STRATA LAW: AN UPDATE FROM THE PERSPECTIVE OF THE SUPREME COURT

Address delivered at the 19th Annual Australian College of Strata Lawyers (ACSL) Strata Law Conference on 6 March 2024

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1 Strata is widely considered the key to supporting urban development in growing cities. In New South Wales, more than 1.2 million people live within a strata scheme, which is roughly 17% of the population. Large-scale property developments are also growing in prevalence. There are 89,000 strata schemes in NSW with an estimated property value of $456.4 billion.[2] Projections are that by 2040 over 50% of people in Greater Sydney will be living in strata buildings.[3]

2 It is in this context that there has been a communal incentive to clarify the legislative framework for the creation, variation, termination and management of strata schemes,[4] as governed by the *Strata Schemes Management Act* 2015 (NSW) (Management Act) and the *Strata Schemes Development Act* 2015 (NSW) (Development Act).

3 The point that strata law is both interesting and complex need not be laboured. However, while strata law is often considered through the prism of land law, the topic is imbued with the additional complexities of characterising the nature of an owners corporation, and understanding its interaction with the legal rights of both individual lot owners and third parties. The ownership structures which exist over individual lots and common property within a strata scheme, and the

1 I acknowledge the assistance of my associate, Jasmine Robertson, and tipstaff, Daniel Reede, in the preparation of this paper.

2 City of Futures Research Centre, *Australasian Strata Insights 2022* (June 2023).

3 New South Wales Parliament, *Report on the statutory review of the Strata Schemes Development Act* 2015 *and Strata Schemes Management Act* 2015 (November 2021).

4 New South Wales, *Parliamentary Debates,* Legislative Assembly, 22 November 2023 (Mr Anoulack Chanthivong).

often colourful interactions between lot owners, create fertile ground for disputes to arise in a rapidly evolving and unique area of law.[5]

4 The purpose of this paper is to consider strata disputes from the perspective of the Supreme Court, and that entails consideration of the jurisdiction limits of the Court relative to NCAT.

The appropriate forum for resolving strata disputes in NSW

NCAT

5 Obviously, strata disputes in NSW are ordinarily commenced in the NSW Civil and Administrative Tribunal (NCAT). The Community Land List (formerly the Strata and Community Schemes List) and the Strata Schemes List sit in the Consumer and Commercial Division of NCAT. The 2022-2023 NCAT Annual Report reported that 1657 strata disputes were commenced in the period between July 2022 and June 2023 with the division having a clearance rate of 88.4% within a year. Thus, NCAT plays a critical function in the efficient adjudication of most strata disputes in NSW.

6 The NSW Supreme Court has jurisdiction to hear strata disputes pursuant to its inherent jurisdiction as the superior court of the state. Strata matters are predominantly heard in the Real Property List, within the Court's Equity Division. The statistics released for the final quarter of 2023 show that the Real Property List has a clearance rate of 111% for proceedings commenced within that year (but statistics on matters involving strata have not been collected).

7 There has been significant judicial and tribunal consideration of the limits and scope of NCAT's jurisdiction,[6] and the mechanisms embedded in the

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[5] In February 2024, the Strata and Property Services Commissioner, John Minns, made the following statement: "The whole issue around housing supply, around affordability, and ultimately social and economic wellbeing, requires strata to be successful and requires people to have confidence in strata, and I guess the concern is there are areas where confidence is waning". See Caitlin Fitzsimmons, "'Confidence is waning': New strata commissioner's urgent task to support high rise city", *Sydney Moring Herald* (2 February 2024).

[6] See eg *Vickery v Owners – Strata Plan No 80412* (2020) 103 NSWLR 352 where the Court of Appeal considered NCAT's jurisdiction to hear a claim for damages under the Management Act, see especially consideration at [26]-[56] (Basten JA with whom White J agreed). See also *Coscuez*

Management Act to ensure that the efficient disposal of most strata disputes remains accessible, and as far as possible, not litigious. For example, pursuant to s 227 of the Management Act, applications to NCAT in most strata disputes will not be accepted without demonstrating the parties have first participated in mediation.

The tribunal's jurisdiction

8 Whilst the Supreme Court has general jurisdiction to adjudicate any strata dispute, there are also legislative mechanisms in place to deter parties commencing strata proceedings in the Supreme Court unless necessary. For example, s 253 of the Management Act stipulates that a successful plaintiff may be liable to pay the costs of a proceeding if the Court is of the opinion that the commencement of proceedings in the Supreme Court was unnecessary in circumstances where the Management Act otherwise makes sufficient provision for NCAT to dispose of the issues in dispute.

9 The NSW Court of Appeal explored this issue in *EB 9&10 Pty Ltd v The Owners – SP 934* (2018) 98 NSWLR 889. In that case the primary judge, Kunc J, had ordered that the successful plaintiff pay the defendant's costs of the proceedings. This was on the basis that "notwithstanding the plaintiff's success, the Court is required by s 253(2) of the Management Act to order the plaintiff to pay the defendant's costs. The Court has no discretion in the matter once it has formed the opinion referred to in s 253(2)".[7] The plaintiff had commenced proceedings in the Supreme Court seeking declaratory relief in relation to its right to use part of the common property.

International Pty Ltd v The Owners-Strata Plan No 46433 [2022] NSWCATAP 147 where the NCAT Appeal Panel considered whether the tribunal has the power to make money orders under s 232 of the Management Act, which confers power on the Tribunal to make orders to settle disputes. .

[7] *EB 9 & 10 Pty Ltd v Owners SP 934 (No 2)* [2018] NSWSC 546 at [26]. For completeness, s 253(2) provides: "In any proceedings to enforce any such right or remedy, the court in which the proceedings are taken must order the plaintiff to pay the defendant's costs if the court is of the opinion that, having regard to the subject-matter of the proceedings, the taking of the proceedings was not justified because this Act or the Community Land Management Act 2021 makes adequate provision for the enforcement of those rights or remedies".

10 Justice Kunc found that the Management Act made sufficient provision for lot owners to enforce rights in relation "any lot or common property" pursuant to s 253, and that it is irrelevant that NCAT does not have power to grant declaratory relief, because the relevant consideration is whether the Management Act makes "adequate provisions" for the subject-matter of the proceedings.

11 On appeal, Barrett AJA, with whom Meagher and Gleeson JJ agreed, commented (at [44]):

> By posing the question whether the 1996 SSM Act made "adequate provision" for the enforcement of a right or remedy existing outside the statutory scheme, s 226(2) directs comparison of the ways in which it is possible to "enforce" the right or remedy under the statutory scheme with the ways in which the external litigation allowed it to be "enforced". If the statute provides access to means of enforcement that are, from the perspective of the person who has the right or remedy, at least as effective as the means achievable through external litigation, the conclusion must be that the 1996 SSM Act makes such "adequate provision". It may be, at least in the abstract, that a finding of "adequate provision" will be available even if the means of enforcement available under strata titles legislation are, by comparison, less secure or less effective.

12 The appeal was dismissed.

The NSWSC and NSWCA

13 Nevertheless, there remain discrete circumstances where the Supreme Court is the appropriate forum to determine particular strata disputes. For example, where equitable relief is being sought, proceedings ought to be commenced in the Supreme Court and a growing body of case law considers the availability of equitable remedies to an owners corporation.[8] Furthermore, in certain circumstances the legislation confers exclusive power on the Supreme Court to

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[8] See, for example, *Trentelman v The Owners – Strata Plan No 76700* (2021) 106 NSWLR 227 where the Court of Appeal considered the operation of proprietary estoppel where representations were made to an owners' corporation that rights to access a pool located on an individual lot in the scheme would be unaffected by a development proposal. An argument was advanced by the appellants that an estoppel could only arise in this context if it could be proven that each lot owner within the scheme had detrimentally relied on the representation made. At [179] Leeming JA commented that "Equity's regard for substance over form causes … doubt [regarding] the submission". The appeal from Parker J's first instance judgment in favour of the owners corporation was dismissed. Special leave was refused with costs on 13 May 2022: [2022] HCATrans 98.

determine an application under the relevant par,[9] such as terminations considered below.

14 Questions of contractual and statutory construction are also commonly explored in superior jurisdictions. In *Walker Corporation Pty Ltd v The Owners – Strata Plan No 61618* [2023] NSWCA 125, the Court of Appeal considered whether a particular provision of the strata management statement that governed the Woolloomooloo Finger Wharf Development (the Wharf), and a similarly worded by-law, was inconsistent with the Management Act, beyond the power of the Development Act, or, alternatively, uncertain.

15 The Wharf is made up of eight lots. Seven of the eight lots in the development were subdivided by a registered strata plan and are constituted as independent strata schemes. The eighth lot has not undergone a strata subdivision and is referred to as the stratum lot. The strata management statement (SMS) for the Wharf established a building management committee (BMC) which was responsible for appointing a strata manager.

16 The disputed clause required that the owners corporations of each strata scheme within the development appoint the same strata manager, as that appointed by the BMC. The BMC was comprised of the owners corporation of each strata scheme, as well as the leaseholder of the stratum lot (which, as mentioned above, is part of the development but has not undergone a strata subdivision) and the owner of a separate freehold lot. It was responsible to manage and operate the Wharf on behalf of the members, according to the SMS.

17 McCormacks NSW Pty Ltd (McCormacks) was the strata manager for the Wharf and each of the strata schemes until late May 2022. In late May and early June 2022, this changed pursuant to resolutions passed at the extraordinary general meetings of three of the strata schemes, referred to as Residential South, Carpark Wharf and the Promenade. The applicant, Walker Corporation

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[9] See, for example, *Strata Schemes Management Act 2015* (NSW), s 129: "In this Part: court means Supreme Court…".

Pty Ltd, owned three lots in Residential South and Carpark Wharf. It contended that the three aforementioned strata schemes breached cl 8.11 of the SMS by terminating McCormacks and appointing Strata Choice Pty Ltd. Clause 8.11 read as follows:

> Obligations of Owners Corporations
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> 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 The applicant further contended that Residential South and Carpark Wharf breached a provision of their respective by-laws, which were in similar terms to terms to cl 8.11 of the SMS. Each by-law read as follows:

> Agreement with the Strata Manager
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> 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.

19 Parker J made the following determinations at first instance:

(1) The by-law was void for uncertainty. The relevant provisions of the Act, being ss 49(1) and 52(1), required specification of the functions to be delegated to the strata managing agent, yet the by-laws failed to identify the delegated functions, nor did they provide for the terms of appointment (therefore terms such as remuneration were open to negotiation).

(2) His Honour rejected the applicant's argument that the words "appoint and retain" was a constructional choice which did not affect the validity of the by-law, as it would produce a result whereby an owners corporation would have no alternative but to agree to the terms the agent may nominate. This "absurd consequence" showed the unworkability of the by-law to which to definite meaning could be ascribed. His Honour adopted the same reasoning when concluding that cl 8.11 of the SMS was also void.

(3) The by-law was also invalid as it was inconsistent with s 49(2) of the Management Act, which provides that the appointment of a strata managing agent ”is to be made by instrument in writing authorised by a resolution at a general meeting of the owners corporation”. Instead, the by-law imposed the obligation on the owners corporation to make the appointment, not on lot owners to attend a meeting and vote in compliance with the process set out by s 49(2).

(4) Clause 8.11 was outside the scope of s 99 of the Development Act. 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 or waives, under subsection (2), the requirement for a strata management statement.” Clause 8.11 required the appointment of a particular person as strata manager of a multi-strata scheme, and also required the delegation of all functions which may be delegated by an owners corporation under the Management Act. His Honour considered this went beyond the purpose of an SMS which is a statement to manage "the building and its site", which, in turn, has a narrow scope of meaning when read in the context of other clauses in Sch 4 of the Development Act.

(5) Finally, his Honour found that the clause was inconsistent with the Management Act as it transferred the choice of strata managing agent from the owners corporation to the BMC which infringed the prohibition on delegated functions. Specifically, 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".

20 On appeal, Mitchelmore JA (with whom Leeming and Kirk JJA agreed) concluded at [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.

21 Her Honour also commented (at [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.

22 It was ultimately unnecessary for the Court of Appeal to determine whether the clause was void for uncertainty. The appeal was dismissed.

23 The Court of Appeal also plays an important review function within the NSW Strata Regime. The recent decision in *Sunaust Properties Pty Ltd t/as Central Sydney Realty v The Owners – Strata Plan No 64807* [2023] NSWCA 188 illustrates this point. In that case, a dispute arose between the owners corporation and the caretaker of a strata scheme over two buildings in Ultimo. The caretaker brought Supreme Court proceedings against the owners corporation seeking payment of amounts due under the 2001 Caretaker Agreement under which they had been appointed. The owners corporation filed a cross-application claiming set-off for alleged overcharging. Those proceedings remain on foot.

24 In December 2020, the owners corporation brought NCAT proceedings against the caretaker, pursuant to s 72 of the Management Act, seeking to terminate the Caretaker and to transfer the lots to a new building manager. Those orders were made and the caretaker appealed to the NCAT Appeal Panel (Appeal Panel). The Appeal Panel considered that it did not have jurisdiction to hear the matter due to the concurrent Supreme Court proceedings. The matter was remitted to the Tribunal pursuant to orders made on 27 June 2022. On the same day the matter was remitted, the owners corporation sought to reopen the

appeal on the basis that some grounds of appeal had not been considered. The owners corporation referred to s 63 of the *Civil and Administrative Tribunal Act 2013* (NSW) in support of this application, which provides:

> (1) If, after the making of a decision by the Tribunal, the President or the member who presided at the proceedings is satisfied that there is an obvious error in the text of a notice of the decision or a written statement of reasons for the decision, he or she may direct a registrar to alter the text of the notice or statement in accordance with the directions of the President or the member.
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> (2) If the text of a notice or statement is so altered, the altered text is taken to be the notice of the Tribunal's decision or the statement of its reasons, as the case may be, and notice of the alteration is to be given to the parties in the proceedings in such manner as the President or member may direct.
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> (3) Examples of obvious errors in the text of a notice of a decision or a statement of reasons for a decision are where--
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> > (a) there is an obvious clerical or typographical error in the text of the notice or statement, or
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> > (b) there is an error arising from an accidental slip or omission, or
> >
> > (c) there is a defect of form, or
> >
> > (d) there is an inconsistency between the stated decision and the stated reasons, or
> >
> > (e) there is an inconsistency between the name of a person stated in the text of the notice or statement and the name stated on the person's birth certificate or other form of identification.

25 The appeal was reopened, and the Appeal Panel dealt with the further grounds of appeal but ultimately decided not to change its original decision, and made orders to that effect on 27 October 2022. The Caretaker then appealed to the NSW Court of Appeal.

26 Two issues were on appeal: first, whether the Appeal Panel had the power to make the 27 October 2022 orders; and secondly, whether the Appeal Panel erred in concluding that the Tribunal had jurisdiction under s 72 of the Management Act to make orders in relation to the Caretaker Agreement. On the first issue, which is most relevant here, Basten AJA (with whom Meagher JA agreed) stated (at [162]):

> The conclusion that the power to reopen the earlier decision was not only available, but was also the appropriate course in the present case, flows from the obligation imposed by the guiding principle in s 36(1) to facilitate the just, quick and cheap resolution of the real issues in the proceedings, applied to the exercise of the power to reopen. It is true that in the present case the issue of jurisdiction was squarely raised by the applicant in its appeal to the Appeal Panel, and that it was the owners corporation which sought to have the question of jurisdiction resolved. However, as explained above, had the Appeal Panel failed to resolve that question, it would simply have delayed, at greater expense to the parties and the Tribunal, the final resolution of an issue which was undoubtedly central to the application before the Tribunal and was then unresolved.

27 On the second issue, Basten AJA (with Meagher and Stern JJ agreeing in principle) upheld the decision of the Appeal Panel and concluded that NCAT has jurisdiction to make orders in relation to agreements. The appeal was ultimately dismissed.

28 Noting this context, the purpose of this paper is to provide an update on issues effecting strata law in NSW, which have recently been considered by the Supreme Court. This comes at a time where the *Strata Legislation Amendment Act* 2023 (Amendment Act) has been in operation for just over three months.

29 The mechanisms of termination and collective sale also play a critical remedial function in circumstances where most of the lot owners consider a strata scheme has practically failed.

Collective upgrade or dispose of strata developments

30 One of the objects of the Development Act, as defined in s 3(c), is to "provide for…the variation, termination and renewal of strata schemes". These objects are then dealt with in Parts 9 and 10 of the Development Act.

31 Part 9 of the Development Act outlines the process for variation or termination of strata schemes. The powers conferred on the Supreme Court to make an order pursuant to Part 9 are unqualified and discretionary. There are only a small number of reported judgments concerning applications to terminate strata schemes under Part 9. Of the schemes that have been terminated, the decision to seek termination orders were either unanimous or repairing the building was

so commercially unviable, that demolition of it was the only sensible option. This paper will not traverse the operation of Part 9 in great detail.

32 Part 10 outlines the process for the collective sale of a strata scheme. Since its introduction under the 2015 legislative reforms, only 12 strata schemes have notified the Registrar General of having received the required support for a renewal proposal.[10] The strata renewal process has been described as follows:

> The strata renewal process was intended to overcome barriers to urban renewal created by the rigidity of the previous scheme. It draws on the collective decision-making process that is a hallmark of strata ownership, and offers transparency through several key stages, with a court approval process as a final safeguard.[11]

33 When the Strata Schemes Development Bill 2015 was read for the second time in the Legislative Assembly, one of the key intentions of the reforms was to empower lot owners with an effective and transparent process for how to deal with a building as it ages.

34 This was recently considered in some detail in the "Mascot towers" case, *The Owners – Strata Plan No 80877 v Lannock Capital 2 Pty Ltd* [2023] NSWSC 1401.

"Mascot Towers"

35 The media has given a lot of attention to the unfortunate turn of events that have unfolded at a mixed-use development consisting of two high rise towers in Mascot. There has been much public interest in the various legal proceedings over the last five years where stakeholders have attempted to mitigate losses that have been suffered as a result of defective construction.

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[10] New South Wales Parliament, Report on the statutory review of the Strata Schemes Development Act 2015 and Strata Schemes Management Act 2015 (November 2021), p 23.

[11] New South Wales Parliament, *Report on the statutory review of the Strata Schemes Development Act 2015 and Strata Schemes Management Act 2015* (November 2021) p 23.

36 The factual matrix in the proceedings was novel, and required the Court to explore various complex principles of strata and property law.

37 The following questions were answered:

(1) First, when is it appropriate for the Court to exercise its discretion to order the termination of a strata scheme under s 136 of the Development Act?

(2) Secondly, if an owners corporation owes existing debts to an unsecured lender, should the lender take priority over mortgagees who have registered mortgages over individual lots within the strata scheme, in circumstances where there are unlikely to be sufficient funds to repay all debts owed?

(3) Thirdly, in what circumstances would it be more appropriate for the owners to seek the Land and Environment Court's approval of a collective sale under Part 10 of the Development Act, rather than a termination?

38 A brief outline of the relevant facts follows.

39 The Mascot Towers strata plan was registered on 30 July 2008 and construction was completed in 2009. Between 2011 and 2018, several building defects were becoming obvious, and by 2019 during a routine inspection, significant structural cracks were identified in the transfer beams of the building. The building was subsequently deemed to be unsafe and at risk of collapse, necessitating an evacuation order.

40 After the building was evacuated, the owners corporation engaged building consultants about the rectification of the towers. The cost of rectification was estimated to have been many millions of dollars. By August 2019, at an extraordinary general meeting, the owners resolved to carry out some remedial works by raising a special capital works levy in the amount of $7 million. The

special levy was payable over nine months. The decision to raise the $7 million levy was made in alternative to the option of obtaining finance from a financier, such as Lannock Capital 2 Pty Ltd (Lannock).

41 However, by October 2019, the owners decided to pursue a different course. The special levy was rescinded and the owners agreed to pursue a $10 million finance facility with Lannock to fund the rectification works.

42 At this time, the owners corporation was also incurring various legal fees. For example, proceedings against the original builder/developer of Mascot Towers were already on foot. Separately, around this time the owners corporation received advice that some of the issues affecting Mascot Towers may have been caused by the construction of a neighbouring building known as Peak Towers. The proceedings against the builder/developer eventually settled and in 2023 the proceedings against Peak Towers also settled for an undisclosed figure.

43 By September 2020, when owners still had no access to their lots, Lannock proposed a further $22.5 million facility to fund rectification works. By this time, the estimated cost of rectification was $33.8 million.

44 In November 2020, the owners corporation entered into that second Lannock facility.

45 During this period, the owners were simultaneously exploring the option of a collective sale pursuant to Part 10 of the Development Act. After several months of negotiations, the highest bidder had made an offer to purchase the whole of the strata scheme of $40.5 million. At the time the further Lannock facility was entered, the collective sale was still being progressed. In April 2021, a firm offer of $42 million was received.

46 By this point, the owners were informed by the strata comittee that a projected total repair cost of $45 million could be expected. There were therefore three options on the table:

(1) repairing the building,

(2) pursuing a collective sale, and

(3) an option which did not properly crystalise until July 2021, seeking a termination order.

47 Ultimately the owners resolved to make an application to the Supreme Court for an order terminating the strata scheme. The decision to do so was not unanimous. The application was also contested by Lannock, who had total outstanding debts of just under $16 million at the time the termination application was made.

48 The other defendants were:

(a) the financial institutions, who hold mortgages over individual lots in the scheme;

(b) a registered lessee of two lots within the scheme; and

(c) an individual lot owner.

49 These parties did not actively resist the termination order, but did seek to protect their registered interests and were primarily concerned with the form of appropriate orders, should a termination order be made.

Termination orders

50 As noted above, the power to order termination of a strata scheme under s 136 of the Development Act is an unqualified discretion. Section 136(1) of the Development Act provides that the "court may, on an application…make an order terminating a strata scheme". Without repeating the analysis of the existing authorities, which appears at paragraphs [40]-[60] of the judgment, the relevant considerations for the Court to consider are varied and there is limited judicial commentary on how the discretion ought to be appropriately exercised.

A summary of the principles appears at [70] of the decision, where the Court opined:

> As accepted in the authorities above, the termination power under s 136 ought be used sparingly. In other cases, the applicant for a termination order had a particular purpose for the termination, such as converting multiple units into a single dwelling [*Borsky v Proprietors Strata Plan No 198333* (1986) 7 NSWLR 84] or a single-owner developer wanting to re-develop [*Pritpro Pty Ltd v Willoughby Municipal Council* (1986) 3 BOR 97224]. In other cases, the building has no longer been viable [*Mary Erling v The Owners Strata Pllan No 8891* [2010] NSWSC 824; *Brenchley v The Owners – Strata Plan No 80609* [2022] NSWSC 646].

51 However, a paramount consideration of the Court is how best to balance and protect the interests of lot owners, the owners corporation and third parties who are interested in the scheme. This concept finds its origin in the *Conveyancing (Strata Titles) Act* 1961 (NSW), which provided the means to bring a strata scheme to an end where "destruction" of the scheme's property had occurred. Under the historic legislation, the Court could make a declaration that destruction was "deemed", in circumstances where members of the scheme had voted in its favour, and the Court was satisfied:

> …that having regard to the rights and interests of the proprietors as a whole it is just and equitable that the building shall be deemed to have been destroyed and makes a declaration to that effect.

52 While the language of "just and equitable" is not found in s 136(1) of the Development Act, the owners corporation submitted that the Court ought to exercise its discretion to order the termination of a strata scheme "in the same way as if considering a liquidation of a company on the "just and equitable" basis" (at [42]). That concept and its interaction are beyond the scope of this pape r and it did not feature in the parties' submissions.

53 The owners corporation made two key submissions in support of its application, and as to how the Court ought to exercise its discretion to order termination: first, that the owners corporation was "insolvent", and therefore an analogy could be drawn to the winding up of an insolent company; and secondly, that the buildings had effectively failed due to defects.

54 These submissions were insufficiently persuasive.

55 The Court made two key comments when refusing to terminate the scheme. The first was that an owners corporation cannot be “insolvent”. This conclusion was drawn with reference to the levying process that is outlined under s 83 of the Management Act. In circumstances where the owners corporation has incurred significant debts, lot owners may be personally exposed to these liabilities. It was unclear whether the lot owners had been informed of those legal consequences.

56 Further, there was insufficient evidence to demonstrate that lot owners understood the termination process, and had made an informed decision when choosing to pursue an application for termination, as compared to rectification of the building or a collective sale.

57 The Court re-emphasised what has been expressed in earlier judgments, namely that termination orders ought to be made sparingly and in clear circumstances, for example where lot owners had evidenced an understanding of their personal liability for the debts of an owners corporation, or where demolition of the building is inevitable. That was not the case.

Priority dispute

58 The most controversial, and novel, issue in the Lannock case concerned how a priority dispute ought to be determined between Lannock and the registered mortgagees, had a termination order been made. The Court did not formulate the precise form of order, but explained in *obiter* the appropriate way to accommodate the competing positions of unsecured lenders, to whom the owners corporation on one hand, and the registered mortgagees with security over the individual lots of a strata scheme in another, was liable.

59 Section 8 of the Development Act outlines the relationship between the NSW strata Regime and the *Real Property Act* 1900 (NSW). For example, s 8(1) reads that [the Development Act] “is to be read and interpreted with the Real Property Act…as if it formed part of this Act”. The Court commented that in

absence of an express departure within the Development Act from the concept of indefeasibility, the integrity of the Torrens register ought to be maintained when directing how a termination ought to proceed.

60 Further, whilst s 8(2) provides that the Development Act prevails to the extent of any inconsistency with the Real Property Act, no contrary intention is contained in Part 9, such that any unsecured creditor of the owners corporation ought be paid form the pooled sale proceeds before any registered mortgagee.

61 This conclusion was aligned with various authorities that made plain that the rights of any registered interest holder ought to be protected and maintained when making directions for the termination of a strata scheme. For example, this was reflected in an order recently made by Robb J in *Brenchley v The Owners – Strata Plan No 80609* [2022] NSWSC 646 that "any security interest held against a lot in the Scheme becomes, on the termination taking effect, a charge against the applicable lot owner's entitlement to receive a distribution in the winding up of the Scheme…" (at [62]).

62 As to the position of an unsecured creditor, whilst such an interest ought to be preserved, it should not be improved. Unsecured creditors of the owners corporation have a personal right to sue for the repayment of any debts owing. However, they do not have an interest in the land. In fact, securing the position of a lender against the common property of a strata scheme is expressly prohibited in s 100 of the Management Act.

63 Relevantly, at [128] - [129] comments were made on the orders that ought to be made to resolve the priority dispute, which would have arisen had a termination order been made:

> 128 Should directions be necessary, then they must be fashioned to include a direction to the effect that lot owners are personally liable to contribute to the discharge of the OC's debts, including the Lannock debt.
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> 129 Practically, that would mean that after termination, the pooled fund realised through a sale would be distributed in the following order (vis a vis lot owners, their mortgagees and creditors of the OC):

> (1) Each lot owner would be entitled to their portion representing their original unit entitlement.
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> (2) That portion would be charged by the current registered mortgagees to the extent of their security.
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> (3) Any remaining portion would be allocated to the lot owner.
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> (4) Each lot owner would be liable to contribute in their proportion to the debts of the OC, similar to the way levies are raised to pay expenses. If a lot owner had insufficient funds from their portion of the fund, then they would be personally liable to pay the balance. If one or more lot owners did not pay their allocation of the OC's debts, then the person administering the OC could seek further contribution from lot owners, again in their respective proportions, similar to s 81(4) SSMA.

Whether collective sale more appropriate

64 When considering the cases in which a termination order had been made, the Court observed that the owners corporation had sought the order for a purpose which required substantial structural developments to the scheme. For example, at [70] the Court commented:

> There is no case about a termination, where, as here, the applicant intended to sell the whole building, which could in fact be repaired, and where the evidence did not demonstrate that such repair was commercially insensible.

65 The purpose of introducing the concept of a collective sale into the Development Act was to provide a "flexible, transparent and fair"[12] process for ending a strata scheme. Furthermore, the collective sale process is intended to facilitate collaborative decision making and to provide certainty about a sale price and the process of sale in order to provide a clear and certain outcome for individual lot owners, and by extension secured and unsecured lenders.

66 Certainty of outcome and the protection of individual lot owners was a paramount consideration of the Court when comparing a termination order to the option of a collective sale in the context of the Mascot Towers development. At [80] the Court noted:

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[12] New South Wales, *Parliamentary Debates,* Legislative Assembly, 14 October 2015 (Mr Victor Dominello).

> 80 Should a Part 10 process be engaged, then the lot owners would know the exact sale price and the exact financial position they will face, following the sale. Currently, it is not apparent whether all the lot owners understand that their potential liability for the OC's debts could extend beyond their proportionate interest in the pooled fund that would be achieved in a sale of the building; in fact, lot owners would have to contribute in proportion with their unit entitlements to the OC's debts, even if they received insufficient funds from the sale process, as detailed further below.

67 A termination order was not justified merely due to a failed collective sale or in circumstances where it is unnecessary demolish a building.

Conclusion

68 While the decision in Lannock contains some important commentary as to the operation of Parts 9 and 10 of the Development Act, the application for termination was ultimately dismissed and much of the analysis raised by the Court was only put forward in *obiter*. However, the decision remains a landmark development in how an owners corporations ought to explore the mechanisms made available under Parts 9 and 10 of the Development Act.

The Amendment Act and the position going forward

69 The recent reforms to the strata regime in NSW, as made by the Amendment Act, are worth some brief mention. In December 2020, a Discussion Paper inviting feedback on the Development and Management Acts was released for public consultation by the Department of Customer Service on behalf of the Minister for Customer Service and the Minister for Better Regulation and Innovation, being the ministers responsible for the administration of the strata regime in NSW.

70 The review was conducted pursuant to s 204 of the Development Act and s 276 of the Management Act, which requires the ministers to review both pieces of legislation against the initial policy objectives within five years of their commencement. In November 2021, the *Report on the statutory review of the Strata Schemes Development Act 2015 and Strata Schemes Management Act* 2015 was released. The report was extensive, and over 150 recommendations were made.

71 The recommendations in relation to Part 10 of the Development Act were, in sum, that the current status of the legislation ought to be retained. However, in the second reading speech for the Strata Legislation Amendment Bill 2023, it was indicated “good faith and disclosure obligations” would be applied to all lot owners, not only those on the strata renewal committee and that the Land and Environment Court will now need to consider potential conflicts of interests when considering objections to strata renewal applications under a revised s 182(4) which sets out the process for a court to effect to a strata renewal plan.

72 The amendments came into force on 11 December 2023. In the absence of any further clarification as to the nuanced and novel issues discussed in the decision in *The Owners – Strata Plan No 80877 v Lannock Capital 2 Pty Ltd*, owners corporations, lot owners and interested parties may find guidance in considering the options for strata schemes that are coming to their natural end – either due to building defects or a desire to redevelop.

Conclusion

73 The Australian College of Strata Lawyers plays an important function in the continuing professional development of legal practitioners in the complex and evolving space of NSW Strata Law.

74 Thank you for the opportunity to present an update on recent issues from the perspective of the Supreme Court.