Court of Appeal
Supreme Court

New South Wales

Case Name:	Walker Corporation Pty Ltd v The Owners – Strata Plan No 61618
Medium Neutral Citation:	[2023] NSWCA 125
Hearing Date(s):	14 April 2023
Date of Orders:	5 June 2023
Decision Date:	5 June 2023
Before:	Leeming JA at [1] Mitchelmore JA at [2] Kirk JA at [59]
Decision:	1. The application for leave to appeal is granted. 2. The applicant is to file and serve a notice of appeal in the form of the draft notice of appeal within 7 days. 3. The appeal is dismissed with costs.
Catchwords:	LAND LAW — Strata title — Strata managing agent – where three owner corporations of Finger Wharf development at Woolloomooloo passed resolutions terminating appointment of strata managing agent and appointing new one – where strata managing agent is different to managing agent appointed for Wharf as a whole by building management committee as a result – where clause of strata management statement (“SMS”) required owners’ corporations to “appoint and retain” the same strata managing agent as the building management committee appoints as strata manager for Wharf as a whole – whether clause of SMS inconsistent with Strata Schemes Management Act 2015 (NSW), not authorised by Strata Schemes Development Act 2015 (NSW) or uncertain

Legislation Cited:	Strata Schemes Development Act 2015 (NSW) Strata Schemes Management Act 1996 (NSW) Strata Schemes Management Act 2015 (NSW)
Cases Cited:	The Owners – Strata Plan No 74232 v Tezel [2023] NSWCA 35 White v Betalli (2007) 71 NSWLR 381; [2007] NSWCA 243
Category:	Principal judgment
Parties:	Walker Corporation Pty Limited (Applicant) The Owners - Strata Plan No 61618 (First Respondent) Robert Edmund Quickenden (Second Respondent) Jeffrey Kent Smoot (Third Respondent) Alexander Peter Kathestides (Fourth Respondent) Cynthia Jean Jackson-Nagy (Fifth Respondent) Fotoulla Lazaridis (Sixth Respondent) Paul Margolin (Seventh Respondent) Vivian Paraskevi Mavrocordatos (Eighth Respondent) The Owners - Strata Plan No 61770 (Ninth Respondent) Annabelle Romaine Warren (Tenth Respondent) Laslo Abonyi Nagy (Eleventh Respondent) Lilting House Pty Limited (Twelfth Respondent) The Owners - Strata Plan No 61619 (Thirteenth Respondent) Douglas Thomas Dean (Fourteenth Respondent) Schielang Pty Limited (Fifteenth Respondent) Anthony Mervyn MacDonald Miller (Sixteenth Respondent) Hall Plain Superannuation Fund Pty Limited (Seventeenth Respondent) Christopher William Townsend (Eighteenth Respondent) McCormacks NSW Pty Limited (Nineteenth Respondent) Strata Choice Pty Limited (Twentieth Respondent)
Representation:	Advocates: J Ireland KC (Solicitor) (Applicant) JS Emmett SC and J Jaffray (First to Eleventh, Thirteenth to Fourteenth, Sixteenth, Eighteenth and Twentieth Respondents)

	Solicitors: McGirr Lawyers Pty Limited (Applicant) Gilchrist Connell (First to Eleventh, Thirteenth to Fourteenth, Sixteenth, Eighteenth and Twentieth Respondents)
File Number(s):	2022/318549
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Supreme Court of New South Wales
Jurisdiction:	Equity
Citation:	[2022] NSWSC 1246
Date of Decision:	16 September 2022
Before:	Parker J
File Number(s):	2022/176310

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

HEADNOTE

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

The applicant, Walker Corporation Pty Ltd, owns lots in two of the seven strata schemes in the Finger Wharf development at Woolloomooloo, Sydney. It brought proceedings in the Supreme Court in relation to resolutions passed by three strata schemes, by which the three owners corporations terminated the appointment of McCormacks NSW Pty Ltd ("McCormacks") as strata managing agent and appointed Strata Choice Pty Ltd ("Strata Choice") in its place. It argued that, by doing so, the three owners corporations breached cl 8.11 of the strata management statement ("SMS") for the Wharf, which required the

owners corporation of each strata lot in the Wharf to appoint and retain the same strata managing agent as the building management committee (“BMC”) appointed as the Strata Manager. It also contended that two owners corporations had breached a provision of their by-laws, which was in similar terms to cl 8.11.

By way of separate cross-claims, the three owners corporations and the Chairperson of one of the owners corporations challenged the validity of cl 8.11 and the equivalent by-laws. As to cl 8.11, invalidity was alleged on the basis that the clause was inconsistent with the *Strata Schemes Management Act 2015* (NSW) (“the Management Act”), beyond the power conferred by the *Strata Schemes Development Act 2015* (NSW) (“the Development Act”), and uncertain. Justice Parker upheld each of those arguments.

The applicant sought leave to appeal, which application was heard concurrently with the appeal. It argued that the resolutions breached the obligation in cl 8.11 to “retain” McCormacks. Absent amendment of the SMS, which required a unanimous resolution at a meeting of the BMC, the obligation in cl 8.11 could not be outflanked by resolutions at the level of individual owners corporations.

The Court (Mitchelmore JA, Leeming and Kirk JJA agreeing), granting leave to appeal and dismissing the appeal, held:

(1) It is appropriate to grant leave to appeal in light of the general importance of the proper construction of the provisions of the Development Act and the Management Act: at [10].

(2) Clause 8.11 of the SMS is inconsistent with the Management Act and consequently contrary to s 105(5) of the Development Act. The Management Act contemplates that decisions about the appointment of a strata managing agent and the powers or duties to be delegated to it are to be made by the lot owners acting through an owners corporation. The legislative intent is that the owners corporation has primary responsibility for managing the strata scheme and its powers of delegation are to be exercised for the benefit of lot owners. Inconsistently, cl 8.11 extinguishes the right of the owners corporation, in a

general meeting, to appoint a strata managing agent of its choosing, and to terminate that agent's services if necessary: at [10], [37]-[53].

(3) Clause 8.11 is not authorised by the Development Act. The statutory concept of an SMS as a "management" statement "for the building and its site", and the functions of the BMC as "managing the building and its site" do not extend to a complete takeover of management of all the functions which may be delegated by an owners corporation to a strata managing agent. Additionally, the list in cl 4 of Sch 4 of the Development Act of the matters for which an SMS may provide does not support an SMS that effectively prescribes the management arrangements for the individual strata schemes which form part of the building: at [10], [54]-[55].

(4) Given the Court's findings in relation to inconsistency and ultra vires it is not necessary to consider whether cl 8.11 is also invalid for uncertainty: at [10], [36], [56].

JUDGMENT

1 **LEEMING JA:** I agree with Mitchelmore JA.

2 **MITCHELMORE JA:** This application for leave to appeal concerns the validity of certain resolutions passed by the owners corporations of three of seven strata schemes in the Finger Wharf development at Woolloomooloo, Sydney. By those resolutions, the owners corporations terminated the appointment of McCormacks NSW Pty Ltd ("McCormacks") as strata managing agent and appointed Strata Choice Pty Ltd ("Strata Choice") in its place.

3 By way of background, pursuant to the legislative predecessor of the *Strata Schemes Development Act 2015* (NSW) ("the Development Act"), the Wharf was divided into eight three-dimensional lots, seven of which were further subdivided by way of a registered strata plan and constitute independent strata title schemes. The registered strata management statement for the Wharf ("SMS") established a building management committee ("BMC") which, among other things, was responsible for appointing a Strata Manager. Clause 8.11 of the SMS required the owners corporation of each strata lot in the Wharf to appoint and retain the same strata managing agent as the BMC appointed as the Strata Manager.

4 Before late May 2022, McCormacks was both the Strata Manager for the Wharf and the strata managing agent for each of the strata schemes. That position changed as a result of the resolutions passed at extraordinary general meetings of the owners corporations of the strata schemes known as Residential South, Carpark Wharf and The Promenade, in late May and early June 2022.

5 The applicant, Walker Corporation Pty Ltd, owns one lot in Residential South and two lots in Carpark Wharf. It brought proceedings in the Supreme Court contending that the owners corporation of those three strata schemes had breached cl 8.11 of the SMS in terminating the appointment of McCormacks as strata managing agent and appointing Strata Choice. The applicant also contended that by this conduct, Residential South and Carpark Wharf breached a provision of their respective by-laws, which was in similar terms to cl 8.11.

6 The owners corporations of Residential South, Carpark Wharf and The Promenade were active respondents on the application for leave, along with certain individual and corporate lot owners. McCormacks was also a respondent but it did not participate in the appeal.

7 In the court below, the three owners corporations and the second respondent, who was the Chairperson of the owners corporation of Residential South, filed cross-claims. Although there was some variation between them, central to each cross-claim was a challenge to the validity of cl 8.11 of the SMS on the basis that it was inconsistent with the *Strata Schemes Management Act 2015* (NSW) ("the Management Act"), was otherwise beyond the power conferred by the Development Act, or, alternatively, was uncertain. The cross-claimants also challenged the validity of the similarly-worded provision in the by-laws of Residential South and Carpark Wharf.

8 Parker J conducted an expedited hearing limited to the validity of cl 8.11 and the equivalent by-law, on the basis that other issues raised on the cross-claims would only require determination if the applicant succeeded on that anterior issue. His Honour concluded that cl 8.11 of the SMS was uncertain, inconsistent with the provisions of the Management Act, and beyond the scope

of the provisions of the Development Act dealing with strata management statements. His Honour also concluded that the impugned by-laws were uncertain and inconsistent with the provisions of the Management Act.

9 Although the draft notice of appeal raised seven proposed grounds of appeal, the applicant's written and oral submissions on the leave application reduced to a core point. The applicant contended that pursuant to s 105(1) of the Development Act, the SMS was binding on each of the owners corporations. Terminating McCormacks' appointment breached cl 8.11 of the SMS. Absent amendment of the SMS, which required an unanimous resolution at a meeting of the BMC, the obligation in cl 8.11 could not be outflanked by resolutions at the level of individual owners corporations.

10 The respondents opposed the grant of leave to appeal on the basis of the merits of the application. They contended that the applicant's argument in support of leave did not engage with his Honour's conclusion that cl 8.11 was invalid. In order to succeed on the appeal, the applicant needed to identify error with respect to each of the bases on which his Honour reached that conclusion; and it had not done so.

11 The application for leave to appeal was heard concurrently with the appeal. In light of the general importance of the proper construction of the provisions of the Development Act and the Management Act, I would grant leave to appeal. However, I would dismiss the appeal. The primary judge was correct to conclude that cl 8.11 was contrary to s 105(5) of the Development Act on the basis of inconsistency with provisions of the Management Act, and that it was otherwise not authorised by the Development Act. (It may be that there is an overlap between those two grounds but it is unnecessary to express a view on the point and I have addressed them separately.) It is unnecessary in those circumstances to consider whether the clause was also invalid for uncertainty.

12 The respondents filed a draft Notice of Contention, contending that if the applicant succeeded on any of its appeal grounds the primary judge should have confined the declaratory relief by reference to the inconsistency of the disputed clauses with the legislation and uncertainty, so as not to cut across

other relief that was the subject of the various cross-claims. As I would dismiss the appeal, it is unnecessary to consider the Notice of Contention.

Background to the application for leave

13 There was no challenge to the primary judge's summary of the background against which the issues for consideration arose. The Wharf is owned by a government instrumentality, currently Transport for New South Wales: J [6]. As I noted above, the Wharf structures have been divided into eight three-dimensional lots, seven of which were further subdivided by way of a registered strata plan. The eighth lot has not undergone a strata subdivision and was referred to by the primary judge as the "stratum lot": J [3].

14 Section 99(1) of the Development Act provides that the Registrar-General must not register a plan as a strata plan that creates a part strata parcel "unless the Registrar-General also registers a strata management statement for the building and its site" (see also s 10(1)(d)). The term "strata management statement" is defined in s 4 of the Development Act to mean "a strata management statement that complies with section 100". Section 100 provides that a strata management statement must be in the approved form and comply with Sch 4 of the Act.

15 In accordance with ss 10(1) and 99(1) of the Development Act, the SMS for the Wharf was registered with the strata plan that created the seven strata lots and the stratum lot. Clause 2.2 of the SMS provided that the owners corporation for each strata lot was a member of the BMC (referred to in the SMS as "the Committee"), as was the leaseholder of the stratum lot and the owner of the freehold. The BMC was "responsible to manage and operate The Wharf on behalf of the Members according to this management statement": cl 66.

16 Pursuant to cl 4.3 of the SMS, the BMC was required to appoint a Strata Manager, with cl 8.2(a) broadly describing the Strata Manager's role as "manag[ing] The Wharf and provid[ing] administrative, financial management and book keeping services according to this clause". Clause 8.2(b) permitted the BMC to delegate its functions and the functions of its officers to the Strata Manager (subject to some limitations in cl 8.4 which are not presently relevant).

Clause 17(a) of the SMS provided that the appointment (or termination) of the Strata Manager must be determined by resolution of the BMC.

17 Clause 8.11 was central to this application and provided:

> **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 [*Strata Schemes Management Act 1996* (NSW)] the same Strata Manager the Committee appoints under this clause.

18 Section 28 of the *Strata Schemes Management Act 1996* (NSW) ("1996 Management Act"), to which cl 8.11 referred, was the predecessor of s 52(1) of the Management Act, which deals with the owners corporation delegating functions to the strata managing agent. There was a suggestion below that the reference to s 28 may have been a typographical error, and that the intended reference was to s 27, which dealt with appointment of the strata managing agent: J [139]. Ultimately it was, and remains, unnecessary to resolve this issue.

19 Clause 18 of the SMS listed the matters for which an unanimous resolution of the BMC is required. Those matters included, in paragraph (a), "amending, adding to or repealing parts of this management statement".

20 As I noted above, the by-laws for Residential South and Carpark Wharf contained an equivalent provision that required the owners corporation to appoint as its strata managing agent the strata manager appointed by the BMC: J [16]. Although the draft notice of appeal does not take issue with the primary judge's decision on the by-laws, his Honour's reasoning on the by-laws was applied to cl 8.11 in some respects. The primary judge extracted by-law 28 of the Residential South scheme (which is identical to by-law 24 of the Carpark Wharf OC by-laws) at [100]:

> **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.

21 Unlike cl 8.11, both by-laws referred to s 27 of the 1996 Management Act, which was the legislative predecessor of s 49(1) of the 2015 Management Act: J [139].

22 As Parker J observed, for more than twenty years there was no dispute about aligning the management of the Wharf with the management of the seven strata schemes: J [14]. Relevantly to the current dispute, on 12 March 2019 the BMC engaged McCormacks as the Strata Manager for the Wharf, and in December 2021 extended its contract: J [12]. McCormacks was also duly appointed as the strata managing agent for each of the seven strata schemes: J [14]-[15]. In late May and early June 2022, the owners corporations of Residential South, Carpark Wharf and The Promenade passed the impugned resolutions terminating the appointment of McCormacks and appointing Strata Choice: J [15].

The decision of the primary judge

23 It was common ground in the proceedings below that the issues of construction which arose (and which now arise on the application for leave to appeal) should be considered by reference to the current legislation: J [35]-[40].

24 The primary judge first addressed the validity of the challenged by-laws and the argument that they were void for uncertainty, which his Honour accepted: J [116]. The second respondent, who was separately represented below, submitted that it was not sufficient merely to appoint a qualified person as the strata managing agent, because ss 49(1) and 52(1) of the Management Act also required specification of the functions to be delegated: J [102]. The challenged by-laws did not identify the specific functions which were to be delegated to the strata managing agent, nor did they provide for the terms of that appointment, and certain terms (such as remuneration) would have to be the subject of negotiation.

25 The primary judge rejected the applicant's argument that determining the scope of the delegation bound up with the words "appoint and retain" was a "constructional choice" which did not affect the validity of the challenged by-law: J [107]-[112]. His Honour considered that if the applicant's argument was correct, "once an agent has been appointed by the BMC as its managing agent, an [owners corporation] has no alternative but to agree to whatever terms the agent may nominate for accepting appointment as the strata managing agent for that [owners corporation]": J [115]. This was an "absurd

consequence" that showed the unworkability of the by-law, to which no definite meaning could be ascribed: J [116].

26 Although his Honour's conclusion on uncertainty was sufficient to invalidate the challenged by-law, "for the sake of completeness" his Honour also determined the issue of inconsistency: J [117]. His Honour referred to s 49(2) of the Management Act, which provides that the appointment of a strata managing agent requires an ordinary resolution of the owners corporation. His Honour observed that the challenged by-law purported "to impose the obligation on the owners corporation to make the appointment, not on the lot owners to attend a meeting and vote for it": J [124]-[125]. His Honour considered that this gave rise to inconsistency between the terms of the challenged by-law and the provisions of the Management Act, which invalidated the by-law.

27 The primary judge was also "inclined to think that the challenged by-law was ultra vires", on the basis that it went beyond the scope of the power to make by-laws in s 136(1) of the Management Act, for "the management, administration, control, use or enjoyment of the lots or the common property and lots" of the relevant strata scheme: J [119]. However, the point was not addressed in argument and it was unnecessary to make a final decision about it: J [123].

28 In relation to cl 8.11 of the SMS, his Honour adopted the same reasoning on uncertainty as his Honour had applied to the challenged by-laws and concluded that cl 8.11 was uncertain: J [142]. On the question of ultra vires, which was argued in relation to cl 8.11, his Honour observed that the clause required the appointment of a particular person as a strata managing agent over a multi-strata scheme, and the delegation of all functions which may be delegated by an owners corporation under the Management Act. His Honour considered that this took the clause outside the scope of s 99 of the Development Act, which describes an SMS as a "management" statement for "the building and its site": J [146], [154]. His Honour also had regard in this context to clauses in Sch 4 of the Development Act which made more detailed provision for the content of strata management statements and which, in his

Honour's opinion, limited the scope of "management…of the building and its site".

29 Finally, his Honour addressed the question of inconsistency in relation to cl 8.11. His Honour first referred to s 105(5) of the Development Act, which provides:

> 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) any other Act or law.

30 The terms of s 105(5) bear some similarity to the terms of cl 1 of Sch 4 of the Development Act, which relevantly provides that a strata management statement "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.

31 Senior counsel for the owners corporation respondents submitted in this regard that the effect of cl 8.11 was to transfer the choice of strata managing agent from the owners corporation to the BMC, which infringed the prohibition on the delegation of functions under s 10(2) of the Management Act. Senior counsel also submitted that the clause was inconsistent in effect with s 49 of the Management Act, which placed the decision to appoint a strata managing agent and, if so, on what terms, with the owners corporation. Further, the clause derogated from the right of the owners corporation to apply to the Tribunal for review of an appointment pursuant to s 72 of the Management Act. If the Tribunal considered that the appropriate relief in such a case was for termination and removal of the agent, that would "for practical purposes", be nullified by an obligation on the part of the lot owners to reappoint the agent: J [166]-[167]. More generally, the clause "overrode the right of individual lot owners to vote at the general meeting as they chose in deciding whether and whom to select as the agent": J [169].

32 In response, the applicant 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 [owners corporation]". It contended that the enforceability of such a contract was "well accepted in the parallel case of company shareholders": J [170].

33 The primary judge concluded that cl 8.11 of the SMS was inconsistent with the Management Act. In rejecting the applicant's argument, his Honour stated at J [172]-[173]:

> "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.
>
> 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."

The application for leave to appeal

34 The focus of the draft notice of appeal was cl 8.11 of the SMS. As I noted above, the seven proposed grounds in the draft notice of appeal were refined to a central contention in the applicant's written and oral submissions. The applicant submitted that following the appointment of McCormacks as Strata Manager for the Wharf, cl 8.11 of the SMS required each of the owners corporations to appoint McCormacks as strata managing agent. Further, the language of "appoint and retain" in the clause required each of the owners corporations not to terminate McCormacks' appointment as strata managing agent for so long as it remained under contract as Strata Manager. In passing the impugned resolutions in late May and early June 2022, the owners corporation of each of Residential South, Carpark Wharf and The Promenade had breached the obligation to "retain" McCormacks.

35 The applicant relied on s 105(1) of the Development Act, which provides that a registered strata management statement for a building "has effect as an

agreement under seal" which is binding upon, among others, the owners corporation of a strata scheme for part of the building and an owner of a lot in a strata scheme for part of the building. The SMS could only be amended by an unanimous resolution, which was absent; and in those circumstances the purported resolutions were in defiance of the SMS and invalid.

36 The applicant submitted that as the issue was one of contract, the primary judge's "excursus" into other issues was unnecessary and irrelevant. Save for this submission, the applicant did not engage with the reasoning by which the primary judge concluded that cl 8.11, on which it relied, was invalid. As the respondents submitted, the applicant needed to establish error in relation to each of the three bases on which the primary judge considered cl 8.11 was invalid.

37 The respondents' submissions sought to defend all three bases, but only one need be upheld to maintain the orders of the primary judge. Although his Honour upheld the argument regarding the uncertainty of the terms of cl 8.11 and only addressed the inconsistency and *ultra vires* arguments for completeness, as the latter two arguments are directed to the scope of the power to make strata management statements it is appropriate to consider them first.

38 His Honour was correct to conclude that cl 8.11 of the SMS was invalid by reason of s 105(5) of the Development Act, because it was inconsistent with the provisions of the Management Act which place the appointment and functions of the strata managing agent in the hands of the lot owners, acting through the owners corporation.

39 In *White v Betalli* (2007) 71 NSWLR 381; [2007] NSWCA 243 at [204], in a passage the respondents extracted in their written submissions, Campbell JA described the strata legislation as establishing "a statutory framework within which a type of local community can be created and administered". His Honour described that community as one "where co-ownership, and the physical proximity of spaces that the owners are entitled to occupy, create the opportunity for both cooperation and conflict". In *The Owners – Strata Plan No 74232 v Tezel* [2023] NSWCA 35 at [31], I observed that the objects in s 3 of

the Management Act recognise those diametrically opposed possibilities, expressing the dual aim of providing “for the management of strata schemes” and “for the resolution of disputes arising from strata schemes”.

40 The principal responsibility for the management of a strata scheme is vested in the owners corporation, which is constituted under s 8 of the Management Act: s 9(1). The responsibility imposed on the owners corporation is “for the benefit of the owners of lots in the strata scheme”, and includes management and control of the use of the common property (s 9(2)(a)), and the administration of the scheme (s 9(2)(b)).

41 Pursuant to s 10(2) of the Management Act, an owners corporation must not delegate any of its functions to a person “unless the delegation is specifically authorised by this Act”. Pursuant to s 13(1), certain functions of an owners corporation may be delegated to or conferred only on a member of the strata committee or a strata managing agent, including the levying of contributions, the taking out of insurance, the conduct of meetings of the owners corporation, and the maintenance of records required to be kept under the Act.

42 Part 4 of the Management Act deals with the appointment and responsibilities of strata managing agents. Pursuant to s 49(2), the appointment of a strata managing agent must be made “by instrument in writing authorised by a resolution at a general meeting of the owners corporation”. Section 50 prescribes the term of a strata managing agent, restricting it to three years if not terminated earlier by the authority of a resolution at a general meeting of the owners corporation. Section 52 then deals with delegation of the owners corporation’s functions to a strata managing agent, with s 52(1) providing that, by instrument appointing a strata managing agent “or some other instrument”, an owners corporation may 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.

43 Section 52(4) further provides that an owners corporation “may delegate the functions only if authorised to do so by a resolution at a general meeting”, while s 52(5) provides that a resolution is also required to revoke or vary a delegation

pursuant to s 52. Section 54 permits the instrument of appointment of a strata managing agent to provide for the agent to exercise all or specified functions of the office holders or strata committee of the owners corporation.

44 The provisions of the Management Act to which I have referred contemplate that questions of whether there should be a strata managing agent, who that should be, and which powers or duties should be delegated to it, are to be decided by the owners corporation from time to time. Specifically, ss 49(2), 50(2) and 50(3) of the Management Act provide that the appointment, reappointment or termination of a strata managing agent must be effected by way of a resolution at a general meeting of the owners corporation. The delegation of functions must also be so authorised: Management Act, s 51(1). The Management Act also includes provisions by which the strata managing agent is to report to the owners corporation on the performance of its functions (see for example ss 55 and 58-61). These requirements collectively reflect the importance to lot owners of the appointment of a strata managing agent, of the agent's performance of the functions that an owners corporation delegates to it, and of ensuring the ongoing accountability of the agent to lot owners through the owners corporation.

45 As the respondents submitted, in the face of these provisions it was "entirely unsurprising" that the primary judge found that cl 8.11 the SMS was inconsistent with the Management Act. The provisions to which I have referred evince an intention that it is the owners corporation which has primary responsibility for the management of a strata scheme, with obligations to exercise its functions and powers, including the power of delegation, for the benefit of lot owners. Clause 8.11 extinguished the right of the owners corporation, in general meeting, to appoint a strata managing agent of its choosing, and to terminate that agent's services if that was considered necessary.

46 Additionally, as the respondents further submitted, cl 8.11 was inconsistent with the jurisdiction that s 72 of the Management Act confers on the Tribunal to review the performance of strata managing agents and building agents. The powers of the Tribunal in this regard include terminating an agreement to

appoint a strata managing agent in circumstances where the agency agreement is “harsh, oppressive, unconscionable or unreasonable”: subss 72(1)(a) and (3)(f). The conferral of this power on the Tribunal is not constrained, inter alia, by the terms of a strata management statement.

47 The inclusion of unreasonableness as a basis on which to terminate an agency agreement may be contrasted with the restriction on the power to make by-laws, which is confined to by-laws which are “harsh, unconscionable or oppressive”: s 139(1). The power of the Tribunal to invalidate a by-law is correspondingly confined to by-laws meeting that statutory description: s 150(1).

48 The respondents also drew attention to s 139(7) as having separate significance. It provides that community management statements and precinct management statements (made under other legislation) prevail over by-laws, but makes no reference to strata management statements made under the Development Act. A provision of a similar nature appears in the Development Act, namely, s 155. It is in Part 10 of the Act, which deals with the strata renewal process for freehold strata schemes and is not directly relevant to the issues in this case. What is of note is that s 155(1) provides that “[i]f there is any inconsistency between the [Management Act] and this Part or an order of the court made under this Part, this Part and the order prevail to the extent of the inconsistency”. The provision illustrates that the legislature has considered the interaction between the Development Act and the Management Act and has made express provision in particular circumstances as to which is to prevail.

49 Returning to the Management Act and the provisions dealing with dispute resolution, in Part 12 of the Management Act, the “interested persons” who may apply to the Tribunal are defined in ss 226(1) and 226(2); the latter refers to where an application relates to a strata scheme for a part strata parcel and includes, in (a), “a strata managing agent for… any other scheme affecting the building”. As the respondents submitted, the Management Act contemplates different strata managing agents for different schemes within a building.

50 Section 232(1)(c) of the Management Act confers power on the Tribunal to make orders to settle disputes or rectify complaints, including about "an agreement appointing a strata managing agent or a building manager". Section 232(4) and (5) apply specifically in relation to part strata parcels, and provide:

> (4) **Disputes involving management of part strata parcels** The Tribunal must not make an order relating to a dispute involving the management of a strata scheme for a part strata parcel or the management of the building concerned or its site if—
>
> (a) any applicable strata management statement prohibits the determination of disputes by the Tribunal under this Act, or
>
> (b) any of the parties to the dispute fail to consent to its determination by the Tribunal.
>
> (5) The Tribunal must not make an order relating to a dispute involving a matter to which a strata management statement applies that is inconsistent with the strata management statement.

51 Although s 232(4) and (5) might at first blush be thought to tell against the general tenor of the respondents' contentions in reliance on the provisions of the Management Act, I accept their submission that the references to a strata management statement in s 232(4) and (5) assume a strata management statement that complies with the provisions of the Development Act, including, relevantly, s 105(5)(c). Put another way, the subsections take as their starting point a valid strata management statement.

52 Pursuant to s 237(1) of the Management Act, the Tribunal may appoint a strata managing agent to a strata scheme. However, the power of appointment is subject to s 237(3), which provides 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.

53 As the primary judge recognised, s 237 demonstrates the importance of lot owner democracy under the Management Act, with the Tribunal's power to take the appointment of the strata managing agent out of the hands of lot

owners limited to circumstances “where there is no practical alternative if the scheme is to function”: J [173]. Further, such an appointment is temporary, and cannot exceed two years: s 237(7).

54 It is apparent from the provisions of the Management Act to which I have referred that the primary judge did not err in concluding that cl 8.11 of the SMS was inconsistent with provisions of the Management Act and, in accordance with s 105(5) of the Development Act, was invalid.

55 His Honour’s conclusion that cl 8.11 was invalid on the basis that it was not authorised by the provisions of the Development Act was also correct. As set out above, the term “strata management statement” is defined by reference to s 100 of the Development Act. Section 100 provides that a strata management statement must be in the approved form and comply with Sch 4 of the Act. Clause 2(1) of Sch 4 lists the matters for which a strata management statement must provide, including, in (a), the establishment and composition of a building management committee and its office holders, the functions of the BMC and its office holders “in managing the building and its site”, and in (c), “the way in which the statement may be amended”. Clause 4, which is headed “Other Matters”, relevantly provides as follows:

> (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 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.

(3) This clause does not limit the matters that may be included in a strata management statement.

…

56 As the primary judge observed at [154], the description in s 99 of an SMS as a “management” statement “for 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[s] which may be delegated by an [owners corporation] to a strata managing agent” under the Management Act. I note that the description in cl 2(1)(b) of Sch 4 of the functions of the BMC as “managing the building and its site” uses similar language to s 99. Additionally, and significantly, the content of cll 4(1) and 4(2), even though expressed to be without limitation (in cl 4(3)), does not support a strata management statement effectively prescribing the management arrangements for individual strata schemes forming part of the building.

57 In circumstances where cl 8.11 of the SMS is invalid as a matter of power, it is unnecessary to determine whether the clause is also invalid on the basis of uncertainty.

Conclusion

58 I propose the following orders:

(1) The application for leave to appeal is granted.

(2) The applicant is to file and serve a notice of appeal in the form of the draft notice of appeal within 7 days.

(3) The appeal is dismissed with costs.

59 **KIRK JA:** I agree with Mitchelmore JA.

****

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.