Civil and Administrative Tribunal
New South Wales

Case Name:	Owners Corporation SP65564 v Community Association DP270215 [Jacksons Landing]
Medium Neutral Citation:	[2017] NSWCAT
Hearing Date(s):	2 August 2017 (on the papers for separate question) and subsequent written submissions during August and September 2017.
Date of Orders:	10 October 2017
Date of Decision:	10 October 2017
Jurisdiction:	Consumer and Commercial Division
Before:	Gregory Burton SC, FCIArb, Senior Member

Decision:

1. Order pursuant to s 81 of the *Community Land Management Act 1989* (NSW) (“*CLMA”*) that by-law 23.1, the words “and all Subsidiary Body Property” in by-law 26.1 and by-law 26.5 of the by-laws in the respondent Community Association’s management statement are revoked on the basis that they are invalid.

2. Order pursuant to s 82 of the *CLMA* that the following purported resolutions of the respondent Community Association are invalidated:

(a) the purported special resolution purportedly passed at the special general meeting of the respondent on 16 June 2016 purportedly authorising the addition of by-law 26.5;

(b) the purported resolutions purportedly passed at the meeting of the executive committee of the respondent on 14 April 2016

numbered 5(c)-(g).

3. Direct the parties to file with the Tribunal and serve on each other on or before 24 October 2017 the following:

1) Draft further orders (if any) to give effect to these reasons, to make any variation in the drafting of the orders made today that is seen to be desirable to give effect to these reasons, and for the future conduct of the proceedings (showing parts agreed and disagreed in those draft orders and reasons for disagreement).

2) Written submissions as to the matters in (1).

3) Written submissions as to costs of the proceedings to date and of the separate question in light of these reasons, including provision of any privileged offers admissible on questions of costs and submissions thereon.

Catchwords:	Community and strata schemes – whether community management statement can be altered by a special resolution against opposition of some owners to impose a uniform obligation for management across all common property in subsidiary strata schemes - whether non-consensual financial impositions can be on proportions other than the unit entitlement in the community scheme - effect of registration if special resolution void by reason of later statute than Torrens legislation
Cases Cited:	Re Coldham; ex parte Brideson (1989) 166 CLR 338 Humphries v Proprietors "Surfers Palms North" Group Titles Plan 1955 (1994) 179 CLR 597 Owners SP 3397 v Tate (2007) 70 NSWLR 344, [2007] NSWCA 207 *OC68751 v CA DP270281* [2015] NSWCATCD 99 Stanizzo v Secretary, Dept of Justice NSW [2016] NSWSC 348
Legislation:	Community Land Management Act 1989 (NSW) Community Land Development Act 1989 (NSW) Strata Schemes Management Act 2015 (NSW) Strata Schemes Development Act 2015 (NSW) Real Property Act 1900 (NSW)

Category:	Principal judgment
Parties:	Owners Corporation SP65564 (applicant) Community Association DP270215 (respondent)
Representation:	Counsel: D Knoll AM (Applicant) R Lovas (Respondent) Solicitors: DEA Lawyers (Applicant) Lawyers Chambers (Respondent)
File Numbers:	SCS 16/40567; SC 16/55985; SCS 16/43745
Publication Restriction:	Nil

REASONS FOR DECISION

1 The applicant in each of the substantive proceedings SCS 16/40567 and SC 16/55985 is an owners corporation which is a member in the respondent community association in Pyrmont New South Wales known as Jacksons Landing. The Community Plan and accompanying management statement was registered 16 May 2000. The remaining proceeding SCS 16/43745 was on 16 November 2016 directed to proceed as an appeal filed by the respondent to the substantive proceedings on 30 September 2016 against orders made in SCS 16/40565. SCS 16/40565 was an interlocutory application filed on 8 September 2016 seeking interim orders to preserve the alleged status quo of no finalised contract to provide estate management services, to a value of approximately $2.5million. A strata adjudicator made the interim order on 9 September 2016, provoking the appeal mentioned above which is presently deferred, along with the balance of the substantive proceedings, pending the outcome of this determination of separate question. The interim order was extended on 14 December 2016. On 10 February

2017 orders to similar effect were made under s 31(2)(a) of the *Civil and Administrative Tribunal Act 2013* (NSW) (*CATA*).

2 At a hearing on 22 March 2017, where the same orders were made in the two substantive proceedings and the appeal, a Tribunal member ordered that there be determined as a separate question paragraphs 1 and 2 of the application filed 23 December 2016 in SC 16/55985, "save that, if the Tribunal determines that the specified by-laws are invalid and that the Tribunal nevertheless has a discretion whether or not to revoke those by-laws, the Tribunal will not, as part of the separate question determine how it will exercise the discretion". The balance of the proceedings are to be determined on a date to be fixed after the Tribunal's decision on the separate question.

3 Further directions to prepare the separate question for hearing were made in terms of requiring written submissions in chief and reply in relation to the separate question, with those submissions to confirm "which documents [the parties] are requiring the Tribunal to consider, including any parts of affidavits that are not to be considered for the purposes of these directions". The parties had been granted leave to be legally represented at a directions hearing covering all three proceedings (including the appeal) on 10 February 2017. (This confirmed an earlier order in the appeal proceedings made on 16 November 2016.)

4 The Tribunal ordered the determination of the separate question on the papers "and if it requires further oral submissions it will make further directions

prior to deciding the separate question". Further oral submissions were not required. Brief further written submissions were sought and provided in August and September 2017 on the effect (if any) of registration of the impugned provisions in the management statement under the strata legislation.

5 Paragraphs 1 and 2 of the application filed 23 December 2016 in SC 16/55985 read as follows:

> "1. An order pursuant to s 81 of the *Community Land Management Act 1989* (NSW) ("*CLMA"*) to revoke one or more of the [respondent's] by-laws 23.1, 23.4, 26.1 and 26.5 on the grounds that they are ultra vires and therefore invalid.
> 2. An order pursuant to s 82 of the *CLMA* invalidating the following purported resolutions of the [respondent]:
> (a) the purported special resolution purportedly passed at the special general meeting of the [respondent] on 16 June 2016 making by-law 26.5;
> (b) the purported resolutions passed at the meeting of the executive committee of the [respondent] on 14 April 2016 numbered 5(c), (d) and (e)."

6 For completeness, paragraph 3 of the application sought, in the alternative to 1 and 2, an order pursuant to *CLMA* s 80 revoking the four by-laws named in paragraph 1 as not in the best interests of the members of the respondent or the proprietors of strata lots within the scheme to which the community management statement related.

7 In relation to paragraphs 1 and 2, the application by way of expansion said that the purported resolutions of the respondent to appoint and contract with an estate manager (Brookfield Global Integrated Solutions BM PL) were invalid, that the respondent was purporting to charge the applicant "estate management costs" otherwise than in accordance with unit entitlement and that doing so was ultra vires. It was said that the practical effect of the

claimed ultra vires action was that the respondent was purporting to charge the applicant $79,481.64 pa for estate management services whereas if the applicant was charged by unit entitlement it would be charged $40,194 pa.

8 A letter dated 7 October 2016 recording a failed mediation under the auspices of Fair Trading on 5 October 2016 was provided in respect of each substantive application.

9 The application in the other substantive proceedings, SCS16/40567, was filed on 8 September 2016 (with the interim application mentioned earlier) and was originally for adjudication. On 6 February 2017 it was transferred to the Tribunal pursuant to s 71B of *CLMA*. It was objected to by the respondent as futile because it sought to prevent the signing of an estate management contract (mentioned above) which it was said had already been signed, on 28 April 2016, or otherwise was binding by or about that date. In essence, determination of the order sought has been subsumed within the determination of the application in SC16/55985 because signature will be ineffective if the contract is not binding for reasons to be determined in SC16/55985 concerning the underpinning by-laws and resolutions. The Tribunal alone has power to make the orders sought in SC16/55985.

10 In its written submissions on the separate question filed 27 April 2017 the applicant no longer pressed for revocation of by-law 23.4 but expanded the impugned executive committee resolutions from 5(c)-(e) to 5(c)-(g) being all the resolutions relating to execution of the management contract.

11 The determination of the separate question essentially involves three issues:

(1) Were any of the impugned by-laws 23.1, 26.1 and 26.5 beyond power in whole or part and, if in part, was the balance of the particular by-law severable or divisible from the valid part.

(2) Were any of the impugned parts of the special resolution on 16 June 2016 approving by-law 26.5 and executive committee resolutions of 14 April 2016 5(c)-(g) beyond power or otherwise invalid.

(3) if the answer to any of the foregoing is yes, does the Tribunal have a discretion nevertheless not to revoke or invalidate the by-law or resolution in question.

12 The management statement is defined as a community management statement. The operative version with amendments made at a special general meeting of the respondent on 11 June 2015 was registered on 15 December 2015. The impugned special resolution passed at a special general meeting of the respondent on 16 June 2016 added by-law 26.5 in its present form, which was registered 27 June 2016. The impugned by-laws in the management statement are as follows:

23. COMMUNITY ASSOCIATION'S RIGHTS AND OBLIGATIONS

Contracts
23.1 The Community Association may, on its own behalf or on behalf of each Subsidiary Body, contract with persons to provide:

(a) management, operational, maintenance and other services for Community Property or Subsidiary Body Property;
(b) services or amenities to the Owners or Occupiers;
(c) services or amenities to Community Property, Subsidiary Body Property; and
(d) Security Services.

26. JACKSONS LANDING SERVICES AGREEMENT

> 26.1 The Community Association will appoint an estate Manager to manage the Community Property and all Subsidiary Body Property.
>
> **26.5 CHARGING OF ESTATE MANAGEMENT COSTS**
>
> a) The Community Association will bear its share of the estate management fee, such share determined by reference to the estate management contract in place from time to time.
>
> b) The remainder of the estate management fee, after deduction of the Community Association's share, will be borne by the strata subsidiary bodies in shares calculated with reference to the number of lots within each strata subsidiary body, and the Community Association will invoice the strata subsidiary bodies accordingly.

13 The impugned executive committee resolutions of 14 April 2016 read to the following effect:

> 5(c) endorsed the finance services sub-committee recommendation to award the estate management contract to Brookfield for an initial 3 year period commencing 1 July 2016 for a total lump sum which was broken into lump sums for transition and each year. Owners queries were to be organised by the managing agent for answer at an information session.
>
> 5(d) authorised execution by the managing agent under the respondent's seal of the final form of the estate management contract.
>
> 5(e) authorised annexing of the letter awarding the contract to the contract.
>
> 5(f) established a working group drawn from subsidiary strata owners to work with the estate manager and report to the finance and services sub-committee.
>
> 5(g) directed the managing agent to send an information pack "with details of rights, responsibilities and pricing under the estate management contract" to each subsidiary strata's office-bearers.

14 The introductory warning to the management statement says that the management statement is binding on the respondent, each Subsidiary Body and each Lot owner and that each owner or occupier of a Subsidiary Scheme which is a Strata Scheme is bound as well by the by-laws of that Strata Scheme.

15 The Definitions section A in the management statement applies the definitions in the *CLMA* and the *Community Lands Development Act 1989* (NSW) (*CLDA*) to terms used but not defined in the management scheme.

16 The management statement section B contains specific definitions. It defines the respondent as the Community Association. The applicant is a defined Subsidiary Body because it is a defined Owners Corporation being an owners corporation created on registration of a defined Strata Plan. A defined Strata Plan is a strata plan that subdivides a defined Community Development Lot. A defined Community Development Lot is a lot that is not: (a) Community Property, a public reserve or a drainage reserve, (b) land that has become subject to a Subsidiary Scheme, or (c) severed from the Community Scheme. The defined Community Scheme is the Community scheme constituted on registration of the Community Plan (being DP 270215). Defined Community Property is lot 1 in the Community Plan and includes the Community Facilities defined to include the following constructed or to be constructed on Community Property: swimming pool, tennis courts; The Station (community function centre); Gatehouse, and Gym (mostly shown on the Concept Plan registered with the by-laws in the management statement). A defined Subsidiary Scheme is a Strata Scheme which is a strata scheme constituted on registration of a Strata Plan. A defined Strata Lot is a lot in a Strata Plan. A defined Subsidiary Plan is a Strata Plan, a defined Subsidiary Scheme is a Strata Scheme, and defined Subsidiary Body Property is the common property of a Strata Scheme. The word “lot” itself is defined in the management statement but is not a defined term in the *CLMA* or the *CLDA*.

17 The definitions above state that they "mean" what follows. There are specific references to "includes" in some definitions. "Including" and similar expressions are not words of limitation: Interpretation section B. Headings and bolding are for guidance only and do not affect the construction of the management statement: Interpretation section C.

18 Under interpretation section D, if the whole or any part of a provision of a by-law is void, unenforceable or illegal, it is severed and the remaining by-laws have "full force and effect", but this provision has "no effect if the severance alters the basic nature of the Management Statement or is contrary to Public Policy".

19 Under interpretation section E(c), subject to an express provision in the management statement or the *CLMA* or *CLDA*, consents by the respondent under the management statement may be given by the respondent at a general meeting or the executive committee at an executive committee meeting.

20 Under interpretation section F, the respondent may exercise a right, power or remedy at its discretion.

21 Under by-law 6.1 the respondent Community Association is "responsible for the control, management, operation, maintenance and repair of the Community Property". By-law 7.2 gives the respondent similar responsibilities in relation to the Community Facilities. The Community Association's insurance obligations under by-law 11 concern only Community Property and Community Association risks. By-law 4.5 requires each

Subsidiary Body to maintain its respective common property including to the reasonable satisfaction of the Community Association.

22 Under by-law 14.1 an Owner must pay contributions "levied under this Management Statement and the Community Titles Legislation" when they fall due. Under by-law 5.5 Subsidiary Bodies must reimburse the Community Association "in proportion to their respective unit entitlements as stated on the Community Plan" in respect of the Community Association's control, management, operation, maintenance and repair of any recreational facilities whose use is restricted to the owners of specified Subsidiary Schemes.

23 Under by-law 16.1 an Owner or Occupier may only undertake specified activities of construction, alteration or use to Subsidiary Body Property with the prior written approval of the Community Association or Subsidiary Body. This complements by-law 3 which gives an approval power to the executive committee of the Community Association for anything "which can be seen from outside the Lot" if, in the committee's reasonable opinion, the matter is not in keeping with the features of the overall scheme or is not compatible with the prescribed architectural and landscaped standards for the scheme. It also complements by-law 4 which empowers the executive committee of the Community Association to require, by notice, maintenance and repair obligations to be complied with by owners and owner corporations of Strata Lots.

24 Under by-law 25 the Community Association may make and at any time add to Rules for "management, operation, use and enjoyment of the Community

Parcel and the Community Property". Community Parcel is defined as the land the subject of the community scheme constituted on registration of the community plan DP 270215. The Rules must be consistent with the legislation, management statement and development consent, and bind (amongst others) Owners and each Subsidiary Body.

25 By-law 26.1 is quoted above as part of the impugned by-laws. By-law 26.2 provides that an estate Manager appointed by the Community Association may have the duties and remuneration set out in by-law 26. By-law 26.3 provides that these duties "may include": (a) the supervision or carrying out of property management responsibilities (such as cleaning, supervision, general repair and maintenance, renewal and replacement) "of: (1) Community Property; (2) Subsidiary Body Property use of which is restricted to the Community Association; or (3) any personal property vested in the Community Association"; (b) "the provision of services to Subsidiary Bodies including the services of a handyman, gardener and security guard; (c) the supervision of any employees or contractors of the Community Association; (d) the control and supervision of the Community Parcel generally;" (e) a web page in relation to the Community Scheme; and (f) any other matter, activity or thing which the Manager and the Community Association agrees is necessary or desirable for the operation and maintenance of the Community Association. Under by-law 26.4 the estate Manager is paid a fee "that is determined from time to time".

26 By-law 27.2 provides, “for the proper administration and security of the Community Scheme as a whole”, the Subsidiary Bodies “must use” any Security Service Manager appointed by the Community Association.

27 By-law 28 provides that “For the proper administration of the Community Scheme as a whole, the Subsidiary Bodies may use the licensed Managing Agent of the Community Association as their managing agent”.

28 It will be seen that the provisions of the management statement, leaving aside the impugned by-laws, recognises powers for the respondent Community Association directed to maintaining the coherence and integrity of the entire Community Scheme but also recognises distinct roles for Subsidiary Bodies such as the applicant. Further illustrations, where symbiotic but distinct roles are incorporated into the one by-law, are in by-law 2.2 where building works on any part of the scheme require, not only approval from the executive committee of the Community Association, but also approval from the relevant Subsidiary Body in Subsidiary Schemes, by-law 8 concerning fencing and by-law 1 concerning prescription and variation of architectural standards and landscape standards for the Community Parcel and component Subsidiary Scheme elements.

29 The applicant has also consistently pointed to the absence of any general meeting of the respondent to approve the estate management contract, and to the executive committee of the respondent not taking into consideration the objections made by a significant proportion of the Subsidiary Bodies. The applicant had previously had its own building manager. The matters just

complained about are part of the reason that the applicant contends that the executive committee does not have power of itself to bind Subsidiary Bodies to such a Community Scheme-wide estate management contract. Another part of the reason is that any approved scheme can only render Subsidiary Bodies and their Owners liable on the basis of unit entitlement.

30 *CLMA* s 20 relevantly provides as follows:

> **20 Levy on member of association**
>
> **(1)** An association may levy a contribution payable to it by a member under Part 4 of Schedule 1 by serving on the member a written notice of the contribution payable.
>
> …
>
> **(3)** The contribution to be paid to a community association by each of its members is the amount that bears to the total amount to be raised by the contributions the same proportion as is borne to the total unit entitlement for the community scheme:
>
> (a)
> if the member is the proprietor of a community development lot—by the unit entitlement for the development lot, or
>
> (b) … , or
>
> (c) if the member is a … a strata corporation—by the unit entitlement for the former community development lot the subject of the … strata scheme.
>
> …
>
> **(10)** A contribution is due and payable as directed by the association when deciding to make the levy.
>
> …
>
> **(13)** The amount of a contribution, together with any interest:
>
> (a) is recoverable by the association as a debt, and
>
> (b) forms part of the fund to which the contribution is payable.

31 The omitted provisions of s 20, that deal with precinct and neighbourhood associations, also refer to unit entitlement as the basis of charging liability. Section 20A refers to interest and discounts in respect of “contribution”.

32 *CLMA* Schedule 1 is headed “Functions of Association”. In Sch 1 Part 1 para 1 under the heading “Definitions”, it is stated “In this Schedule: **property** means, in relation to an association, its association property and

personal property." Section 3(1) of the Act relevantly defines "association property", in relation to a community association in a community scheme such as the respondent, to mean the community property in the scheme. Community property means the lot shown in a community plan as community property. Community plan means the type of plan registered in these proceedings containing at least two development lots and a lot shown as community property (here lot 1). Community scheme means, relevantly, the manner of subdivision in the community plan and in subsidiary strata plans and "the rights conferred, and the obligations imposed, by or under this Act [the *CLMA*], the *Community Land Development Act 1989* and the *Strata Schemes Development Act 2015* in relation to the community association, its community property, the subsidiary schemes and persons having interests in, or occupying, development lots and lots in the subsidiary schemes."

33 Schedule 1 Part 2 para 2(1) requires the community association, among other matters not presently relevant, to "control and manage … all other parts of its association property" for the benefit of its members, who are the subsidiary schemes such as the applicant. Rule 4 also relates to maintenance and replacement only of association property as defined.

34 Schedule 1 Part 4 deals with finance. Rule 12 requires the community association to establish an administrative fund and a sinking fund. Rule 13 provides for estimates and levies. Except for insurance premiums, the subject matter of estimates and levies is matters connected only with association property and "other" recurrent and capital expenses. There is no indication that the reference to "other" recurrent and capital expenses should

be read as beyond those within the community association's province from other statutory provisions including the items in the lists in which they appear in rule 13(1) and 13(2) and, arguably, any consensual arrangements pursuant to *CLMA* s 22 (discussed below). Under rule 16, a community association "must" not make payments other than those the subject of rule 13 estimates and distribution of a fund surplus under rule 17. Under rule 17, a distribution of surplus requires a unanimous resolution and is made in accordance with unit entitlement.

35 *CLMA* Part 3 is headed "Association property". Section 53 provides as follows:

> **Value of interests of members of an association**
>
> **(1)** The comparative value of the relevant interests of the members of a community association or a precinct association is the same as the proportion that is borne to the total unit entitlement for the community scheme or precinct scheme:
>
> (a) in the case of a member who is proprietor of a development lot—by the unit entitlement for the development lot, or
>
> (b) in the case of a member that is a precinct association, a neighbourhood association or a strata corporation—by the unit entitlement for the former development lot that is subject to the precinct scheme, neighbourhood scheme or strata scheme.
>
> **(2)** The comparative value of the relevant interests of the members of a neighbourhood association is the same as the proportion that is borne to the total unit entitlement for the neighbourhood scheme by the respective unit entitlements for the neighbourhood lots.
>
> **(3)** In this section:
>
> **relevant interest** in relation to a member, means:
>
> (a) the value of the member's vote on a poll at a meeting of the association, or
>
> (b) the amount of a levy on the member in relation to the total levies on all members of the association, or
>
> (c) the interest of the member in the association property, or
>
> (d) the interest of the member in an amount of surplus funds being distributed by the association, or
>
> (e) the interest of the member in the community parcel, precinct parcel, neighbourhood parcel or strata parcel on termination of the applicable scheme.

36 There is no other provision in the *CLMA* or *CLDA* which empowers charging on a compulsory basis by a community association. *CLMA* s 22 empowers a community association to enter into agreements with its members for the provision of services. This is a distinct and different exercise from entry into an agreement with a third party (such as a managing agent) for provision of services to a member of the community association, let alone without the consent of that member to such provision: compare *Humphries v Proprietors "Surfers Palms North" Group Titles Plan 1955* (1994) 179 CLR 597 at 602-604, 608, 612. Section 83 empowers Tribunal review only of contributions levied under the compulsory provisions.

37 *CLMA* s 5(5) states that "A community association has the functions conferred or imposed on it by Schedule 1, by other provisions of this Act and by any other Act". The relevant provisions appear to be those cited above from each of Schedule 1 and the *CLMA*.

38 *CLMA* s 13(1) with s 13(5) provides that a community management statement is binding, as if it contained mutual covenants executed under seal to perform its terms, on the community association and its subsidiary body members such as the applicant and (among others) owners in a strata scheme such as the applicant's members.

39 *CLMA* s 14 provides as follows:

> **Amendment of management statement**
>
> **(1)** Except as provided by subsection (2), an association may amend its management statement in relation to the control, management,

> administration, use and enjoyment of the lots, or of the association property.
> **(2)** A management statement may not be amended:
> (a) in a manner inconsistent with any restriction imposed by this Act on the making of the amendment, or
> (b) in a manner that would make the management statement inconsistent with this Act or the Community Land Development Act 1989.
> **(3)** An amendment requires:
> (a) a unanimous resolution if the amendment would affect by-laws made under section 17 to control or preserve the essence or theme of the scheme to which they relate, or
> (b) a unanimous resolution if the amendment would affect a by-law the terms of which have effect because they are the terms of an order by the Tribunal, or
> (c) in any other case—a special resolution.
> **(4)** An amendment has no effect until it is registered.
> **(5)** Lodgment of an amendment cannot be accepted later than 2 months after the passing of the resolution making the amendment.

40 In relation to registration of management statements and amendments to them, *CLMA* s 3(2) states "This Act is to be interpreted as part of the *Real Property Act 1900*, but, if there is an inconsistency between them, this Act prevails". There is an equivalent provision in *CLDA* s 3(2).

41 The respondent says that *CLMA* s 14(1) encompasses the type of power to compel acceptance by members of a contract with a third party if it is made pursuant to a by-law authorising such a contract and that at least new by-law 26.5 (if not by-laws 23.1 and 26.1 in their more general terms) is empowered to be made by s 14(1), and by special resolution since it is not a resolution requiring unanimity. I accept that unanimity is not required as no by-law specified under s 17 has been pointed out as being affected and there is no relevant order of the Tribunal pointed out to me. The respondent also says that there is no restriction imposed by the Act on making such a by-law.

42 I respectfully disagree with the respondent's submissions (except to the limited extent I have mentioned). *CLMA* s 14(2)(b) is expressly engaged by

any by-law which makes the management statement inconsistent with the *CLMA* or the *CLDA*. Those statutes set out a comprehensive regime, stated in s 5 and Schedule 1 examined above, for the establishment, functions, powers and governance of the community living schemes to which they apply. There is no power within those statutory provisions which authorises the establishment or operation of the compulsory imposition of a uniform estate management contract such as the respondent seeks to impose on each of its members and their strata members.

43 The respondent points to the reference to the undefined term “lots” in s 14(1). Even if that term were a source of power to regulate the common property of Subsidiary Schemes, that power is subject to compliance and consistency with the other provisions of the *CLMA* and *CLDA*, which for the reasons I have expressed is fatal to the respondent’s submission. However, it seems to me that the submission does not recognise that the applicant’s property sought to be regulated by the impugned by-laws is not the entire “lot” but, rather, the common property within the relevant strata scheme, all of which is subject to detailed definition in the *CLMA*. The use of “lot” in s 14(1) therefore seems simply to state the obvious: that, if otherwise within power, the respondent’s by-laws can cover areas of intersecting obligation (in the way described in these reasons) with its members.

44 In particular, there is no mechanism within the financial regime under which a community association such as the respondent operates which provides for the a compulsory imposition such as the respondent seeks to impose. Consensual regimes under *CLMA* s 22 either would be operated through an

account mechanism separate from the compulsory accounts with s 22 as its source of statutory authority (reported via an account created pursuant to rule 11(4)(c)) or would (as previously indicated) be permitted within the compulsory accounts as a recurrent expenditure.

45 By contrast, the focus in the statutory regimes, which is reflected in the provisions of the community scheme management statement in question here and examined earlier in these reasons, is on creating a symbiotic regime where the focus of the community association is on its responsibility for association property, with its constituent members having a focus on responsibility for the common property within their subsidiary schemes, and an overarching role of supervision for the community association in monitoring overall compliance with the community plan.

46 Further, the regime in all its essential aspects including financial imposition, as indicated by s 53 and the finance provisions discussed above is premised on unit entitlements and no other basis. There is a mechanism in *CLMA* s 78 for varying unit entitlements if that is the subject of complaint, but it would be for all purposes.

47 An executive committee, and a special general meeting of the community association, has no power to pass resolutions that are beyond the statutory limit.

48 There is no element of discretion for the Tribunal to exercise in favour of validation if matters are invalid because they are beyond power, even if in some circumstances there may be a residual discretion in at least s 82:

compare *Re Coldham; ex parte Brideson* (1989) 166 CLR 338 at 347; *Stanizzo v Secretary, Dept of Justice NSW* [2016] NSWSC 348 at [48]. Contrary to the respondent's submission, *CLMA* s 75A does not govern ss 81 and 82 but provides for other circumstances of dismissal. Further contrary to the respondent's submission, *CLMA* s 98 is not a qualification of but, rather, an aid if required to the principal provisions for relief and is governed in its utility and application by the principal provisions. That may in appropriate circumstances, as the respondent says, include a stay on condition of a commitment to replace or modify by-laws beyond power. It does not qualify that the impugned by-laws are to be ordered to be invalid as beyond power.

49 The respondent seeks to draw a distinction between by-laws such as 23.1 which are the same in substance as the original by-laws registered in 2000 and amending by-laws such as 26.5, even though the entire by-laws were replaced and re-enacted in 2015. The respondent draws attention to the width of the by-laws that may be included within the original management statement under Sch 3 cl 3 of the *CLDA* which relevantly includes under para 3(1)(k) that the by-laws may relate (a word of wide import) to any agreements entered into for the provision of services and under para 3(2) that para 3(1) does not limit the matters that may be included in a management statement.

50 The respondent however accepts, as it must, that such a power does not permit by-laws that conflict with any other provision of either the *CLMA* or the *CLDA*. To rely upon *CLDA* Sch 3 cl 3 in the manner contended for by the respondent would lead to a conflict with the provisions already discussed.

51 The respondent makes the same argument with respect to *CLDA* Sch 3 paras 3(1)(b) (safety and security measures) and 3(1)(g) (business or trading activities carried on by the association and the method of distributing and sharing any profit or loss). In addition to the reasons already given, these provisions are not germane to the particular exercise of power sought to be justified or, in the case of security measures, fit within a specific regime in respect of security which is distinct from management of the common property of Subsidiary Schemes.

52 I do not agree that re-enacted by-laws should be treated as still having the status of original by-laws even if the same in substance. The re-enactment necessarily included, in the whole, accretions to the original by-laws. However, even if so treated, the respondent's argument does not succeed for the reasons just given in preceding paragraphs.

53 The respondent's reliance upon *CLMA* s 120 is misconceived. That provision preserves general law rights which a community association, acting within power, may have and seek to enforce in another forum, subject to costs consequences if they could have been enforced within the relevant statutory regime. The provision does not operate as a bootstraps source of power for an amendment to by-laws that (if made within power) have contractual force by virtue of the statutory regime.

54 More generally, and as will be apparent from what precedes in these reasons, the respondent's argument has an inherent circularity. Contractual provisions formed by the by-laws, and contracts with third parties made pursuant to

them, are valid and binding on the members under statute or general law only if they are within power to be made; the power to make them of itself does not overcome the restrictions in other provisions with which made by-laws must be compliant in order to be valid. Moreover, the respondent's approach implicitly treats the by-laws as a species of commercial contract which appears to be at odds with the correct approach to interpreting them: compare *Owners SP 3397 v Tate* (2007) 70 NSWLR 344, [2007] NSWCA 207 at [33]-[73].

55 The respondent relies upon the decision of another Senior Member of the Tribunal in *OC68751 v CA DP270281* [2015] NSWCATCD 99. I am not bound by that single member decision. It appears from the Senior Member's reasons, particularly at [43]-[44], that the matter of invalidity was but one issue in the proceedings and was not as fully argued as in the present proceedings, including as to relevant authority. In any event, the relevant by-law in that determination did not have the element of financial imposition other than in accord with unit entitlements which is a central element in invalidity in the present case.

56 Accordingly, the impugned executive committee resolutions, the special resolution authorising the addition of by-law 26.5, by-law 26.5 and by-laws 23.1 and 26.1 are in their current form beyond power and invalid, and not able to be validated by the Tribunal, because they purport to authorise compulsory imposition on Subsidiary Schemes and their members of estate management services beyond the defined Community Property and the other statutorily-

authorised powers and obligations of the respondent Community Association and to make financial impositions on a basis other than unit entitlements.

57 To the extent the resolutions and by-laws are not separable or divisible from the invalid matters then the whole resolution or by-law is ultra vires and invalid and will need to be made again in a valid form within power.

58 Addressing that issue of separability and divisibility:

> (1) By-law 23.1 in itself could be made valid on its face, because its current wording is required in relation to matters within the by-law agreed to by Subsidiary Schemes, but if and only if it was amended to add, after "Subsidiary Body" in line 2, the words "with the agreement of the Subsidiary Body" or an amendment substantively similar. The current drafting does not enable an excision to achieve the same substantive effect. Accordingly, in its present form it is invalid but a regime could be embodied in orders for its amendment which (if passed) would make it valid.
>
> (2) By-law 26.1 is valid if the words "and all Subsidiary Body Property" are excised and there is no indication that those words are not separable or divisible.
>
> (3) The whole of by-law 26.5 is invalid.
>
> (4) The special resolution purportedly made 16 June 2016 purportedly authorising the addition of by-law 26.5 is invalid.
>
> (5) The executive committee resolutions 5(c)-(g) purportedly made 14 April 2016 are invalid on the basis that they are premised on an entire management contract that includes within its scope matters beyond the power of the respondent to enter into and there is no evidence that the parties to that contract contemplated its entry on a lesser scope of contract rights and obligations.

59 The respondent has not suggested that the Tribunal does not have power under *CLMA* ss 81 or 82 to deal with the invalid executive committee resolutions, the special resolution and the invalid parts of the by-laws. In any event, it is clear that what was passed adversely affected the applicant to the extent that is a criterion under s 82.

60 No party has suggested that ss 81 and 82 pursuant to s 3(2) of the *CLMA* and s 3(2) of the *CLDA* (set out earlier in these reasons) do not enable the management statement to be varied in accordance with an order made under those provisions, to delete the ultra vires by-laws, despite registration of the management statement, and I so find.

61 The Tribunal sought further written submissions from the parties on any interaction between s 42 and any other relevant provision of the *Real Property Act 1900* (NSW) (*RPA*) and the later provisions of the *Strata Schemes Management Act 2015* (NSW) (SSMA) and the *Strata Schemes Development Act 2015* (NSW) (*SSDA*). In those submissions neither party identified a provision in the *SSMA* which is the equivalent of *CLMA* s 3(2) and *CLDA* s 3(2). There is an equivalent provision in *SSDA* s 8(2), which as a consequence makes the effect of *RPA* s 42 subject to *SSDA* s 40(2). Neither party identified any other relevant provision of the *RPA*.

62 Even without an equivalent provision in the *SSMA*, individual lot owners in each Subsidiary Scheme will have their registered interests unaffected by the registration of the void by-laws, whether or not they have become registered since registration of the void by-laws. The interest of each of those owners is subject to the rights of their respective owners corporations including in terms of financial impositions and the rights of the respondent community association in so far as those rights translate into a valid burden on the members of the community association, in this case each owners corporation in a Subsidiary Scheme. Those owners corporations can impose on their lot owners only valid expenses to which the owners corporations are subject,

including valid impositons to which they are subjected by the management statement. The registered status of the void by-laws does not protect from the effect of voidness if for no other reason than the effect of *CLMA* s 81and/or s 82 combined with s 3(2) and reflected in *SSDA* s 8(2) and s 40(2) (making unnecessary the need to consider any other reason). If the respondent did not apply to remove from registration the void by-laws the applicant would be entitled to an order under *CLMA* s 98 directed to the respondent to apply for removal from registration of the void and revoked by-laws by the procedure in *CLDA* s 40 with effect under *CLMA* s 99. There is no indication that these statutory provisions, which are inherent in the regime creating the relevant property rights and to which those property rights are subject, give a right to be heard on their operation beyond the immediate parties to these proceedings.

63 The Tribunal's order for revocation under CLMA s 81 will operate to remove the invalid by-laws as if they had never been registered. That is the ordinary meaning of revoke and no party has suggested to the contrary. The effect of the provisions such as *CLMA* s 3(2) discussed above removes by the operation of that order on its registration any effect of registration during the time the revoked by-law was on the register, making unnecessary the need to consider any other basis for that effect.

64 The Tribunal will accordingly grant relief broadly to the effect sought in claims 1 and 2 on the application, which were the subject of the separate question, and will make orders to that effect, but refined in accord with these reasons, in particular what has been said concerning separability and divisibility. The

Tribunal will give the parties the opportunity to lodge written submissions containing draft further orders to give effect to these reasons, to make any variation in the drafting of the orders made today that is seen to be desirable to give effect to these reasons, and for the future conduct of the proceedings (showing parts agreed and disagreed in those draft orders and reasons for disagreement) and on the costs of the proceedings to date and costs of the separate question.

ORDERS

1 Order pursuant to s 81 of the Community Land Management Act 1989 (NSW) ("CLMA") that by-law 23.1, the words "and all Subsidiary Body Property" in by-law 26.1 and by-law 26.5 of the by-laws in the respondent Community Association's management statement are revoked on the basis that they are invalid.

2 Order pursuant to s 82 of the CLMA that the following purported resolutions of the respondent Community Association are invalidated:

(a) the purported special resolution purportedly passed at the special general meeting of the respondent on 16 June 2016 purportedly authorising the addition of by-law 26.5;

(b) the purported resolutions purportedly passed at the meeting of the executive committee of the respondent on 14 April 2016 numbered 5(c)-(g).

3 Direct the parties to file with the Tribunal and serve on each other on or before 23 October 2017 the following:

(1) Draft further orders (if any) to give effect to these reasons, to make any variation in the drafting of the orders made today that is seen to be

desirable to give effect to these reasons, and for the future conduct of the proceedings (showing parts agreed and disagreed in those draft orders and reasons for disagreement).

(2) Written submissions as to the matters in (1).

(3) Written submissions as to costs of the proceedings to date andof the separate question in light of these reasons, including provision of any privileged offers admissible on questions of costs and submissions thereon.

(signed)

Gregory Burton SC, FCIArb
Senior Member
Civil and Administrative Tribunal of NSW

10 October 2017

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