordance with article 8.11 of the SMS. The third rebel OC, Promenade, does not have any such provision in its by-laws.

17 The contention on behalf of the three rebel OCs is that the obligation in article 8.11 in the SMS (to which I will refer as the "challenged SMS article") is not binding on them; or, if it is legally binding, it should be set aside. The two rebel OCs which have by-laws to the same effect as that article likewise contend that those by-laws (to which I will refer as the "challenged by-laws") are invalid or unenforceable.

18 The chairperson of the Residential South OC is Robert Edmund Quickenden. Mr Quickenden is a barrister. He appears to have played a significant part in

the decision by the rebel OCs to repudiate the existing arrangements and appoint Strata Choice as their strata managing agent.

19 Walker Corporation Pty Limited ("Walker"), the plaintiff, is the owner of one lot in the Residential South strata scheme and two lots in the Carpark Wharf scheme. Walker maintains the validity of the challenged SMS article and the challenged by-laws. These proceedings have been brought by Walker to vindicate that position.

Issues for determination

20 Twenty parties are named by Walker as defendants to its statement of claim. The Residential South, Carpark and Promenade OCs are the first, ninth and thirteenth defendants. Mr Quickenden is the second defendant. The third to eighth defendants, tenth, eleventh, fourteenth, sixteenth, and eighteenth defendants are either individual lot owners who are office bearers in one or other of the rebel OCs. McCormacks is the nineteenth defendant. Strata Choice is the twentieth defendant.

21 Walker's statement of claim framed its prayers for relief largely in declaratory terms. Declarations were sought that the purported appointment of Strata Choice was invalid and McCormacks remains the strata managing agent for the OCs. Alternatively, declarations were sought that the OCs are obliged to appoint McCormacks as their strata managing agent. Consequential orders were sought for all of the property (including the books and records) of each OC to be delivered up by Strata Choice to McCormacks.

22 Walker also sought an order against Mr Quickenden and the other individual office holder defendants that the costs payable by the OCs should be quarantined and borne by those individuals, and not Walker. The Management Act provides for such an order to be made in a proper case.

23 Mr Quickenden is separately represented. He has actively defended the proceedings and filed a cross-claim. That cross-claim also sought, primarily, declaratory relief. Mr Quickenden sought declarations to the effect that the challenged SMS article and the challenged by-laws are invalid as being unsupported by the Development Act, or inconsistent with the Management Act. Alternatively, he sought orders that the Court declare the offending by-

laws invalid or unenforceable. For this purpose, he relied on provisions of the Management Act which apply to by-laws which are "harsh, unconscionable or oppressive". He also sought relief against both the challenged SMS article and the challenged by-laws under the *Contracts Review Act 1980.*

24 The three rebel OCs have also cross-claimed. There are some differences in emphasis between the rebel OCs and Mr Quickenden, but their cross-claim sought relief along the same lines as his.

25 The three rebel OCs have been commonly represented in these proceedings. That common representation extends to the third to eighth, tenth, eleventh, fourteenth and sixteenth defendants. I will refer to these defendants collectively as the "Rebel OC Defendants".

26 Strata Choice has filed a submitting appearance. McCormacks does not appear to have done so but has played no active role in the proceedings.

27 Walker has not joined as defendants the remaining four strata lot OCs, the leaseholder of the hotel stratum lot, or the registered proprietor of the fee simple (TfNSW). But those parties have been joined as cross-defendants to the cross-claims of the rebel OCs and Mr Quickenden. However, they have played no active part in the proceedings so far.

28 The identity of the strata manager for the rebel OCs is obviously an urgent question, and the proceedings have been managed in the Expedition List. It however became clear that the claims for relief against the challenged by-laws under the Management Act and for relief against the challenged SMS article and the challenged by-laws under the *Contracts Review Act 1980* gave rise to factual issues which would take some time to work out.

29 I therefore proposed that the Court would conduct an expedited hearing, but the hearing would be limited to determining whether the challenged SMS article and the challenged by-laws are statutorily valid. If Walker succeeded on this question, the further issues raised by the cross-claims would be considered at a later point. Counsel for Walker accepted that this would require some adjustment to the terms of the declarations sought in the statement of claim so

as to make it clear that those declarations would not prejudice the grant of relief under the *Contracts Review Act* or the Management Act.

30 The hearing took place on 15 August. The principal issues debated were the validity of the challenged SMS article and the challenged by-laws. Counsel for Mr Quickenden raised a further contention that the proceedings against him were not maintainable and should be summarily dismissed whatever the outcome of the validity arguments. There was also some debate about separate claims by the defendants that McCormacks' appointment, or the extension of that appointment, were invalid. Counsel for Walker invited me to deal finally with these claims. Counsel for the defendants resisted that course.

31 Counsel for Walker did not press the contention that the challenged SMS article or the challenged by-laws themselves had the effect of invalidating the purported appointment of Strata Choice as the strata managing agent for the rebel OCs, or automatically continuing McCormacks' appointment to that position. Counsel accepted that resolutions from the rebel OCs under the Management Act were required.

32 But counsel contended that the effect of the challenged SMS article (and the challenged by-laws) was to impose a corporate obligation on each of the rebel OCs to make the necessary appointment by passing the necessary resolution. Furthermore, the article (at least; as I describe below, the position for the by-laws was less clear) imposed personal obligations on the strata lot owners to take all action required to give effect to the article. This included voting in favour of the necessary resolution at a general meeting of the OC.

33 Counsel submitted that it ought to be sufficient for the Court to make a declaration to this effect. But counsel accepted that in the event of recalcitrance, the obligation would be enforced by mandatory orders directed to the lot owners for each OC requiring them to vote in favour of a resolution appointing McCormacks as the strata managing agent for that OC. Counsel did also suggest that, following the making of the declaration, it might be possible to obtain enforcement orders from the New South Wales Civil and Administrative Tribunal ("NCAT") instead. But I did not understand this to

qualify counsel's contention that the challenged SMS article created obligations, enforceable by mandatory injunction, on the strata lot owners.

34 As a consequence of the way Walker puts its case, it is necessary to consider the validity of the challenged SMS article and the challenged by-laws separately. If I find that the challenged SMS article is invalid, that does not necessarily mean that the challenged by-laws are invalid. Their validity as by-laws must be considered separately. By the same token, if the challenged SMS article has the effect claimed for it, and creates an enforceable obligation on the strata lot owners of the rebel OCs to pass a resolution appointing the BMC's managing agent as their strata managing agents, that will be effective even if the by-laws fail.

Statutory context

35 Strata title was first introduced in New South Wales by the *Conveyancing (Strata Titles) Act 1961* ("1961 Act"). That Act was repealed and replaced by the *Strata Titles Act 1973* ("1973 Act").

36 The 1961 and 1973 Acts provided only for freehold strata schemes. Leasehold schemes were introduced by the *Strata Titles (Leasehold) Act 1986* ("1986 Act").

37 The 1961, 1973 and 1986 Acts all dealt with the development of strata title properties as well as the management and administration of strata schemes. In 1996 the legislative scheme was split into two. Provisions dealing with the management and administration of strata schemes were deleted from the 1973 and 1986 Acts and re-enacted as the *Strata Schemes Management Act 1996* ("1996 Management Act"). The remaining development provisions were left in the 1973 Act (renamed the *Strata Schemes (Freehold Development) Act 1973*) and the 1986 Act (renamed the *Strata Schemes (Leasehold Development) Act 1986*).

38 In 2015 the legislation was again repealed and re-enacted. The 1996 Management Act was replaced by the *Strata Schemes Management Act 2015* ("2015 Management Act"). The residual development provisions from the 1973 and 1986 Acts were replaced by the *Strata Schemes Development Act 2015* ("2015 Development Act").

39 The provisions dealing with building schemes which arise for consideration in the present dispute were introduced by way of amendment to the 1973 and 1986 Acts in 1992: see *Strata Titles (Part Strata) Amendment Act 1992* (which amended the 1973 Act) and the *Strata Titles (Leasehold Part Strata) Amendment Act 1992* (which amended the 1986 Act). Those provisions deal only with building schemes where at least one of the lots in the scheme is a strata lot. Legislation providing for building schemes where all the lots are stratum lots under RPA title was inserted into the *Conveyancing Act 1919* in 2001: *Conveyancing Amendment (Building Management Statements) Act 2001*.

40 The development subdivision of the Wharf took place under the 1986 Act, at a time when the management and administration of strata schemes was governed by the 1996 Management Act. Nonetheless it was common ground that the statutory interpretation issues which arise in this case should be determined by reference to the provisions of the 2015 Development and Management Acts. I will therefore proceed to summarise the main provisions of the 2015 Acts which are relevant, before addressing in general terms the principles which relevantly govern the interpretation and validity of strata title instruments such as by-laws and SMSs.

2015 Management Act

41 The body corporate for a strata scheme (OC) is constituted by s 8 of the Act. Its responsibilities are set out in general terms in s 9:

> (1) The owners corporation for a strata scheme has the principal responsibility for the management of the scheme.
>
> (2) The owners corporation has, for the benefit of the owners of lots in the strata scheme—
>
> (a) the management and control of the use of the common property of the strata scheme, and
>
> (b) the administration of the strata scheme.
>
> (3) The owners corporation has responsibility for the following—
>
> (a) managing the finances of the strata scheme (see Part 5),
>
> (b) keeping accounts and records for the strata scheme (see Parts 5 and 10),
>
> (c) maintaining and repairing the common property of the strata scheme (see Part 6),

(d) taking out insurance for the strata scheme (see Part 9).

42 The Act provides for the OC to be assisted in the discharge of its responsibilities. Section 11 provides:

> The owners corporation for a strata scheme may be assisted in the carrying out of its management functions under this Act by any one or more of the following—
>
> (a) the strata committee of the owners corporation established in accordance with this Act,
>
> (b) a strata managing agent for the scheme appointed in accordance with Part 4,
>
> (c) a building manager for the scheme appointed in accordance with Part 4.

43 An OC may obtain assistance by delegating functions. But such delegations are regulated by the Act. I refer below to some of the specific provisions which authorise delegation of specific functions. Section 10(2) provides that an OC must not delegate any of its functions unless the delegation is "specifically authorised" by the Act.

44 Part 4 of the Act deals with the appointment and responsibilities of strata managing agents and building managers. So far as strata managing agents are concerned, s 49 deals with appointment and relevantly provides:

> (1) An owners corporation for a strata scheme may appoint a person who is the holder of a strata managing agent's licence under the Property and Stock Agents Act 2002 to be the strata managing agent of the scheme.
>
> (2) The appointment is to be made by instrument in writing authorised by a resolution at a general meeting of the owners corporation.
>
> …
>
> (5) An owner who is seeking appointment as a strata managing agent is not entitled to vote or cast a proxy vote on the appointment at a meeting of the owners corporation.

45 Section 50 deals with the term of the appointment. It relevantly provides:

> (1) The term of appointment (including any additional term under an option to renew) of a strata managing agent for a strata scheme expires (if the term of the appointment does not end earlier or is not ended earlier for any other reason)—
>
> (a) [not applicable]
>
> (b) in any other case, at the end of the period of 3 years following the appointment.

(2) A person may be reappointed by the owners corporation by resolution at a general meeting as the strata managing agent for a strata scheme at the end of the person's term of appointment.

(3) The appointment of a strata managing agent may be terminated in accordance with the instrument of appointment if authorised by a resolution at a general meeting of the owners corporation.

…

There is a further provision which provides for an existing agent to be reappointed by the committee at the end of the agent's term for a period not exceeding three months: 2015 Management Act s 50(4).

46 Section 52 deals with delegation of the OC's functions to a strata managing agent. It provides:

(1) An owners corporation may, by the instrument appointing a strata managing agent or some other instrument, delegate to the strata managing agent—

(a) all of its functions, or

(b) any one or more of its functions specified in the instrument, or

(c) all of its functions except those specified in the instrument.

(2) An owners corporation must not delegate to a strata managing agent its power to make—

(a) a delegation under this section, or

(b) a decision on a matter that is required to be decided by the owners corporation, or

(c) a determination relating to the levying or payment of contributions.

(3) A delegation may be made subject to the conditions or limitations as to the exercise of all or any of the functions, or as to time or circumstances, that may be specified in the instrument of delegation.

(4) An owners corporation may delegate the functions only if authorised to do so by a resolution at a general meeting.

(5) An owners corporation may, if authorised to do so by a resolution at a general meeting, revoke or vary a delegation under this section.

47 Section 54 also relevantly provides:

(1) The instrument of appointment of a strata managing agent may provide that the strata managing agent has and may exercise all the functions of the chairperson, secretary, treasurer or strata committee of an owners corporation or the functions of those officers or the strata committee specified in the instrument.

(2) However, the chairperson, secretary, treasurer and strata committee of an owners corporation may continue to exercise all or any of the functions that the strata managing agent is authorised to exercise.

> (3) Any act or thing done or suffered by a strata managing agent in the exercise of any function of the chairperson, secretary, treasurer or strata committee conferred on the strata managing agent in accordance with this section—
>
> > (a) has the same effect as if it had been done or suffered by the chairperson, secretary, treasurer or strata committee, and
> >
> > (b) is taken to have been done or suffered by the chairperson, secretary, treasurer or strata committee.
>
> ...

48 Section 71 requires a potential agent to disclose to the OC the existence of certain interests before their appointment as agent. Those interests are: any "connection" with the original owner of the property; and any "direct or indirect interest in" the strata scheme (other than as agent).

49 The Act also contains provisions about ongoing disclosure of information by the agent once appointed. Section 58 provides that the OC may require the agent to disclosure particulars of accounts operated by the agent. Particulars of transactions on behalf of the OC may be obtained by the OC under s 59. Section 60 requires disclosure of commissions and training services (including conference attendances) received by the agent, which are to be reported at the owners' AGM.

50 Section 72 gives the Tribunal jurisdiction to review the performance of strata managing agents and building agents. It relevantly provides:

> (1) The Tribunal may, on application by an owners corporation for a strata scheme, make any of the following orders in respect of an agreement for the appointment of a strata managing agent or building manager for the scheme—
>
> > (a) an order terminating the agreement,
> >
> > (b) an order requiring the payment of compensation to a party to the agreement,
> >
> > (c) an order varying the term, or varying or declaring void any of the conditions, of the agreement,
> >
> > (d) an order that a party to the agreement take any action or not take any action under the agreement,
> >
> > (e) an order dismissing the application.
>
> ...
>
> (3) The Tribunal may make an order under this section on any of the following grounds—
>
> > (a) that the strata managing agent or building manager has refused or failed to perform the agreement or has performed it unsatisfactorily,

(b) that charges payable by the owners corporation under the agreement are unfair,

(c) that the strata managing agent has contravened section 58 (2),

(d) that the strata managing agent has failed to disclose commissions or training services (including estimated commissions or value of training services or variations and explanations for variations) in accordance with section 60 or has failed to make the disclosures in good faith,

(e) that the strata managing agent or building manager has failed to disclose an interest under section 71,

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

51 Part 7 of the Act deals with by-laws. The initial by-laws are registered with the strata plan. They may be amended by special resolution.

52 Section 135 imposes requirements to comply with the by-laws. It provides:

135 Requirement to comply with by-laws

(1) The by-laws for a strata scheme bind the owners corporation and the owners of lots in the strata scheme and any mortgagee or covenant chargee in possession, or tenant or occupier, of a lot to the same extent as if the by-laws—

(a) had been signed and sealed by the owners corporation and each owner and each such mortgagee, covenant chargee, tenant and occupier, and

(b) contained mutual covenants to observe and perform all the provisions of the by-laws.

(2) There is an implied covenant by the tenant of a lot or common property to comply with the bylaws for the strata scheme.

Note. The effect of having been taken to have signed and sealed a by-law is that the person is always taken to have known about it.

53 Sections 136 to 139 deal with the content of by-laws. Section 136 is the general provision. It is in general terms:

136 Matters by-laws can provide for

(1) By-laws may be made in relation to the management, administration, control, use or enjoyment of the lots or the common property and lots of a strata scheme.

(2) A by-law has no force or effect to the extent that it is inconsistent with this or any other Act or law.

54 There are then specific provisions regulating the terms of by-laws which can be made with respect to subjects such as occupancy limits on strata units and the keeping of animals. Section 139 imposes various other restrictions limiting the

scope of by-laws. Subsection (1) provides that a by-law "must not be harsh, unconscionable and oppressive".

55 Section 150 gives the Tribunal power to declare by-laws invalid. Such a declaration may be made if the Tribunal considers that the OC had no power to make the by-law, or the by-law is harsh, unconscionable or oppressive for the purposes of s 139(1). The Tribunal also has power under s 148 to nullify changes made to the by-laws. This power may be exercised if, having regard to the interests of the owners the change "should not have been made".

56 Dispute resolution is dealt with in Part 12. The basic provision is s 232(1) which gives the Tribunal power to make orders to settle disputes. For the purpose of applications to the Tribunal, interested persons are defined in ss 226(1) and 226(2). They include other building lot owners and occupiers of a lot.

57 Section 237 gives the Tribunal power to appoint a strata managing agent to a strata scheme where the circumstances require it. Such an appointment is temporary, and cannot exceed two years. The section relevantly provides:

> (1) **Order appointing or requiring the appointment of strata managing agent to exercise functions of owners corporation** The Tribunal may, on its own motion or on application, make an order appointing a person as a strata managing agent or requiring an owners corporation to appoint a person as a strata managing agent—
>
> (a) to exercise all the functions of an owners corporation, or
>
> (b) to exercise specified functions of an owners corporation, or
>
> (c) to exercise all the functions other than specified functions of an owners corporation.
>
> (2) **Order may confer other functions on strata managing agent** The Tribunal may also, when making an order under this section, order that the strata managing agent is to have and may exercise—
>
> (a) all the functions of the chairperson, secretary, treasurer or strata committee of the owners corporation, or
>
> (b) specified functions of the chairperson, secretary, treasurer or strata committee of the owners corporation, or
>
> (c) all the functions of the chairperson, secretary, treasurer or strata committee of the owners corporation other than specified functions.
>
> (3) **Circumstances in which order may be made** The Tribunal may make an order only if satisfied that—

(a) the management of a strata scheme the subject of an application for an order under this Act or an appeal to the Tribunal is not functioning or is not functioning satisfactorily, or

(b) an owners corporation has failed to comply with a requirement imposed on the owners corporation by an order made under this Act, or

(c) an owners corporation has failed to perform one or more of its duties, or

(d) an owners corporation owes a judgment debt.

(4) **Qualifications of person appointed** A person appointed as a strata managing agent as a consequence of an order made by the Tribunal must—

(a) hold a strata managing agent's licence issued under the Property and Stock Agents Act 2002, and

(b) have consented in writing to the appointment, which consent, in the case of a strata managing agent that is a corporation, may be given by the Secretary or other officer of the corporation or another person authorised by the corporation to do so.

(5) **Terms and conditions of appointment** A strata managing agent may be appointed as a consequence of an order under this section on the terms and conditions (including terms and conditions relating to remuneration by the owners corporation and the duration of appointment) specified in the order making or directing the appointment.

…

The appointment of an agent excludes the exercise of the relevant functions of the OC by anyone else: s 56.

2015 Development Act

58 The relevant statutory provisions are found in Part 6 of 2015 Development Act which deals with part strata parcels. Division 1 of Part 6 (ss 99-105) deals with strata management statements.

59 The creation and amendments of strata management statements, and their registration, are dealt with by ss 99 and 101-104. The effect of those provisions is to require the terms of the SMS to be agreed on behalf of the "owner" of each lot in the subdivision. In the case of a strata lot, agreement must come from the OC. In the case of a stratum lot, agreement comes from the registered proprietor of the fee simple, and also any registered proprietor of a leasehold interest. Each of these parties, subject to a limited right to opt out, is then a member of the BMC.

60 A strata management statement is described in s 99 as a management statement "for the building and its site". The form and content of a strata management statement is dealt with by s 100 which provides:

> A strata management statement must be in the approved form and comply with Schedule 4, and that Schedule applies to the statement.

61 Section 105 deals with the effect of strata management statements once registered. It relevantly provides:

> **105 Effect of strata management statement**
>
> (1) A registered strata management statement for a building has effect as an agreement under seal containing the covenants referred to in subsection (2) entered into by each person who for the time being is—
>
> (a) the owners corporation of a strata scheme for part of the building, or
>
> (b) an owner, mortgagee in possession or lessee of a lot in a strata scheme for part of the building, or
>
> (c) another person in whom is vested the fee simple of a part of the building or site affected by the statement, or
>
> (d) the mortgagee in possession or lessee of a part of the building or site referred to in paragraph (c).
>
> (2) The covenants referred to in subsection (1) are—
>
> (a) a covenant by which the persons jointly and severally agree to carry out their obligations under the registered strata management statement, and
>
> (b) a covenant by which the persons jointly and severally agree to permit the carrying out of the obligations.
>
> …
>
> (5) A strata management statement has no effect to the extent that it is inconsistent with—
>
> (a) a condition imposed on a planning approval relating to the site of the building to which the statement relates, or
>
> (b) an order under Part 12 of the Strata Schemes Management Act 2015, or
>
> (c) another Act or law.

62 In schedule 4, cl 1 deals with the form of an SMS. It provides:

> A strata management statement must include the information required by the regulations and must not be inconsistent with—
>
> (a) the conditions imposed on a planning approval relating to the site of the building to which the statement relates, or
>
> (b) this Act or any other Act or law.

63 Clause 2 deals with matters which must be included in an SMS. It relevantly provides (emphasis added):

> (1) A strata management statement must provide for—
>
> (a) the establishment and composition of a building management committee and its office holders, and
>
> (b) the functions of the committee and the office holders **in managing the building and its site**, and
>
> (c) the way in which the statement may be amended, and
>
> (d) the settlement of disputes, or the rectification of complaints, **about the management of the building or its site**, whether by requiring reference of disputes or complaints to the Secretary [of the relevant Stage government department] or Tribunal or, with the person's consent, to any other person for a recommendation or decision or otherwise, and
>
> (e) the **fair allocation of the costs of shared expenses relating to parts of the building**, and
>
> (f) a review process to ensure that the allocation of those costs remains fair with any such review taking place as soon as practicable after any change in the shared facilities or services (including any change in the use of those shared facilities or services), with at least one such review occurring every 5 years even if no such change has occurred, and
>
> (g) the manner in which notices and other documents may be served on the committee.
>
> (2) A strata management statement must include details of the method used to apportion the costs of shared expenses referred to in subclause (1) (e).
>
> (3) Nothing in a strata management statement requires the Secretary or the Tribunal to do anything without the consent of the Secretary or the Tribunal.

64 Clause 4 deals with "other matters". It relevantly provides (emphasis added):

> (1) A strata management statement may include provisions regulating, or providing for the regulation of, any one or more of the following—
>
> (a) the location, control, management, use and maintenance of a part of the building or its site that is a means of access,
>
> (b) the storage and collection of garbage on and from the various parts of the building,
>
> (c) meetings of the building management committee,
>
> (d) the keeping of records of proceedings of the committee.
>
> (2) A strata management statement may include particulars relating to any one or more of the following—
>
> (a) safety and security measures,
>
> (b) **the appointment of a managing agent**,

(c) the control of unacceptable noise levels,

(d) prohibiting or regulating trading activities,

(e) service contracts,

(f) an architectural code to preserve the appearance of the building.

Interpretation and validity of strata title instruments

65 **Strata scheme by-laws**: Authority on the validity and interpretation of by-laws has been influenced by the analogy with the rules in company law about the scope and interpretation of a company's memorandum and articles of association (now its constitution). The development of those rules was traced by McHugh and Gummow JJ in *Bailey v New South Wales Medical Defence Union Ltd* (1995) 185 CLR 399 at 433-440.

66 The precursor to the modern company, which was created by statute upon registration, was an unincorporated joint stock company established under a deed of settlement. The management of the venture and the rights of the investors were governed by the terms of the deed of settlement. They thus bound the initial investors, as parties to the deed of settlement, directly. Subsequent investors were also bound through a requirement on the trustees of the deed of settlement to require incoming investors to execute some form of accession deed under which they were to be bound by those terms.

67 Because the investors' obligations arose by deed, any debts owed by investors as contributories were specialty debts. This gave them a legally preferred status, and in particular a longer limitation period for enforcement.

68 The winding up of joint stock companies was put on a statutory basis by the *Joint Stock Companies Winding-up Act 1848* (11 & 12 Vict c 45) and *Joint Stock Companies Winding-up Amendment Act 1849* (12 & 13 Vict c 108). Those Acts provided for winding up by the court, with a list of contributories to be settled by a Master.

69 In *Robinson's Executor's Case* (1856) 6 De GM & G 572; 43 ER 1356, the question arose in the winding up of the Royal Bank of Australia, which had failed, whether a debt on the list of contributories as settled by the Master was a specialty debt. Stuart VC decided that it was not. The debt was seen as deriving from the statutory winding up process rather than the contributory's

original obligations under the deed of settlement. It also had the benefit of a longer limitation period. This view was confirmed on appeal.

70 The deed of settlement structure was replaced with the modern system of registration of memorandum and articles of the company by the *Joint Stock Companies Act 1856* (19 & 20 Vict c 47). Sections 9 and 10 provided that, once registered, the terms of the memorandum and articles bound the company and its members as if the members had covenanted under seal to observe those terms. They also provided that debts payable by members to the company pursuant to the memorandum and articles of association (in particular, calls) should be deemed to be specialty debts.

71 The enactment of ss 9 and 10 created deemed covenants by the members of the company, but not the company itself, and this feature was carried forward in later enactments in the United Kingdom and Australia, until comparatively recently. Nevertheless, the enactment stated that the memorandum and articles were binding on the company, and it was accepted that the company was so bound: *Australian Coal & Shale Employees' Federation v Smith* (1937) 38 SR (NSW) 48 at 54-55 per Jordan CJ.

72 In *Buck v Robson* (1870) LR 10 Eq 629, Bacon VC stated (at 631) that the enactment had been introduced so as to overcome the difficulty created in *Robinson's Executor's Case*. This fits chronologically with the decision of Stuart VC (which was given in December 1855; the appeal was not decided until December 1856), and was accepted by McHugh and Gummow JJ in *Bailey* at 434. Their Honours referred only to the part of the enactment dealing with specialty debts, whereas Bacon VC spoke in wider terms. But although the enactment went beyond deeming debts as specialty debts (and that part has now fallen away), it all fell within an overall purpose of ensuring that the terms of the memorandum and articles could be enforced as contractual obligations.

73 Under a deed of settlement structure, the original investors, and any new investors in the joint stock company were contractually bound as between themselves in the ordinary way. Ordinary equitable remedies such as specific performance and rectification were available. On the face of it, a memorandum of association would be enforceable as between the subscribers in the same

way as any other contract. But there was a complication when it came to enforcement between the company on the one hand and the subscribers on the other.

74 In *Scott v Frank F Scott (London) Ltd* [1940] Ch 794 an application was made to rectify the memorandum and articles of association of a company on the grounds that the memorandum and articles as registered did not reflect the actual intention of the subscribers to the memorandum. The original subscribers to the memorandum remained the only shareholders in the company at the time the application was made. Nonetheless it was held that rectification was not possible.

75 Luxmoore LJ, giving the judgment of the Court of Appeal, pointed out that the company itself only came into legal existence at the moment of registration. His Lordship referred to the then *Companies Act 1929* (19 & 20 Geo 5 c 23) section which provided that the memorandum and articles were binding on the company and its members as if they had been signed and sealed by each member and contained covenants to observe all of their provisions and continued (at 803):

> It seems plain that this section does not admit of any rectification of the memorandum and articles apart from alterations under the express powers of the Act, for the only contract is a statutory contract in which the Company is included by reference to the registered documents and to no other documents.

76 A further area in which the "statutory contract" diverged from actual contractual relations between the members arose when it became possible by statute to amend the memorandum and articles. This of course allowed for new rules to be imposed on shareholders which they had never actually agreed to. Similarly, previously existing rights could be abrogated without individual consent.

77 As McHugh and Gummow JJ described in *Bailey*, the courts reacted to this by limiting the interpretation of the "statutory contract". Its terms were interpreted as applying only to rights and obligations of a member "in his character as a member". They did not apply to other rights and obligations of "a person who happens to be a member". Thus, a distinction arose between the "statutory contract" and a "special contract" between the company and the shareholder. A

"special contract" (confusingly named, because it is really just a contract of the usual, consensual, type) can incorporate features of the articles but comes into existence as a result of events other than the mere existence of a shareholding. Members' rights and obligations under the "statutory contract" could be varied. But rights and obligations under a "special contract", even if conferred in whole or in part by the articles themselves, could not be.

78 In *Bailey* members of the company (a medical defence union) were entitled under the company's articles to an indemnity against professional negligence claims. The articles were later varied so as, in the case of former shareholders, to replace the previous right to indemnity with a discretionary system. A claim was made against a former shareholder and the company decided not to continue cover. It was held that the original indemnity article was part of a "special contract" with the shareholder, rather than the "statutory contract", and therefore could not be varied so as to deprive the former shareholder of cover.

79 In *Bailey*, McHugh and Gummow JJ saw the law on "special contracts" as a outgrowth of the courts' "concern that persons becoming members should not become bound to do something unrelated to membership of a company as a consequence of a provision one would not expect to find in the constitution of the company in question". Equally there is the concern that members of a company may, by amendment of the constitution, have obligations imposed upon them which are unrelated to membership as such and to which they have not consented. Functionally, the law in this area has some points of comparison with the administrative law doctrine of *ultra vires* which I discuss below.

80 The analysis of rights and obligations between a company and its shareholders under its constitution in terms of "statutory contract" and "special contract" was not challenged in *Bailey*. But as McHugh and Gummow JJ pointed out at 438 the distinction has been criticised. In some quarters the criticism has gone further. Their Honours quoted in their judgment at 435 the first sentence of the following comments about the statutory provision by Professor Sealy (in *Cases and Materials in Company Law* (Butterworths, 5th ed, 1992) at 96):

> [It] was enacted to cover a gap which was thought to have been created when the memorandum and articles replaced the deed of settlement in 1856: neither

> it nor all the subsequent theorising has any relevance to the present-day world. Our legislators should go back to the drawing board.

Strictly speaking, a gap had already arisen before the Act of 1856, but this does not detract from the point Professor Sealy was making.

81 A body of law has also grown up around the interpretation of the "statutory contract" in a company's constitution. At one point it appeared that the test for invalidity on the ground of uncertainty was particularly stringent, so that any ambiguity in a constitutional provision would render it void for uncertainty. The justification offered for this view was that the terms of the "statutory contract" could potentially affect third parties dealing with the company who would only have the terms of the constitution as registered to go on.

82 In *National Roads and Motorists' Association v Parkin* (2004) 60 NSWLR 224, the Court of Appeal rejected that stringent view of uncertainty. An article in a company constitution can be void for uncertainty, but the test is the usual one applicable to contractual uncertainty, namely that the Court is unable to put any definite meaning on the text. Mere difficulty in determining its meaning is not enough.

83 The decision in *Parkin* was seen as turning on the abolition of the doctrine of *ultra vires* in company law. This diminished, if it did not eliminate, the potential for prejudice to third parties dealing with the company law from uncertainty as to the interpretation of internal rules of procedure.

84 Even so, the *Parkin* judgment emphasised that some limitations on the principles ordinarily applicable to the construction of contracts (and in particular commercial contracts) do not apply. In particular, construction by reference to extrinsic circumstances known to the subscribers at the time the constitution was adopted is not permissible. These facts will not necessarily be known to a subsequent purchaser of shares and the meaning of the constitutional provision must be the same for all shareholders whenever their shares were acquired. (This parallels the rule that rectification of a company constitution cannot be obtained even where its terms differ from those which were intended by the initial subscribers). The practical effect is that the factual matrix for the interpretation of a company constitution is very limited, in much the same way as the factual matrix for the interpretation of registered instruments under the

RPA (*Westfield Management Ltd v Perpetual Trustee Company Ltd* (2007) 233 CLR 528 at [35]-[45]).

85 **Strata scheme by-laws**: It is a feature of strata title in New South Wales (and elsewhere) that an owners' corporation, although a body corporate having features similar to those of certain types of company, is not governed by company law. Nevertheless, the "statutory contract" enactment from company law was carried across to the 1961 Act by s 13(6). In fact, s 13(6) of the Act in fact went somewhat further than the then company law provision in this State (s 22(1) of the *Companies Act 1936*) in that the OC was not only expressly bound by the by-laws, but was deemed to have covenanted to abide by them as the members were. This feature has been carried forward and is now found in s 135 of the 2015 Management Act quoted at [52] above.

86 I have not researched the decision to include this provision in the strata title legislation in 1961. Presumably the intention, either directly or indirectly as a result of picking up the company law enactment, was to ensure that by-laws could be contractually enforced between the members and the OC. Despite Professor Sealy's comments, that is not a completely useless exercise. The 2015 Management Act makes provision for the enforcement of an OC's by-laws, including by way of order of the Tribunal (ss 146-147). It gives a contractual jurisdiction to the courts which they might not otherwise have: *North Wind v Proprietors – Strata Plan 3143* [1981] 2 NSWLR 809 at 814D-E.

87 I was referred by both parties in the present case to the judgment of the Court of Appeal in *Owners of Strata Plan No 3397 v Tate* (2007) 70 NSWLR 334 which concerned the interpretation of strata scheme by-laws. In that case, the judge at first instance had applied ordinary principles of contractual construction to the interpretation of a strata scheme by-law. This was rejected by McColl JA (with whom Mason P concurred). Her Honour referred to the more limited approach to the construction of "statutory contracts" in *Parkin*, but also raised the possibility that by-laws are a form of delegated legislation. In the end it was not necessary to make a final decision between the two analyses (which were, in her view, not necessarily inconsistent with each other): see [72]-[73].

88 The potential significance of characterising by-laws as a form of delegated legislation is that, if they are, then administrative law doctrines with the potential to invalidate them would be applicable. Three doctrines are of potential application in the present case.

89 One is that delegated legislation may be void for uncertainty: Pearce and Argument at [22.4]-[22.7]. The second is what Pearce and Argument refer to (at [12.13]) as "simple ultra vires": delegated legislation is only valid to the extent that it operates within the limits, express and implied, of the grant of statutory power. See Pearce, DC and Argument, S, *Delegated Legislation in Australia* (LexisNexis Butterworths, 5th ed, 2017).

90 The third is repugnancy, or as Pearce and Argument term it, inconsistency (see at [19.1]-[19.2]). Delegated legislation is only valid to the extent to which it is consistent with the enabling legislation. The doctrine usually has statutory force, in that a grant of power to make delegated legislation is normally expressly limited to regulations which are "not inconsistent" with the enabling act. But the doctrine itself does not depend upon any such express provision. It also applies to inconsistency with other legislation (except where protected by a "Henry VIII" clause) and with certain common law rights.

91 In the present case, the argument for invalidity based on inconsistency involved the application of an express provision of the 2015 Management Act (s 136(2), quoted at [53] above) which requires by-laws not to be inconsistent with that or any other Act. Clearly this provision applies in its terms even if the by-laws are a species of contract and not delegated legislation. Nor is it necessary to rely on the doctrine of inconsistency with the common law, as opposed to statute.

92 As already noted, invalidity of an instrument because of uncertainty is also a feature of contract law. Following the decision in *Parkin*, (which was cited with approval by McColl JA but would presumably apply equally to by-laws) there appears to be no practical distinction between the scope of such invalidity in contract law or administrative law.

93 But there is no doctrine of simple *ultra vires* in contract law. The main arguments by the parties focused on invalidity because of inconsistency. But

counsel for Walker accepted, as I understood them, that questions of *ultra vires* could arise. Whether by-laws are a type of delegated legislation is therefore relevant for that purpose.

94 With respect, I find the considerations mentioned by McColl JA in *Tate* (at [34]-[70]) persuasive. By-laws apply whether the lot owners and occupiers consent to them or not. Anyone who purchases a strata unit can of course find out in advance what the by-laws say. But the by-laws cannot on any view be seen as wholly voluntary. For one thing, they can be amended. For another, the implications of the text may not be fully appreciated by the purchaser (compare the point made by McHugh and Gummow JJ concerning the statutory contract in company law, quoted at [77] above).

95 In the end, this level of analysis may not be necessary. As will be seen, under the 2015 Management Act there is an express grant of legislative power to make by-laws on specified subjects. However broad that power may be, it must always be possible to argue that a particular by-law falls outside the scope of the enabling enactment.

96 **Strata management statement**: What I have just said about by-laws goes equally for SMSs. There is a "statutory contract" provision (2015 Development Act, s 105, quoted at [61] above) which presumably derives from the equivalent provision in strata title legislation, with the same apparent purpose of assisting in enforcement. An article in an SMS can be void for uncertainty just as a by-law (or a contract) can. There is an express limitation based on inconsistency with the 2015 Development Act or any other Act (Schedule 4, cl 1, quoted at [62] above). And the argument that an SMS is a form of delegated legislation, and cannot go beyond the grant of power in the enabling statute (s 100 and Schedule 4, quoted at [60]-[64] above), is equally persuasive. Indeed, where enforcement against an individual unit owner is in issue it is even more persuasive, because an individual unit owner has no direct input at all into the form of the SMS.

Validity of challenged by-laws

97 Counsel for the defendants divided up the arguments between them, reflecting different emphases in the way in which the cases for their respective clients

had been put. Counsel for the Rebel OC Defendants took the inconsistency argument. Counsel presented this argument first as it applied to the challenged SMS article. In the course of that part of the argument, the *ultra vires* issue arose, as I describe below. Counsel for Mr Quickenden presented the uncertainty argument. I will deal first with the arguments as they applied to the challenged by-laws. In doing so I will deal first with the uncertainty argument.

98 The challenged Residential South OC by-law (by-law 28) provides:

> **Agreement with the Strata Manager**
>
> The Owners Corporation must … appoint and retain under section 27 of the [1996] Management Act the same strata manager that the Building Management Committee appoints under the Strata Management Statement.

99 The terms of the challenged Carpark Wharf OC by-law (by-law 24) are the same. For convenience, I will refer to the challenged by-law in the singular in what follows.

Uncertainty

100 Counsel for Mr Quickenden contended that the challenged by-law is void for uncertainty because, having regard to the terms of the 2015 Management Act, it is not sufficient merely to appoint a qualified person as strata managing agent. A valid appointment also requires the specification of the functions which were to be delegated to that strata managing agent. Furthermore, the terms of the appointment (including the remuneration to which the strata managing agent was to be entitled) have to be negotiated.

101 Counsel submitted that without these matters being agreed between the OC and the strata managing agent there could be no effective appointment. Because the challenged by-law did not specify the relevant details it had no legal content.

102 Counsel relied in support of this argument on observations from Priestley JA in *Gillett v Halwood Corporations Ltd* [1998] NSWCA 281. That case concerned the appointment under the 1973 Act, s 78(1), of a "managing agent" (the then equivalent of a strata managing agent). His Honour stated:

> Section 78(1) states what at first sight seems to be a two step procedure whereby a body corporate may (i) 'appoint a managing agent' and (ii) 'delegate to him … any one or more of its powers, authorities, duties and functions'.

> ‘Managing agent’ is not a term which, simply by itself, carries a precise, recognised meaning. Undefined, it may apply to a wide variety of contractual relationships. For this reason, I doubt whether, if a body corporate, in general meeting and by instrument in writing, appointed a managing agent without any delegation of any power, authority, duty or function, the appointment would have any content. Definite content would require the delegation to the appointee, in like manner to the appointment of the managing agent, of at least one of the corporate body’s powers, authorities, duties and functions. Thus, it seems to me that for the purposes of Pt IV Division 3 it is the delegation of some power, authority, duty or function which constitutes the delegate a managing agent. On this view ‘managing agent’ in s 78 is a convenient name for someone who has been delegated one or more of the relevant powers, authorities, etc.
>
> The concluding words of s 78(1) seem to me to make this particularly clear. A body corporate may revoke an ‘appointment and delegation’ or it may ‘revoke in part the delegation’. That is, revocation of appointment and delegation are co-extensive, but revocation of part of the delegation will leave the appointment as managing agent on foot; put in other words, there can be no managing agency without delegation.
>
> This view is also supported quite precisely, I think, by one of the provisions of s 57. That section dealt principally with the meeting of the body corporate which must be held within one month after the expiration of the initial period defined in s 5. That meeting was to be called the first annual general meeting of the body corporate (subs (3)). One of the items that must be placed on the agenda for that meeting, pursuant to subs (2)(f) of s 57 was
>
> > to decide whether a managing agent should be appointed under s 78(1) by the body corporate and, if a managing agent is to be appointed, which powers, authorities, duties or functions of the body corporate should be delegated to him.
>
> This provision seems to go upon the basis that unless the person or entity designated managing agent had some delegated powers etc then that person or entity would have no such powers etc and the designation managing agent would be nothing more than an empty name.
>
> These considerations show, in my view, that step (i) of the apparent two step procedure is preliminary only, and of no effect until step (ii) is taken, and further that a Pt IV Division 3 managing agent becomes such by the delegation of one or more of the body corporate’s powers etc to him, her or it.

103 The provisions of the 1973 Act to which Priestley JA referred are all reflected in the current provisions of the 2015 Management Act. The provisions of s 78(1) of the 1973 Act concerning appointment and authority, and removal, are now found in ss 49(1), 52(1) and 50(3) of the 2015 Management Act. Section 15(h) corresponds with the provision in the 1973 Act concerning appointment of a strata manager at the initial meeting of the OC.

104 In theory it may be permissible under the 2015 Management Act to have a valid appointment of a strata managing agent without any delegation of the

OC's functions to the agent. The Act refers in s 11(b) to a strata managing agent being appointed so as to "assist" the OC. It may be that an agent could be appointed to "assist" the OC without any delegation of any of the OC's functions to that agent (for instance, "assisting" by providing advice to the OC on request). But clearly that sort of appointment would not be sufficient for Walker in the present case.

105 Perhaps for this reason, counsel for Walker did not appear to dispute that an appointment, to be valid, requires an accompanying delegation. But counsel submitted that such a delegation is bound up with the words "appoint and retain". Determining the scope of the delegation was simply a "constructional choice" and did not affect the validity of the challenged by-law. According to this submission, it was unnecessary for the Court to determine what delegation of authority was required by the by-law; but if, contrary to the argument, it was necessary to do so, the argument apparently was that the by-law effects a delegation of all delegable functions.

106 Before considering the argument further, some of its practical limitations should be noted. In the first place, the power of delegation is constrained by s 52(2) which prevents an OC from delegating certain functions. One of those functions is the making of determinations "relating the levying or payment of contributions" (s 52(2)(c)). Second, the Act contemplates multiple, and apparently possibly overlapping, delegations to one or more strata managing agents, or to other persons. In particular, s 13 expressly contemplates delegation of functions to "a strata managing agent" or "a member of the strata committee". Even if the OC can be required to delegate to the Wharf BMC managing agent all of its delegable functions, the existence of a power to make delegations to other parties of some or all of those same functions could frustrate the delegation in favour of the Wharf BMC managing agent in practice.

107 The delegation of functions to other strata managing agents, or to individual members of the strata committee would not present a practical problem if it was implicitly excluded by the terms of the by-law. It is not necessary for the purpose of this judgment to decide whether it is. But even if it is, s 54(2)

expressly provides that, although functions of the chairperson, the secretary, the treasurer and the strata committee may be delegated to a strata managing agent, the delegation leaves those officers, and the strata committee, free to exercise their statutory functions. For example, in the case of the chairperson, those functions include presiding at general meetings of the OC (s 42). On any view therefore no delegation in favour of the Wharf BMC managing agent can be completely exclusive.

108 I return now to counsel's argument. The first difficulty I have with it is that I do not think that the words "appoint and retain" provide any assistance on the "constructional choice" about the scope of the delegation. There is simply nothing in the text of the challenged by-law which bears on that "constructional choice".

109 But I think there is a more fundamental difficulty with the argument. In order to appoint a strata managing agent, and delegate functions to that agent, the agent must agree to act, and the terms on which the agent will act need to be defined. Most obviously, the agent's rate of remuneration needs to be determined by agreement.

110 The need for such an agreement is recognised in the 2015 Management Act. Section 72 expressly confers jurisdiction on the Tribunal to review, and terminate or vary, the *agreement* with the agent. It is notable that appointment and delegation are not expressly mentioned. Clearly the assumption is that termination or variation of the underlying agreement will flow through to termination or variation of the agent's appointment and termination or variation of the agent's delegation.

111 The Tribunal's power to appoint a strata managing agent as a solution to disputes within the strata scheme (2015 Management Act s 237; see [57] above) likewise recognises the need for an agreement with the agent which underpins the agent's appointment and delegation. No agent can be appointed by the Tribunal without the agent's consent (s 237(4)(b)). And the Parliament was careful to give the Tribunal power to specify the terms of the agreement to be imposed on the OC, including remuneration (s 237(5)).

112 In *Noon v Owners – Strata Plan No 22422* [2014] NSWSC 1260 Darke J had to consider a challenge to a strata scheme by-law which provided for a third-party service provider to have exclusive occupation of parts of the scheme's common property, on condition that the security provider would sublicense those lot owners who wished to have access to those parts of the common property in accordance with a contract between the OC and the service provider. Neither the terms of the contract between the OC and the service provider, nor the terms of the sublicense, were specified in the by-law. As will be seen below, his Honour decided that the by-law was invalid for other reasons; but he also concluded that even if it had not been, it would have been void for uncertainty: see at [71].

113 If Walker's argument is correct, once an agent has been appointed by the BMC as its managing agent, an OC has no alternative but to agree to whatever terms the agent may nominate for accepting appointment as the strata managing agent for that OC. This would include agreeing to pay whatever the agent asked for undertaking the work. And not even this would be sufficient to ensure compliance with the challenged by-law. There would be no way to compel the agent to accept appointment at all if the agent, for whatever reason, declined to do so.

114 To my mind, this absurd consequence shows the unworkability of the challenged by-law. I think that no definite meaning can be ascribed to it. The by-law is void for uncertainty.

115 As a result of this conclusion, the challenged by-law fails as a matter of construction, and it is not necessary to consider other challenges to its validity. Nonetheless, I will do so for the sake of completeness. In doing so I will assume that the by-law does (contrary to my view) sufficiently specify the scope of the delegation, by requiring the OC to delegate all of its delegable functions to the BMC's managing agent.

Ultra vires

116 The *ultra vires* question is whether the challenged by-law has been made "in relation to the management, administration, control, use or enjoyment of the lots or the common property and lots" of the relevant strata scheme within the

meaning of that expression in s 136(1) of the 2015 Management Act. As Basten JA, with whom Macfarlan JA agreed, emphasised in *Cooper v Owners – Strata Plan No 58068* (2020) 103 NSWLR 160 at [12], the language of this part of the Act focuses on the lots and the common property as property. The emphasis is on physical activity which takes place within the three-dimensional spaces which define the lots and the common property. The specific by-law provisions which follow s 136 are of that type.

117 In my view it is difficult to see how the appointment of a strata managing agent to administer the whole of the strata management scheme would fit within this language. Those functions would include the levying and collection of contributions (see 2015 Management Act s 13(1)(b)) and the conduct of strata meetings. While such activities would undoubtedly be part of "management" and "administration" of the strata scheme, they do not in my view readily fall within the concept of "management" or "administration" of the units, or the common property, considered as property.

118 In *White v Betalli* (2007) 71 NSWLR 381, the Court of Appeal upheld the validity of a by-law which gave the proprietor of one of the units in a building the right to store equipment on part of a lot belonging to another proprietor. The case was decided under the 1996 Management Act. At first instance, White J, (as his Honour then was) stated ((2006) 66 NSWLR 690 at [37]) that the only relevant limitations on the scope of permissible by-laws were the express provisions in the Act which prohibited the making of by-laws on particular subjects, and the requirement in the Act that the by-law not be inconsistent with other legislation. His Honour did not mention any limits to the scope of permissible by-laws arising by way of *ultra vires*.

119 On appeal, Santow JA agreed with his Honour. But McColl JA, who dissented, did not. The case was decided only a month or so after her Honour had suggested, with the concurrence of Mason P, that by-laws could be a form of delegated legislation.

120 If it was the intention of White J and Santow JA to deny the application of the doctrine of *ultra vires* to by-laws, then that proposition was not necessary for the decision. Quite clearly, the challenged by-law did involve regulating

activities on the lot in question. The challenge to it was put on a different basis. Furthermore, the 1996 Management Act did not have any equivalent to s 136(1) of the 2015 Management Act and pre-dated the decision in *Cooper*.

121 I am therefore inclined to think that the challenged by-law was *ultra vires*. But the point was not addressed in argument. In view of the conclusions which I have reached elsewhere it is not necessary to make a final decision about it.

Inconsistency with statute

122 The first hurdle which the challenged by-law faces is that by s 49(2) of the 2015 Management Act, the appointment of a strata managing agent requires an ordinary resolution of the OC, passed by a majority of strata lot owners. There is a sense in which the owners meeting in general meeting may be regarded as the OC itself. But counsel for Walker, as I have described, accepted that the imposition of a corporate obligation on the OC to make the appointment would not be sufficient. The OC could not, for instance, validly undertake by contract to make the appointment. In the last resort, it would be necessary for there to be obligations enforceable on the individual lot owners to attend and vote.

123 I question whether any such obligation can be spelt out of the challenged by-law. The by-law purports to impose the obligation on the OC to make the appointment, not on the lot owners to attend a meeting and vote for it. There is nothing in the other by-laws which suggests that they impose any such voting obligation. But if they did, for the reasons which I give below in connection with the challenged SMS article, I think they are inconsistent with other provisions of the 2015 Management Act.

Validity of challenged SMS article

Wharf SMS

124 The Wharf SMS was prepared under the previous version of the Development Act, but the provisions were sufficiently similar to the provisions of the 2015 Development Act which I have quoted above that it is not necessary to refer to the terms of the previous legislation at this point.

125 Consistently with the legislation, the SMS recognises eight “Members” of the building: the OCs (in the case of strata lots), the registered lessees (in the case

of stratum lots) and the registered proprietor of the fee simple. The current Members are the seven OCs; the lessee of the hotel stratum lot, and TfNSW.

126 Consistently with s 105 of the 2015 Development Act, cl 3.2 of the SMS provides that it is binding on all of the Members, as well as the owners and occupiers of strata lots in the Wharf.

127 Clause 3.3 provides:

> A person who must comply with this management statement must not do anything to prevent another person from complying with the management statement.

128 Clause 4 deals with the management structure of the Wharf. As required by the 2015 Development Act Sch 4 cl 3, each of the Members is a member of the BMC (cl 4.1). Clauses 4.3 to 4.5 provide:

> **Who assists the Committee to perform its functions?**
>
> 4.3 The Committee must appoint a Strata Manager to assist in the operation and management of The Wharf. In particular, the Strata Manager may assist the Committee to perform secretarial and financial functions. See clause 8 for more information.
>
> 4.4 The Committee may appoint a Building Manager to assist in the day to day operation of The Wharf and, in particular. the maintenance of Shared Facilities. See clause 9 for more information.
>
> 4. 5 The Committee may enter into contracts with various service providers to assist the Committee perform its functions and obligations under this management statement. In particular, the Committee may enter into contracts for the operation, maintenance. preventative maintenance, repair and replacement of Shared Facilities. The Committee may authorise a third party (eg the Building Manager) to enter into contracts with service providers as agent for the Committee. See clause 6 for more information.

129 The term “Shared Facilities”, referred to in clauses 4.4 and 4.5, is defined as follows:

> **Shared Facilities are:**
>
> (a) services, facilities, machinery and equipment and other items used by two or more Members;
>
> (b) costs for items like the Building Manager, Strata Manager and insurances for The Wharf; and
>
> (c) other facilities and services nominated by or according to this management statement as Shared Facilities.
>
> Shared Facilities include the items in clause 27 and in schedule 1

130 The term “Strata Manager” which is referred to in cl 4.3 is defined. That definition is:

> **Strata Manager** is the strata manager appointed by the Committee under clause 8 to assist in the management of The Wharf and perform administrative, financial management and book keeping functions for the Committee.

131 As referred to in the definition, Clause 8 deals in more detail with the appointment of the Strata Manager. Clauses 8.1 to 8.4 provide:

> **Purpose of the agreement**
>
> 8.1 The Committee has the power to appoint and enter into an agreement with a Strata Manager to assist the Committee perform its functions and, in particular, perform secretarial and financial functions,
>
> **Appointment and delegation of powers**
>
> 8.2 The Committee:
>
> (a) must appoint a Strata Manager to manage The Wharf and provide administrative. financial management and book keeping service according to this clause; and
>
> (b) may, subject to clause 8.4, delegate its functions and the functions of its officers only to the Strata Manager.
>
> 8.3 The Strata Manager must have the licences required by law to be a strata managing agent.
>
> 8.4 The Committee must not delegate these functions to the Strata Manager:
>
> (a) functions which the Committee may exercise only by Unanimous Resolution;
>
> (b) the function to determine and levy Administrative Fund and Capital Works Fund contributions on Members; and
>
> (c) functions which the Committee determines may be performed only by the Committee.

132 The critical provision for present purposes is article 8.11 which provides:

> **Obligations of Owners Corporations**
>
> 8.11 Members which are Owners Corporations must, after the expiry of the initial period for their Strata Schemes, appoint and retain under section 28 of the [1996] Management Act the same Strata Manager the Committee appoints under this clause.

133 In general, decisions of the BMC require an ordinary (majority) resolution. This includes the appointment, or termination of the appointment of, the Strata Manager (clause 17(a)). But certain decisions may only be taken unanimously.

These include amending, adding to or repealing parts of the SMS itself (clause 18(a)).

134 Clauses 20 and 21 set out obligations of the Members, Owners and Occupiers. Clause 21.1 relevantly provides:

> 21.1 In addition to their obligations elsewhere in this management statement, Owners and Occupiers must:
>
> (a) promptly comply with their obligations under this management statement, the Management Act and the Development Act;
>
> (b) comply with decisions of the Committee;
>
> ...

135 Clauses 24.3 and 24.4 impose further obligations on strata lot OCs concerning by-laws. Those clauses provide:

> 24.3 A Member which is an Owners Corporation may add to, change or cancel the by-laws for its Strata Scheme only if:
>
> (a) it consults with the Committee before making the addition, change or cancellation;
>
> (b) it obtains written consent from MMHC; and
>
> (c) the addition, change or cancellation does not conflict with this management statement or the Member's lease with MMHC.
>
> 24.4 A Member which is an Owners Corporation must not make by-laws that are inconsistent with this management statement. If there is an inconsistency, the Owners Corporation must amend the inconsistent by-law to make it consistent with this management statement.

136 Clause 63 deals with resolution of disputes. It applies to "disputes about this management statement" prescribing a procedure whereby the parties to the dispute must endeavour in good faith to resolve it before proceeding with dispute resolution procedure set out in the rest of the clause. The procedure involves the service of a dispute notice; direct negotiations between the parties; mediation; and then expert determination if the dispute has not been resolved. The decision of the expert is final and binding "except insofar as the law allows".

Uncertainty

137 It will be recalled that article 8.11 refers to appointing and retaining the Strata Manager under "section 28" of the 1996 Management Act. That section was the forerunner of s 52(1) of the 2015 Act, which deals with delegation. The

provision of the 1996 Act which dealt with appointment was s 27 (the equivalent of s 49(1) of the 2015 Act), and this was the provision referred to in the challenged by-laws.

138 Counsel for Walker submitted that s 28 might have been referred to because the drafter's purpose was to refer to the "objective of appointment" rather than the mechanism in s 27. Or the reference to s 28 was simply a mistake for s 27 which could be corrected as a matter of construction under the principle in *Fitzgerald v Masters* (1956) 95 CLR 420.

139 Counsel's submission that delegation was the "objective of the appointment" is suggestive. The reference to s 28 may reflect an appreciation on the part of the drafter that appointment on its own was not enough and delegation was required. This tends to reinforce the points I have already made about delegation in connection with the challenged by-laws.

140 But even if the reference to s 28 was only a mistaken reference to s 27, it makes no difference. My reasoning on the uncertainty point in connection with the challenged by-laws applies equally to article 8.11. The article is therefore void for uncertainty. But, as with the by-laws, I will for completeness consider the other grounds of challenge to the article, making the assumption (contrary to my view) that it provides for the delegation of all delegable functions of the OC to the agent so appointed.

Ultra vires

141 In their written submissions, counsel for the defendants conceded that the terms of the Development Act were wide enough to allow the Wharf SMS to require the OCs to appoint the Strata Manager (the BMC's "managing agent") as their strata managing agents. I am not sure whether they continued to maintain that concession by the end of the argument. But in any event the concession does not bind the Court, and I think that its correctness needs evaluation.

142 In *Italian Forum Ltd v Owners – Strata Plan 60919* [2012] NSWSC 895, there was a building scheme for a commercial building containing multiple retail outlets. The SMS required lot owners to pay a contribution towards promotion of the building. This was reflected in a by-law of one of the constituent OCs.

White J considered that there was no apparent difficulty in the SMS imposing an obligation on individual strata lot owners to pay such a levy. His Honour took a wide view of what an SMS might permissibly contain: at [45]. But in the end there was no direct challenge to the SMS in the proceedings before his Honour and it was not necessary to reach a final conclusion on the question.

143 There is nothing in the provisions of the Development Act which expressly delineates the scope of the matters which may be the subject of an SMS. All s 100 does is refer to schedule 4. All that schedule does is to set out the matters which must be included in an SMS and to identify other matters which may be included in it.

144 Nonetheless, s 99 describes an SMS as a "management" statement "for the building and its site". Also, in clause 2 of schedule 4, the functions of the BMC are "in managing the building and its site" (sub-paragraph (b)) and the dispute resolution provisions in subparagraph (d) likewise deal with disputes and complaints about "the management of the building or its site". The question therefore arises whether requiring the appointment of a particular person as strata managing agent by a constituent OC is part of the "management … of the building and its site".

145 Counsel for Walker submitted that the Court should take a wide view of the scope for an SMS to manage the building, including individual strata lots. Counsel argued that this submission was supported by the language of the objects of the Development Act, which include how lots are to be "dealt with" (s 3(b)). But counsel for the defendants pointed out that the term "dealing" is often used in a transactional sense, and it is used (although not universally) in that sense in the Act. In my view the reference in the objects is too general to be of any use in resolving the specific issue about the permissible width of an SMS.

146 Counsel for Walker nonetheless maintained that the effective management of the building may involve interference with the use of the strata units by their owners. Obviously there may be activities within a unit which affect occupants of other strata or stratum lots in the Wharf. So much may be accepted. But in my view there must be some limit to this argument. Not everything which happens within a unit will affect residents of other stratum or strata lots. And

many of the administrative and financial aspects of the relationship between the parties to a strata scheme have no physical effect at all.

147 Counsel for Walker responded that an agent charged with the management of the whole building may indeed have a real interest in the administrative and financial relationship between unit owners and their OC. Counsel gave as an example the collection of levies. As the expenses of the building are ultimately defrayed from contributions by unit owners, there may be, so counsel submitted, a vital interest in ensuring that these amounts were paid and paid promptly.

148 In my view this argument proves too much. It may be that the operation of the Wharf under two different levels of management would be less efficient than otherwise. But the same thing could be said of many other features of the unit-owner democracy which is built into strata title. Perhaps the Wharf would run more efficiently if there were no separate OCs within it at all. But it has not been set up that way.

149 I think there are other features of schedule 4 which suggest that there must be some limitations on the scope of "management … of the building and its site". Two in particular stand out.

150 First, clause 2 recognises that issues will arise as to the allocation of costs of "shared expenses" (subparagraph (e)). Those "shared expenses" derive from "shared facilities or services" (subparagraph (g)). The reference to "shared" facilities and services implies that where such facilities are not "shared" then the resulting expenses fall outside the purview of the BMC.

151 A comparison between the regulation of "shared" expenses under a building scheme and OC expenditure under a strata scheme reinforces the point. In a building scheme the allocation of "share" expenses is largely left to the terms of the SMS and the judgment of the BMC. In a strata scheme there is an elaborate system of regulation which governs expenditure by the OC and the raising of levies to pay for that expenditure. It cannot have been intended that that system could be displaced by framing the SMS so as to treat all of the expenditure on facilities and services by OCs within the building as expenses of managing the scheme as a whole.

152 It is not necessary in the present case to draw the line between what activities within units in a building scheme, and what facilities and services supplied to visitors and occupants, may, and what may not, be regulated by an SMS. Nor is it necessary to determine whether an SMS may regulate the internal affairs of a constituent strata scheme, and if so, which affairs. The point is that some line has to be drawn. In my view the "management … of the building and its site" does not, in the natural meaning of that phrase, extend to the complete takeover of management of all of the function which may be delegated by an OC to a strata managing agent under the 2015 Management Act.

153 The second feature of schedule 4 is the term "managing agent" in clause 4. It is notable that clause 4 speaks of "particulars". This is a strange term to have used in the context. Its usual meaning is a particular instance which illustrates a wider principle. Therefore, it is natural to read clause 4 as referring to particular instances of wider powers conferred in the schedule, even if implicitly.

154 The reference in subclause (2)(f) to an "architectural code" illustrates the point. Although earlier clauses do not specifically say so, the understanding must be that the BMC has power to specify rules governing the external appearance of the building. The adoption of such a code is a "particular" of that (implied) grant of power.

155 In my view the word "agent" is significant. Agents are people who do things that principals might do for themselves. In its natural meaning, I think the term "managing agent" refers to a person who is to discharge functions of the BMC under the SMS, rather than discharging separate functions of a strata managing agent under a constituent strata scheme. So understood the appointment of a "managing agent" fits naturally as a "particular" of the earlier conferral of powers and functions on the BMC.

156 It is true that the phrase "managing agent" was used in the 1973 Act and in the 1986 Act to refer to what is now termed a "strata managing agent". Counsel for Walker, building on the concession made by counsel for the defendants, submitted that when the phrase derives from the 1992 amendments to those

Acts which introduced building schemes, it should be interpreted as having the same meaning.

157 There is some analogy between the positions of a BMC, its members, and a managing agent in a building scheme and the positions of an OC, the strata lot owners and a strata managing agent in a strata scheme. But the analogy is far from exact. In particular, an OC is not the owner of its strata lot in a building scheme in the way in which individuals own their strata units in a strata scheme. Nor is there any element of common property in a building scheme.

158 One practical illustration of the difference arises from the fact that a building scheme may include stratum lots as well as strata lots (as the Wharf does). If the argument for Walker is correct, then an SMS could contain an article requiring that the owner of such a stratum lot appoint and retain a "managing agent". What would the distribution of powers be between an agent so appointed and an unco-operative owner or leaseholder of the lot? There is no meaningful analogy with the provisions of the Management Act which would allow that question to be answered.

159 For these reasons I think that the past use of the term "managing agent" in both the Management and Development Acts is too slender a basis to support counsel's argument. It does not displace the prima facie reading of the term as a reference to an agent of the BMC.

160 Counsel for Walker also submitted that even if the appointment of a strata managing agent to an OC did not fall within the reference to appointing a "managing agent" in clause 4 of Schedule 4, the appointment could be made under the BMC's power to make "service contracts". But for the reasons I have given I think that the phrase "service contracts" must be confined to services provided to the BMC, and this does not include acting as a strata managing agent for a constituent OC.

Inconsistency with statute

161 There was a debate between counsel as to the applicable principles that I should use in deciding whether the by-law was "inconsistent" for the purpose of s 105(5). Counsel for Walker referred me to the principles stated by the High Court in *Ferdinands v Commissioner for Public Employment* (2006) 225 CLR

130 at [47]-[49]. But that case concerned inconsistency of Commonwealth and state statutes under s 109 of the *Australian Constitution*, which is a somewhat different field of discourse.

162 In the end, there is no need to go into the authorities in this field, or even to discuss in any detail the authorities on repugnancy or inconsistency of delegated legislation. I understood it to be common ground that the concept of inconsistency is not limited to what is sometimes called "direct" inconsistency: conflicting demands which cannot both be obeyed, or irreconcilable legal rights or obligations. It extends to indirect conflicts between a right and an obligation which results in one practically negating the other. Beyond that, cases in this area turn on the particular terms of the relevant statutes and regulations.

163 Counsel for the defendants advanced various arguments for inconsistency. In summary, I thought they came down to three points.

164 First, counsel argued that the effect of article 8.11 was to transfer the choice of an OC's strata managing agent from the OC to the Wharf BMC. This infringed the prohibition on delegation of functions under s 10(2) of the 2015 Management Act.

165 Second, counsel submitted that article 8.11 was inconsistent in effect with s 49. Under that section, the decision to appoint a strata managing agent, and if so, who was to be appointed and on what terms, was that of the OC. Article 8.11 also derogated from the OC's right to obtain review of an appointment by the Tribunal under s 72. If the Tribunal considered that a case was a proper one for termination of the appointment and removal of the agent, this would, for practical purposes, be nullified by an obligation on the part of the lot owners to reappoint the agent.

166 Counsel stressed that the powers conferred on the OC were to be exercised in the interests of the lot owners. This duty could not be reconciled with an obligation to appoint a nominated person in all circumstances, overriding a good faith belief that the appointment was not proper. Such an obligation would also effectively render the requirements on an agent to provide information, which are obviously directed towards deciding whether to appoint, or continue the appointment of, the agent, nugatory.

167 Thirdly, article 8.11 overrode the right of individual lot owners to vote at the general meeting as they chose in deciding whether to select, and if selecting, who, as the agent. Again this would be inconsistent in effect with s 49.

168 Counsel for Walker submitted that there was nothing impermissible about a strata lot owner making a contract which obliged the lot owner to vote in a particular way at a general meeting of the OC. The enforceability of such a contract is well accepted in the parallel case of company shareholders. No question of breach of fiduciary duty arises, because shareholders' votes are not subject to fiduciary obligations.

169 It is worth noting how far Walker's argument that the members of the OC are required to vote goes in practice. In the first place, the obligation must necessarily include attending the meeting, in person or by proxy, to ensure that the resolution does not fail for want of a quorum. Second every member of the OC must be obliged to attend and vote, even though an ordinary resolution is all that is required; there is no practical way to limit the obligation to only a sufficient majority of members.

170 In my view the present case differs from the case in which a company shareholder agrees to vote in a particular way in general meeting. It is one thing for a lot owner to make a contract with a third party or another owner to vote in a particular way. It is quite another to impose upon all of the lot owners, as a result of their status as such, an obligation to do so. If article 8.11 does work in the way for which Walker contends, it would make the meeting a charade.

171 The importance of lot-owner democracy is shown by the Parliament's reluctance to interfere with it. The Tribunal's power under s 237 to take the appointment of the strata managing agent out of the hands of lot owners is limited to circumstances where there is no practical alternative if the scheme is to function. Even where the power is exercised, the maximum period of appointment is two years: 2015 Management Act s 237(7). In my view article 8.11 is indeed inconsistent with the 2015 Management Act.

172 This conclusion is I think consistent with another aspect of the decision of Darke J in *Noon*. I have already mentioned that his Honour considered that the

by-law in question was void for uncertainty. His Honour would also have struck down the by-law on the ground that it cut across rights of the lot owners over the common property. As in this case, the effect of the challenged by-law was inconsistent, directly or indirectly, with the exercise of rights secured by the Management Act.

Immunity of Mr Quickenden

173 Mr Quickenden's argument for immunity relied on s 260 of the 2015 Management Act. That section provides:

> (1) A matter or thing done or omitted to be done by any of the following persons, or a person acting under the direction of any of those persons, does not, if the matter or thing was done or omitted to be done in good faith for the purpose of executing functions as such a person under this or any other Act, subject any of the following persons or person so acting personally to any action, liability, claim or demand—
>
> (a) an officer of an owners corporation,
>
> (b) a member of a strata committee.
>
> (2) Any such liability of an officer of an owners corporation or a member of a strata committee attaches instead to the owners corporation.

174 As already noted, it became clear at the hearing that Walker was contending that the challenged SMS article was directly enforceable against individual lot owners as parties to the "statutory contract". Walker sought declaration (and if necessary enforcement) of an alleged personal obligation on his part as a member to vote to appoint McCormacks as the strata managing agent. The decision to join him as a party may have been motivated by his conduct as an officer of the Residential South OC, but that is beside the point. The nature of Walker's claim made him a proper party. Whether the other individual lot owners were necessary parties and had to be joined was not debated and does not now need to be considered.

175 It follows that s 260 does not protect Mr Quickenden from the claim by Walker which was the subject of the hearing. It is not necessary to go into his good faith. I overrule the objection to his joinder.

Validity of McCormacks' appointment

176 As I have noted, there was a disagreement between the parties as to whether I should consider the challenges made to McCormacks' appointment as

managing agent of the Wharf BMC. But in the light of the conclusions which I have reached, I am not sure how significant this issue is. I propose not to deal with it for the moment. The parties can then consider my judgment and indicate whether a decision on any of the points which were argued remains necessary.

Conclusions and orders

177 I have concluded that the challenged SMS article and the challenged by-laws are invalid. To that extent, Walker's claim fails and the defendants' cross-claims succeed. I will make declarations in appropriate form on the cross-claims. It is not clear to me whether any further hearing will be necessary. I will adjourn the matter to allow the parties an opportunity to consult on the form of orders to give effect to my judgment, and costs, if that can be agreed.

178 The orders of the Court are:

(1) Adjourn the proceedings to 9:30 am on 30 September 2022 or such other time as may be arranged with my Associate.

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

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