IN THE HIGH COURT OF AUSTRALIA
SYDNEY OFFICE OF THE REGISTRY

No S66 of 2014

Between

Brookfield Multiplex Ltd
(ACN 008 687 063)
Appellant

and

Owners Corporation Strata Plan 61288
First Respondent

Multiplex Corporate Agency Pty Ltd
Second Respondent

APPELLANT'S SUBMISSIONS

Part I - Certification for publication

1 We certify that this submission is in a form suitable for publication on the internet.

Part II - Issues

2 Whether a developer of commercial premises which had bargained with a builder pursuant to a detailed contract to protect itself against liability for defective work, was concurrently owed by the builder a duty of care in tort to exercise reasonable care in the construction of the building to avoid the developer suffering pure economic loss as a result of latent defects.

3 Whether an owners corporation established pursuant to s 8(1) of the *Strata Schemes Management Act 1996* (NSW) (**SSM Act**), as a successor in title to the common property, was owed by the builder a duty of care to avoid pure economic loss as a result of latent defects.

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Part III - *Judiciary Act 1903, s.78B*

4 The appellant considers that notice is not required pursuant to s 78B of the *Judiciary Act 1903*.

Part IV - Reports of reasons for judgment

5 The decision of the Court of Appeal is unreported. Its internet citation is [2013] NSWCA 317 ("**CA**"). The decision of the primary judge is also unreported. Its internet citation is [2012] NSWSC 1219 ("**SC**").

Part V - Relevant facts

6 The first respondent ("**Owners Corporation**") is the owners corporation of a strata titled serviced apartments development located in Chatswood, New South Wales ("**Serviced Apartments**").

7 The development of the Serviced Apartments arose out of a commercial transaction between Chelsea Apartments Pty Ltd ("**Chelsea**") and the Stockland Trust Group. Prior to the development, Chelsea was the registered proprietor of the land. Pursuant to the terms of a Deed of Master Agreement dated 11th August 1997 ("**Master Agreement**") Chelsea agreed to construct the Serviced Apartments and then lease that property to a Stockland subsidiary, Park Hotel Management Pty Limited ("**Park**") {SC [34], CA [69]-[70]}. It was the common intention of Chelsea and Stockland that the development would be operated as serviced apartments under the "Holiday Inn" franchise and pursuant to the terms of the development consent there could be no other lawful use without consent {SC [33]}.

8 By clause 9.1 of the Master Agreement, each lot in the Serviced Apartments was to be leased by Chelsea to Park. By each of those leases, Park acquired the power to direct the affairs of the Owners Corporation by exercising the voting rights of the lot owners {SC [35]}.

9 The development was marketed for sale to investors who were offered the opportunity to purchase, subject to the lease to Park, an apartment that would be used exclusively as part of a serviced apartment complex, and which would provide a regular return. The

marketing material made it clear that all purchasers of lots in the serviced apartments development would cede their voting rights in respect of the Owners Corporation to the operator from time to time (initially, Park) {SC [36]}.

10 Chelsea was an experienced and sophisticated developer. A Multiplex company had a 40% interest in Chelsea. The remaining 60% interest was controlled by a well-known Queensland developer, E Kornhauser Investments Pty Ltd {SC [39]}.

11 Under the Master Agreement, Stockland bargained for and obtained from Chelsea detailed contractual warranties with respect to the quality of the building work {SC [38]}. Stockland, a major listed public company, was an experienced and sophisticated investor.
10 In negotiating the terms of the Master Agreement, each of Chelsea and Stockland bargained at arms' length and on an equal footing. Each was in a position to assess, in its own interest, what it wanted from the agreement and what it was prepared to give in exchange {SC [40]}.

12 Some months after execution of the Master Agreement, Chelsea entered into a design and construct contract with the appellant ("**Brookfield**") dated 5th November 1997 at a contract sum of $57,530,000 ("**D&C Contract**"). Each of Chelsea and Brookfield was sophisticated and experienced in its area of business, and each negotiated at arms' length and on an equal footing {SC [44], CA [67]}. The CA held that the contractual documentation prepared by these "*sophisticated commercial entities*" ran to "*several*
20 *hundred pages*" and was "*detailed and precise*", involving numerous special conditions {CA [67]}.

13 A number of clauses of the Master Agreement were repeated "back to back" in the D&C Contract {SC [43], CA [69]}. The D&C Contract contained detailed contractual provisions relating to the quality of the services that Brookfield was to provide, including a defects liability period of 52 weeks and issue of a "final certificate" {SC [44]-[48], CA [54]-[58]}. There was also an express provision requiring professional indemnity insurance with a specified run-off period of 4 years after issue of the final certificate {CA [59]}. The CA held that by the D&C Contract Chelsea protected itself against liability and so far as practicable the contract, including the special conditions, ensured that the
30 builder would comply with its obligations {CA [118]}.

14 The D&C Contract specified in detail the terms on which Chelsea would offer individual lots for sale to investors. There was annexed to it a form of standard contract for sale for lots in the Serviced Apartments and Chelsea agreed not to enter into any contract of sale that was not in that form. Under that standard form of contract for sale, specific (but limited) contractual rights were given in relation to defects in the property, including the Common Property {SC [45], CA [63]}.

15 Clause 32.6 of the standard contract for sale provided that Chelsea must repair defects or faults in the property of which notice was served by the purchaser within *6 months* after completion. Clause 33.1 provided that "property" included any interest in common property associated with the lot.

16 Clause 32.7 of the standard contract for sale provided that Chelsea must repair defects or faults in the Common Property of which notice was served by the *Owners Corporation* within *7 months* after the date of registration of the Strata Plan {CA [63]}.

17 Disputes in connection with clauses 32.6 or 32.7 were to be resolved by a final and binding expert determination.[1]

18 After a construction period of approximately two years, the strata plan was registered on 11th November 1999 and the Owners Corporation came into existence as the registered proprietor of the common property. Chelsea continued to be the registered proprietor of the lots. As contemplated by the Master Agreement, leases in respect of the lots were entered into with Park, such that Park obtained the lot owners' voting rights and thereby controlled the Owners Corporation {SC [35]}. All subsequent purchasers of the lots took title subject to those leases and the Owners Corporation has thereby remained controlled by the Serviced Apartments' operator.

19 In 2008, some nine years after completion of the building, the Owners Corporation brought proceedings in the Supreme Court of New South Wales alleging that defects existed in the common property of the Serviced Apartments and contended for a cause of action in negligence against Brookfield as the builder. By the time of hearing before McDougall J, the Owners Corporation had abandoned an earlier pleaded cause of action under Part 2C of the *Home Building Act 1989* (NSW), accepting that the commercial use of the building meant that the development was outside the statutory warranty regime.

[1] Clauses 32.8-32.10 of the standard contract for sale.

20 The duty relied on by the Owners Corporation was described as one "*to take reasonable care to avoid a reasonably foreseeable economic loss to the Plaintiff in having to make good the consequences of latent defects caused by the building's defective design and/or construction*" {SC [18], CA [12]}.

21 McDougall J found that the duty alleged was novel; that *Bryan v Maloney* (1995) 182 CLR 609 was no authority for imposition of the duty alleged {SC [88]}; that it was not appropriate for a judge at first instance to identify and impose a novel duty of care {SC [91]}; and that, in accordance with the observations of Brennan J in *Bryan* at 644, a decision to impose additional duties on a builder in the form of transmissible warranties was a serious matter requiring attention to a range of factors such that it was something to be undertaken by the legislature {SC [92], [104]}. Judgment was entered for the defendants.

22 The CA allowed the Owners Corporation's appeal and found two duties owed by Brookfield, each of which had been rejected by McDougall J. The *first duty* found by the CA was a duty to avoid pure economic loss owed by Brookfield to the developer, Chelsea, concurrently with its contractual obligations arising from the D&C Contract {CA [127]}. The CA found that Chelsea was "vulnerable" in the relevant sense due to its reliance on the expertise of the builder, notwithstanding an earlier finding that Chelsea not only could have protected itself, but in fact did so by entering into the D&C Contract {CA [118]-[120]}.

23 The *second duty* found by the CA was a duty to avoid pure economic loss owed by Brookfield to the Owners Corporation, as the successor in title to Chelsea {CA [129]}.

24 The nature and extent of the duties found by the CA differed from that which had been pleaded and argued for by the Owners Corporation. The CA held that the duty to avoid pure economic loss arose only in respect of defects which were "dangerous" in that they could give rise to personal injury or damage to property {CA [132]}. The plaintiff had not pleaded or argued for a duty defined in that manner.

Part VI - Argument

25 The CA's decision was a significant development of the law in relation to liability in negligence for pure economic loss. This is an area of law which it has been said that

courts should move very cautiously indeed[2]. Further, the development was made in a particular industry and transactional context in which members of this Court have recognised that contract law provides a more just and efficient means of redress and that any extension of remedies beyond those in contract is more properly a matter for parliament given the value judgments involved[3]. For the reasons that follow, the CA's development of the law to recognise duties owed by the builder to each of the developer and the successor in title should be set aside.

The concurrent duty of care alleged to have been owed to the developer

26 It is accepted that a common law duty of care has not been confined to relationships that arise apart from contract and that concurrent obligations in contract and tort may arise[4]. However, it is not the law that every contract carries with it a parallel tortious duty[5]. To the contrary, compartmentalisation of the law of contract and tort remains a "flourishing plant" in Australian jurisprudence[6].

27 Tort liability, both for physical harm and pure economic loss, in a case such as the present falls to be assessed in a contractual matrix[7]. The contract defines the task or endeavour in respect of which the duty to take reasonable care may arise[8]. The contract defines the relationship of the parties[9]. Where a tortious duty arises, the contract will modify and shape the scope and content of the duty[10]. But the cases discussing such modification and limitation (and the oft quoted passage from *Central Trust Co v Rafuse*[11]) must be understood in the context of a duty of care in tort having been accepted as otherwise arising. It is central to the present case that that will not always be so. The law of tort in

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[2] *Perre v Apand* (1999) 198 CLR 180 at 325 [405] (per Callinan J).
[3] *Bryan v Maloney* (1995) 182 CLR 609 at 643-644 (per Brennan J); *Woolcock Street Investments v CDG* (2004) 216 CLR 515 at 559-560 [114]-[115] (per McHugh J), and at 593 [233] (per Callinan J). See also *Perre v Apand* at 226 [120].
[4] *Central Trust Co v Rafuse* [1986] 2 SCR 147 at 204; *Bryan* at 620-621; *Astley v Austrust* (1999) 197 CLR 1 at 20 [44]; *Barclay v Penberthy* (2012) 246 CLR 258 at 285 [47].
[5] *Robinson v P.E. Jones Contractors* [2012] QB 44 at 61 [77], 62 [81] and 64 [92].
[6] *Woolcock* at 591-592 [221] per Callinan J, citing *Astley*.
[7] First use of the expression in this context is generally attributed to La Forest J in *London Drugs v Kuehne & Nagle* [1992] 3 SCR 299 at 327.
[8] *Voli v Inglewood Shire Council* (1963) 110 CLR 74 at 85; *Woolcock* at 532 [28].
[9] *Astley* at 22 [47].
[10] *Astley* at 52 [140] per Callinan J citing *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145; *Koehler v Cerebos (Aust) Ltd* (2005) 222 CLR 44 at 53 [21], 56 [29]; *Kenny & Good Pty Ltd v MGICA* (1999) 199 CLR 413 at 426 [22].

respect of pure economic loss in Australia is such that in some cases the contractual matrix may have the result that no duty of care arises in the first place, and subsidiary issues of modification or limitation thus do not arise.

28 At least since *Woolcock* the contractual matrix has become critical to the assessment of a plaintiff's vulnerability. Vulnerability is to be understood as an inability to protect oneself, including through negotiation of contractual arrangements[12]. The contractual matrix has therefore emerged as having a different and greater relevance than prevailed at the time of *Bryan v Maloney,* when the focus was on the relevance of a contract to demonstrating a "relationship of proximity"[13]. Whilst it is readily apparent that privies to a contract will ordinarily have a more proximate relationship than strangers, since the abandonment of proximity as a conceptual determinate and the emergence of vulnerability as a critical requirement, a detailed and complex contract between sophisticated commercial parties should almost inevitably tend against a finding of vulnerability, and therefore against recognition of a concurrent duty of care in tort. Of course it remains possible that in some cases the terms of a contract will evidence an inequality of bargaining power or lack of sophistication, that may be suggestive of vulnerability. It may be possible to see *Bryan* as such a case. However, that is not this case. Not all building contracts are made equal[14]. The simple contract and domestic relationship of the parties in *Bryan* is at one end of the spectrum. The present case is at the other end.

29 The CA noted a difficulty in reconciling observations in *Woolcock* and *Barclay v Penberthy* on the issue of burden of proof in relation to vulnerability[15]. However, on the facts of this case burden is irrelevant because it was expressly found that Chelsea not only *could* have protected itself but *in fact did,* by entering into the D&C Contract imposing responsibility on Brookfield[16] .

30 Despite that finding, the CA nonetheless proceeded to conclude that "[*t*]*here is no reason in these circumstances to treat the developer as otherwise than vulnerable*" {CA [120]}. The only further circumstances identified were an assumption that the development was a

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[11] *Central Trust Co v Rafuse* at 206, numbered point 3.
[12] *Woolcock* at 530 [23], 533 [31] and 548-553 [80]-[96].
[13] *Bryan v Maloney* at 621.
[14] *Robinson v P.E. Jones* at 62 [81].
[15] CA at [138].
[16] CA at [118].

"*significant financial commitment*" and that, "*in accordance with usual industry practices*", the administration of the contract "*inevitably involved reliance by the developer on the exercise of responsibility by the builder*" {CA [119], [120]}. The CA thereby committed the error of treating reliance as synonymous with vulnerability[17].

31 The CA based its finding of vulnerability (and consequent duty) on matters of the most generic kind, arising solely from the fact of a contract (not its particular terms). Commercial property developments will inevitably involve significant financial investment and reliance on the builder to perform the contract. If a developer with the attributes of Chelsea and with the benefit of detailed warranties such as those in the D&C Contract can be relevantly "vulnerable", then it is difficult to conceive of any principal to a building contract that will not be. That result cannot be reconciled with the exegesis of the concept of vulnerability in *Woolcock*.

32 The finding of fact that Chelsea had protected itself against relevant loss pursuant to the D&C Contract ought to have led to a conclusion that Chelsea was not vulnerable and was not owed a duty of care in tort.

33 There is no sound reason for imposing a duty where it was reasonably open to the plaintiff to take steps to protect itself[18], *a fortiori* where the principal did in fact protect itself, as Chelsea did here. For the reasons developed below, the particular nature of the loss in the current circumstances reinforces the primacy of contract and the absence of any rationale for the general law to superimpose a duty of care in tort. Further, a superimposed duty of care circumvents the temporally limited contractual rights in respect of defects, and the associated assumptions of risk and responsibility that emerge from the present contractual matrix.

The relevant loss is inherent to the contract

34 It is settled law that the loss arising from latent defects is pure economic loss, being the diminution in value of the building arising when a previously unknown defect becomes manifest[19]. In distinction from cases such as *Voli*, *Caltex Oil*[20] and *Perre*, the loss in the

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[17] *Perre v Apand* at 228 [124]. Neither reliance nor assumption of responsibility are sufficient criterion for determination of a duty of care.
[18] *Perre v Apand* at 225 [118] and 226 [120].
[19] *Bryan* at 617; *Woolcock* at 529 [19]-[20].

present context arises not merely from the task or endeavour but from the specific terms of the contract. The risk of harm is paying too much for the work. It therefore arises from the voluntary decision to enter into the commercial transaction pursuant to the contract. No risk of such loss arises outside of the contract. The loss is in essence a fault in the bargain. A party is committed to the risk of that loss upon entry into the contract and cannot escape it, albeit the law deems the risk not to accrue until subsequent manifestation such that the defect is revealed to the market[21].

35 The nature of the loss being inherent and exclusive to the contract reinforces the conclusion that there is no sound reason for the general law to superadd a duty of care in the present context. Where the relevant interest is in getting something of the value paid for under a contract, tort has no necessity or place to impose itself. The contractual price agreed between non-vulnerable commercial parties should be understood to reflect the inherent risks, including of latent defects, and the contracting party is always free to walk away if it does not wish to accept the risk[22]. In the language of tort, the purchaser can be seen as having assumed the risk, albeit in consideration for an agreed term as to price.

36 Further, in the present context the contractual term as to price is central to defining the applicable the standard of workmanship and quality[23]. Thus both the standard of performance and the relevant economic loss are necessarily derived from, and defined by, the contractual terms. A claim cannot be said to be in tort it if depends for the nature and scope of the asserted duty of care on the manner in which an obligation has been specified by a contract[24].

Circumvention of the contractual regime

37 The contractual matrix demonstrates a transactional structure in which clear temporal limitations in respect of defects were adopted. The contractual limitation period for breach should be understood as an important part of the bargain and risk allocation on which the builder entered the transaction. This is reinforced by other aspects of the D&C Contract. As has been noted above, the D&C Contract required contracts for sale to successors in

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[20] *Caltex Oil (Australia) Pty Ltd v Dredge "Willemstad"* (1976) 136 CLR 529.
[21] *See Scarcella v Lettice* (2000) 51 NSWLR 302 at 308 [24] per Handley JA.
[22] *Woolcock* at 558 [110], 560 [114].
[23] *Woolcock* at 554 [100]-[101].

title to be in a specified standard form. That standard form contract granted limited rights in respect of defects in the form of conditions 32.6 and 32.7. Those conditions must be understood as reflecting an assumption of risk by future purchasers in respect of defects remaining latent outside the relevant 6 and 7 month periods during which rights were exercisable. That assumption of risk, entrenched within the contractual matrix, is not congruent with a suggestion that the builder assumed responsibility to successors in title for such matters.

38 Further, the temporal limitation of the builder's risk for defects is consistent with the agreed terms as to professional liability insurance. The builder was obliged to maintain insurance cover until the final certificate and then for a run-off period of just 4 years. In circumstances where the limitation period in contract generally commences at the time that possession is handed over (ordinarily practical completion)[25], the insurance run-off was coextensive with all but some months of the 6 year limitation period. This aspect of the contractual matrix reinforces the inconsistency of subsequent imposition of a liability in negligence that may remain for decades after completion.

39 The recognition of claims in negligence in respect of latent defects that are temporally indeterminate "flies in the face" of the underlying rationales of the statutes of limitation which have formed part of the policy of the law for nearly 400 years[26]. It has an undesirable and unsatisfactory result for commercial enterprise, including both builders and insurers[27].

40 Accordingly, the recognition of a superadded duty of care in tort subverts or contravenes the assumption of risk established by the present contractual matrix and results in a practical outcome that subordinates the law of contract to the law of tort.

41 No such duty should be recognised.

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[24] *Central Trust Co v Rafuse* at 205.
[25] *Honeywood v Munnings* (2006) 67 NSWLR 466 at 470 [17].
[26] *Woolcock* at 555-557 [102]-[105] and [107] per McHugh J.
[27] *Woolcock* at 558 [108]-[109] per McHugh J.

The statutory context of the Owners Corporation

42 Before addressing the specific issue of the duty alleged to be owed, it is necessary to set out the statutory context. In this case, it is submitted that the contractual matrix and the statutory context combine to reveal that no duty of care should be recognised.

43 The Owners Corporation was established pursuant to s 8(1) of the SSM Act on the registration of the strata plan. It is a body corporate comprised of the owners of the lots in the strata scheme: s 11(1), SSM Act.

44 The legal estate in fee simple of the common property was vested in the Owners Corporation upon registration of the strata plan: s 18, *Strata Schemes (Freehold Development) Act 1973 (NSW)* ("**SSFD Act**"). The Registrar-General was obliged to create a folio of the Register for the estate or interest of the Owners Corporation in the common property: s 18(2), SSFD Act.

45 The Owners Corporation holds the common property as "agent" for the proprietors of each of the lots as tenants in common in shares proportional to the unit entitlements of their respective lots: s 20, SSFD Act. The beneficial interest in the common property held by the Owners Corporation as agent is not capable of being severed from, or dealt with except in conjunction with, the separate lots: s 24(2), SSFD Act.

46 The Owners Corporation has, for the benefit of the owners, the management and control of the use of the common property: s 61(1), SSM Act. Its responsibilities include maintaining and repairing the common property, maintaining finances, taking out insurance and keeping accounts and records: s 61(2) SSM Act. It is under a duty to properly maintain the common property and keep it in a state of good and serviceable repair: s 62(1), SSM Act. It must also renew or replace fixtures or fittings comprised in the common property: s 62(2) SSM Act.

47 The Owners Corporation must estimate and levy amounts required to maintain in good condition the common property, as well as for re-painting, renewing or replacing fixtures and fittings and replacing or repairing the common property: ss 75 and 76, SSM Act. If the Owners Corporation is faced with any other expenses it cannot meet from its existing administrative fund or sinking fund then it must levy each lot owner in order to meet those expenses: s 76(4), SSM Act.

48 In *Owners – Strata Plan No 43551 v Walter Construction Group Ltd*[28] Spigelman CJ[29] formulated a number of propositions in respect of the statutory regime:

(a) The word "agent" in the SSFD Act is not used in the technical sense of the law of agency[30];

(b) Each proprietor of a lot has an equitable interest in the common property as a tenant in common with other lot owners[31];

(c) In considering whether an owners corporation can sue with respect to damage to common property it should be treated in the same manner as a trustee, including the right of a trustee to sue in tort for damage to trust property[32]; and

(d) An owners corporation may sue in its own right in the same manner as any other registered proprietor of property[33].

49 Whether Spigelman CJ's proposition (a) is correct in relation to the use of the word "agent" in s 20 of the SSFD Act, however, may perhaps be doubted. Certainly the usage in s 20 appears to convey the notion of "on behalf of".

50 The Owners Corporation also has an express entitlement pursuant to s 227 of the SSM Act to bring proceedings in relation to the common property where the owners of the lots are jointly entitled to take proceedings against any person.

The contractual matrix relevant to the Owners Corporation

51 In this case the relevant contractual matrix is not limited to a single contractual relationship between the builder and the original owner. There were interrelated contracts comprising the Master Agreement, D&C Contract, contracts for sale and leases, which provide the relevant factual context for consideration of any tortious duty of care owed to the Owners Corporation.

52 Whilst not strictly privy to any contract, the Owners Corporation in this case exists only because of contract. It was the Master Agreement which conceived the Owners Corporation by defining the strata title structure for the development. Chelsea was obliged

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[28] (2004) 62 NSWLR 169
[29] With Ipp and McColl JJA agreeing.
[30] ibid at 178 [42].
[31] ibid at 178 [43]-[44].
[32] ibid at 179 [48].
[33] ibid at 179 [49].

to register the Serviced Apartments Strata Plan[34] but subcontracted that obligation to Brookfield[35]. Chelsea was also obliged to register the leases by which the owners of lots would cede their voting rights in respect of the Owners Corporation to Park[36]. Thus from the time of conception, the Owners Corporation was destined (by contract) to be controlled initially by Chelsea and thereafter by the Serviced Apartments operator, a Stockland entity. Stockland had contractual protection in relation to the quality of the builder pursuant to the terms of the Master Agreement.

53 The structure of the transaction put in place by the Master Agreement was such that at the time of registration of the strata plan Chelsea would own all lots and control the Owners Corporation. Chelsea would thereafter register leases in respect of each lot ceding voting rights and control of the Owners Corporation to Park. Lots would then be transferred to purchasers by completion of the contracts for sale.

54 The contracts for sale conferred express rights in respect of defects in the common property on both the lot purchaser and the Owners Corporation[37]. However, those rights were subject to express temporal limitations of 6 and 7 months respectively.

55 There are a number of reasons why the Court ought conclude that no duty of care was owed to the Owners Corporation in light of this contractual matrix.

56 The first is that the CA accepted that on the present authority no duty of care could arise with respect to successive owners unless there was a general law duty owed to the original owner with whom the builder contracted to construct the building[38]. That ought to be regarded by the law as a satisfactory result, being in accordance with the usual policy of the law that successors in title and privies are generally in no better position before the law than their predecessors. That result is particularly appropriate given the statutory context of this plaintiff which, at the time of its creation, was merely an agent for the original owner: SSFD Act, s 20(a).

57 Secondly, the creation of the Owners Corporation as a statutory agent ought to have the legal result of putting the body corporate, in respect of the common property, in the position which the developer (and owner of the lots) had. That is, the legal result of its

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[34] Master Agreement, clause 7.
[35] D&C Contract, special condition 65.
[36] Master Agreement, clause 9.
[37] Standard Contract for Sale, clauses 32.6 and 32.7.

statutory status as agent ought be that the Owners Corporation is recognised as being able to exercise the contractual rights of the developer. In any event, as a practical matter the entitlement to sue on those rights is confirmed by s 227 of the SSM Act[39]. Thus at the time of registration of the strata plan the Owners Corporation was able to enforce obligations in the D&C Contract related to the common property.

58 Further, upon transfer of the lots pursuant to the contracts for sale express rights were conferred by clause 32.7 on the Owners Corporation to issue notices requiring rectification of defects in the common property. In addition, s 227 of the SSM Act permitted the Owners Corporation to bring proceedings enforcing the rights conferred on each lot owner by clause 32.6 of the standard contract for sale.

59 This result ensures that the Owners Corporation has no greater, and no lesser, rights than those of the developer and the successors in title to the lots. In contrast the effect of the CA's decision is to confer greater rights on the Owners Corporation (as successor in title to the common property) than the successors in title to the lots agreed to accept pursuant to the contracts for sale, which temporally limited rights in respect of defects to a number of months. Why should the agent obtain greater rights than those bargained for by the principals whose interests it represents?

60 Thirdly, given that assessment of vulnerability involves consideration of the characteristics or attributes of the plaintiff[40], assessment of the Owners Corporation can only occur by analysis of its guiding mind and the interests which controlled it. At its birth the Owners Corporation was merely the alter ego of a sophisticated property developer and the receptacle of its beneficial interests. Chelsea had bargained for contractual protection in respect of defects pursuant to the D&C Contract.

61 Upon entry into the lease of each lot, the voting rights enabling control of the Owners Corporation passed to the Stockland entity, Park. Stockland had bargained for contractual protection in respect of defects pursuant to the Master Agreement. Title to the lots was transferred to investors, who had purchased pursuant to the form of contract for sale that was annexed to the D&C Contract and which Chelsea had agreed with Brookfield it

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[38] CA at [100], [115]; *Woolcock* at 527 [14], [15].
[39] In Queensland, the statute provides expressly for such subrogation: s 36(3), *Body Corporate and Community Management Act, 1997 (Qld).*
[40] *Woolcock* at 549 [80], 553 [96].

would use. Pursuant to those sale contracts, lot purchasers acquired contractual rights in respect of defects, including express rights for the Owners Corporation to require rectification of defects in the common property.

62 Thus, the contractual matrix had the result that at all relevant times there was a commonality of economic interests and control between the Owners Corporation and commercial entities who had bargained for relevant contractual protection. The Owners Corporation could be no more vulnerable than those who controlled it and whose beneficial interests it held as agent.

Conclusion

10 63 The appropriate conclusion in respect of both issues in this case is that reached by McHugh J in *Woolcock:*[41]

> *"the law of negligence is best served by leaving it to the market and the law of contract to determine who should bear the economic loss that arises as the result of a fall in the value of a commercial building consequent upon the discovery of latent defects in the building."*

64 The appeal should be allowed.

Part VII - Legislative materials

65 See Annexure A.

20 **Part VIII - Orders sought**

66 The appellant's appeal be allowed.

67 In lieu of the Orders of the New South Wales Court of Appeal, the first respondent's appeal to the New South Wales Court of Appeal be dismissed with costs.

68 The first respondent pay the costs of the application for special leave to appeal and the appeal.

69 Such further or other Orders as this Honourable Court deems fit.

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[41] *Woolcock* at 560 [115].

Part IX - Oral argument

70 The appellant estimates that approximately three hours (including reply) will be required for the presentation of its oral argument.

Dated: 22 April 2014

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T.J. Breakspear

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(ACN 008 687 063)

Appellant

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First Respondent

Multiplex Corporate Agency Pty Ltd
Second Respondent

ANNEXURE A

APPLICABLE STATUTOTY PROVISIONS

Legislative provision	**Statement as to the applicability of the provision**	**Page**
Section 18 of the *Strata Titles Act 1973* No. 68 (now the *Strata Schemes (Freehold Development) Act 1973* (NSW) No. 68) (as at November 1999)	This section is still in force, in that form, at the date of making the submissions.	1
Section 20 of the *Strata Titles Act 1973* No. 68 (now the *Strata Schemes (Freehold Development) Act 1973* (NSW) No. 68) (as at November 1999)	This section is still in force, in that form, at the date of making the submissions.	3
Section 24(2) of the *Strata Titles Act 1973* No. 68 (now the *Strata Schemes (Freehold Development) Act 1973* (NSW) No. 68) (as at November 1999)	This section is still in force, in that form, at the date of making the submissions.	5
Section 8(1) of the *Strata Schemes Management Act 1996* (NSW) No. 138	This section is still in force, in that form, at the date of making the submissions.	7
Section 11(1) of the *Strata Schemes Management Act 1996* (NSW) No. 138	This section is still in force, in that form, at the date of making the submissions.	8

Legislative provision	**Statement as to the applicability of the provision**	**Page**
(as at November 1999)		
Section 61(1) and (2) of the *Strata Schemes Management Act 1996* (NSW) No. 138 (as at November 1999)	This section was in force, in that form, from November 1999 to 10 February 2003.	9
Section 61(1) and (2) of the *Strata Schemes Management Act 1996* (NSW) No. 138 (as at the date of making the submissions)	This section is in force, in that form, from the *Strata Schemes Amendment Act 2002* which commenced on 10 February 2003 and at the date of making the submissions. There were no transitional provisions.	10
Section 62(1) and (2) of the *Strata Schemes Management Act 1996* (NSW) No. 138 (as at November 1999)	This section is still in force, in that form, at the date of making the submissions.	11
Section 75 of the *Strata Schemes Management Act 1996* (NSW) No. 138 (as at November 1999)	This section was in force, in that form, from November 1999 to 7 February 2005.	12
Section 75 of the *Strata Schemes Management Act 1996* (NSW) No. 138 (as at the date of making the submissions)	This section is in force, in that form, from the *Strata Schemes Amendment Act 2004* which commenced on 10 February 2003 and at the date of making the submissions. There were no transitional provisions.	14
Section 76 of the *Strata Schemes Management Act 1996* (NSW) No. 138 (as at November 1999)	This section is still in force, in that form, at the date of making the submissions.	13
Section 227 of the *Strata Schemes Management Act 1996* (NSW) No. 138 (as at November 1999)	This section is still in force, in that form, at the date of making the submissions.	16
Section 38(3) of the *Body Corporate and Community Management Act 1997* (QLD) No. 28 (as at November 1999)	This section is still in force, in that form, at the date of making the submissions except that the provision number "38" was amended to provision number "36" by the *Body Corporate and Community Management and Other Legislation Amendment Act* 2003.	18

authorised by) such of the following persons as the Registrar-General may determine:

(a) the lessee under any lease, or the judgment creditor under any writ, recorded in the folio of the Register kept under the Real Property Act 1900 relating to the land comprised in the plan;

(b) the caveator under a caveat affecting any estate or interest in that land,

are lodged in the office of the Registrar-General.

(3) In relation to any particular plan lodged for registration as referred to in subsection (1), the Registrar-General may, without giving notice to any person, dispense with the requirement for a person mentioned in that subsection to sign the plan.

Provisions prohibiting registration to operate cumulatively

17. A provision of this Division prohibiting the registration of a plan or a notice of conversion in circumstances specified in that provision is in addition to any other provision of this Division prohibiting the registration of a plan or a notice of conversion in circumstances specified in that other provision.

Division 2—Common Property

Vesting of common property on registration of strata plan

18. (1) Upon registration of a strata plan any common property in that plan vests in the body corporate for the estate or interest evidenced by the folio of the Register comprising the land the subject of that plan but freed and discharged from any mortgage, charge, covenant charge, lease, writ or caveat affecting that land immediately before registration of that plan.

(2) The Registrar-General shall, upon registration of a strata plan, create a folio of the Register for the estate or interest of the body corporate in any common property in that strata plan.

(3) Upon registration of a strata plan of subdivision creating common property, the common property so created vests in the body corporate for the estate or interest evidenced by the folio of the Register comprising the land the subject of that plan but freed and discharged from any mortgage, charge, covenant charge, lease, writ or caveat affecting that land immediately before registration of that plan.

(4) Upon registration of a notice of conversion, any lot thereby converted into common property vests in the body corporate for the estate or interest evidenced by the folio of the Register comprising the land the subject of that notice at the time when the notice is registered but freed

and discharged from any mortgage, charge, covenant charge, lease, writ or caveat affecting that land before registration of that notice.

(5) Nothing in subsection (1), (3) or (4) affects any right or remedy that may be exercised otherwise than in relation to common property by a person who is a mortgagee, chargee, covenant chargee, lessee, judgment creditor or caveator, even though the person may have signed or consented to the registration of the plan or signed the notice creating the common property.

(6) In this section (other than this subsection), **"lease"** does not include a lease granted to the provider of an electricity, telephone or telecommunication service that is required by that provider for the provision of the service. In relation to land the subject of such a lease, the lessor is taken to be the body corporate and the land leased is taken to be common property on registration of the plan or notice.

Acquisition of additional common property

19. (1) In this section, **"land"** means land under the Real Property Act 1900 (other than land comprised in a qualified or limited folio of the Register or a perpetual lease from the Crown) but does not include a leasehold interest in land evidenced by a lease not registered under that Act.

(2) A body corporate may, pursuant to a unanimous resolution, accept a transfer or lease of land, not being a lot within the parcel, which is contiguous to the parcel but which is not subject to a mortgage, charge or writ, for the purpose of creating, or creating additional, common property and upon so doing shall forthwith cause the dealing evidencing the transaction to be registered under the Real Property Act 1900.

(2A) Subsection (2) does not authorise acceptance of a transfer by the body corporate under a strata scheme that is part of a community scheme under the Community Land Development Act 1989.

(3) The Registrar-General may refuse to register under the Real Property Act 1900, a transfer or lease referred to in subsection (2), if:

(a) it is not accompanied by:

(i) the certificate of title or Crown grant comprising the land described in the transfer or lease or, in the case of a transfer of a lease or sub-lease, the registered lease referred to in the transfer or sub-lease; and

(ii) the certificate of title comprising the common property;

(b) it is not accompanied by a certificate under the seal of the body corporate certifying that the resolution authorising the acceptance of the transfer or lease was a unanimous resolution; or

(c) in the case of a transfer, other than a transfer of a lease, where any land (in this paragraph referred to as **"the original parcel"**) comprised in the parcel before the registration of the transfer was held in fee simple and is contiguous to the land comprised in the transfer there has not been lodged in the office of the Registrar-General for registration under the Conveyancing Act 1919, a plan showing as a single lot the land comprised in the transfer and the original parcel.

(4) Upon the registration under the Real Property Act 1900 of any such transfer, other than a transfer of a lease:

(a) the land comprised therein becomes common property and is subject to the provisions of this Act relating to common property; and

(b) the Registrar-General shall make in the Register such recordings with respect to the land that becomes common property as he considers appropriate.

(5) Upon the registration under the Real Property Act 1900 of any such lease, transfer of a lease or sub-lease:

(a) the leasehold interest becomes common property and thereupon is subject to such of the provisions of this Act relating to common property as are applicable to a leasehold interest;

(b) the body corporate is responsible for all payments and the performance of all duties required of the lessee by the terms of the lease or sub-lease, as the case may be; and

(c) the Registrar-General shall make in the Register such recordings with respect to the leasehold interest that becomes common property as he considers appropriate.

(6) A body corporate may, pursuant to a unanimous resolution and with the concurrence of the lessor, surrender a lease accepted by it under this section.

(7) Upon the registration under the Real Property Act 1900 of any such surrender the Registrar-General shall make in the Register such recordings with respect to the surrender as he considers appropriate.

Body corporate to hold common property as agent for proprietors

20. The estate or interest of a body corporate in common property vested in it or acquired by it shall be held by the body corporate as agent:

(a) where the same person or persons is or are the proprietor or proprietors of all of the lots the subject of the strata scheme concerned—for that proprietor or those proprietors; or

(b) where different persons are proprietors of each of two or more of the lots the subject of the strata scheme concerned—for those proprietors as tenants in common in shares proportional to the unit entitlements of their respective lots.

Common property to be dealt with only under this Act

21. Common property shall not be capable of being dealt with except in accordance with the provisions of this Act.

Folio where no common property

22. (1) Where a strata plan that does not contain common property is registered, the Registrar-General shall create a folio of the Register and record therein, in such manner as he thinks fit:

(a) a statement that the strata scheme concerned does not contain common property;

(b) the name of the body corporate and the address for service of notices on it; and

(c) the schedule of unit entitlement in force in respect of the strata scheme concerned.

(2) During any period for which a folio of the Register created under subsection (1) or section 18 (2) does not contain common property, the Registrar-General shall, in that folio:

(a) record any change, from time to time, in the address for service of notices on the body corporate, evidenced by a notice lodged in accordance with section 61 (2) (b);

(b) record particulars of any amendment or addition to, or repeal of, the by-laws from time to time in force with respect to the strata scheme concerned, notification of which has been lodged in accordance with section 58 (3); and

(c) make any other recording which, by or under this or any other Act, he is required or authorised to make in the folio.

(3) A reference:

(a) in this Act to a folio of the Register or a certificate of title comprising common property includes respectively a reference to a folio of the Register created under subsection (1) or section 18 (2) during any period for which it does not contain common property or to a certificate of title issued under section 22A (2) in respect of any such folio; and

and shall, subsequently, in that folio:

(e) record any change from time to time in the address for service of notices on the body corporate, evidenced by a notice prepared and lodged in accordance with section 61;

(f) record particulars of any amendment, addition or repeal of or to the by-laws from time to time in force notification of which has been lodged in accordance with section 58 (3); and

(g) make any other recording which, by or under this or any other Act, he is required or authorised to make in the folio.

(3) Notwithstanding the provisions of the Real Property Act 1900, the Registrar-General shall not record any easement of the description contained in section 26 (1) (a) or (b), any easement acquired by resumption to the extent that it affects common property or any restriction on the use of land or positive covenant of the description contained in section 26 (1) (a) (whether or not the easement, restriction or positive covenant was created after the commencement of this Act or under section 26 (1)) in the folio of the Register comprising a lot the subject of the strata scheme concerned but shall record the easement, restriction or positive covenant in the folio of the Register comprising the common property, and any such easement, restriction or positive covenant shall affect any such lot to the extent that it is capable of affecting that lot and as if it were recorded by the Registrar-General in the folio of the Register comprising that lot.

(4) Notwithstanding any provision of the Real Property Act 1900, the Registrar-General shall not record any mortgage, charge, covenant charge or writ in the folio of the Register comprising the common property but any such mortgage, charge, covenant charge or writ recorded in the folio of the Register comprising a lot the subject of the strata scheme concerned affects the beneficial interest of the proprietor of that lot in the estate or interest in the common property held by the body corporate as agent for that proprietor in the same way as if that mortgage, charge, covenant charge or writ were recorded by the Registrar-General in the folio of the Register comprising that common property.

Dealings with lots include common property

24. (1) In any dealing or caveat relating to a lot, a reference to that lot includes a reference to any estate or interest in common property which is vested in the body corporate as agent for the proprietor of that lot without express reference to the common property and without that dealing or caveat being recorded in the folio of the Register comprising the common property.

(2) The beneficial interest of a proprietor of a lot in the estate or interest in the common property, if any, held by the body corporate as agent for that proprietor shall not be capable of being severed from, or dealt with except in conjunction with, the lot.

Transfer or lease of common property

25. (1) A body corporate may, pursuant to a unanimous resolution, execute a transfer or lease of common property other than common property the subject of a lease accepted or acquired by the body corporate under section 19 (2).

(1A) Subsection (1) does not authorise a transfer by the body corporate under a strata scheme that is part of a community scheme under the Community Land Development Act 1989.

(2) A body corporate, pursuant to a unanimous resolution, may, if not prevented by the terms of the lease, transfer a lease of common property accepted or acquired by the body corporate under section 19 (2) or grant, by way of sub-lease, a lease of its estate or interest in common property the subject of a lease so accepted or acquired.

(3) A body corporate may, pursuant to a unanimous resolution, accept a surrender of a lease, or, if otherwise empowered so to do, re-enter under a lease, granted under subsection (1) or (2).

(4) The Registrar-General shall register a dealing referred to in subsection (1), (2) or (3) by making in the Register such recordings with respect to the dealing as he considers appropriate.

(5) * * * * *

Creation of easements, restrictions and positive covenants

26. (1) A body corporate may, pursuant to a unanimous resolution:

(a) execute a dealing creating an easement which burdens the common property or a restriction on the use of land or a positive covenant which burdens the common property or the whole parcel;

(b) accept a dealing creating an easement which, or a restriction as to user which, benefits the common property or the whole parcel;

(c) execute a dealing releasing an easement which, or a restriction as to user which, benefits the common property or the whole parcel; or

(d) accept a dealing releasing an easement which burdens the common property or a restriction as to user which burdens the common property or the whole parcel.

Chapter 2 Management of strata schemes

Introductory note

This Chapter provides for who can be involved in the management of a strata scheme and for the rules that govern a strata scheme.

Part 1 Introduction

Introductory note

This Part provides an overview of the Chapter.

8 Who manages a strata scheme?

(1) On the registration of a strata plan for a strata scheme, there is established an owners corporation for the strata scheme in accordance with Part 2.

(2) An owners corporation for a strata scheme has the principal responsibility for the management, of the scheme.

Note. Strata plans for freehold strata schemes are registered under section 8 of the *Strata Titles (freehold Development) Act 1973* and strata plans for leasehold strata schemes are registered under section 7 of the *Strata Titles (Leasehold Development) Act 1986.*

An owners Corporation for a strata scheme is the same as a body corporate for a strata scheme previously established under the *Strata Titles (Freehold Development) Act 1973* or the *Strata Titles (Leasehold Development) Act 1986.*

9 Who else may be involved in managing a strata scheme?

The owners corporation may be assisted in the carrying out of its management functions under this Act by either or both of the following:

(a) the executive committee of the owners corporation established in accordance with Part 3,

(b) a strata managing agent appointed in accordance with Part 4.

10 What rules govern a strata scheme?

On the registration of a strata plan for a strata scheme, a set of by-laws applies to the strata scheme as provided by Part 5.

Part 2 The principal manager—the owners corporation

Introductory note

This Part provides for the establishment of an owners corporation for a strata scheme and for the procedure of an owners corporation.

11 Constitution of owners corporation

(1) The owners of the lots from time to time in a strata scheme constitute a body corporate under the name 'The Owners—Strata Plan No X" (X being the registered number of the strata plan to which that strata scheme relates).

(2) The *Corporations Law* does not apply to or in respect of an owners corporation.

12 Functions of owners corporation

An owners corporation has the functions conferred or imposed on it by or under this or any other Act.

13 Owners corporation may employ persons to assist in exercise of functions

(1) An owners corporation may employ such persons as it thinks fit to assist it in the exercise of any of its functions.

(2) An owners corporation must ensure that any person employed to assist it in the exercise of a function has the qualifications (if any) required by this Act for the exercise of that function.

Note. An owners corporation may employ such persons to assist it as, for example, caretakers and persons providing services to retirement villages. However, where a strata managing agent is appointed the appointment must be in accordance with Part 4. In addition, the Act requires certain functions to be performed by particular persons or persons having particular expertise. For example, section 24 places restrictions on the persons who can exercise functions relating to the finances and accounts of an owners corporation.

(3) An owners corporation may not delegate any of its functions to a person unless the delegation is specifically authorised by this Act.

Chapter 3 Key management areas

Introductory note

This Chapter sets out the key areas of management for a strata scheme, that is, the main responsibilities of an owners corporation for a strata scheme.

Part 1 Introduction

Introductory note

This Part provides an overview of the Chapter.

61 What are the key management areas for a strata scheme?

(1) An owners corporation has the control, management and administration of the common property of the strata scheme for the benefit of the owners.

(2) The owners corporation has responsibility for the following:

(a) maintaining and repairing the common property of the strata scheme as provided by Part 2,

(b) managing the finances of the strata scheme as provided by Part 3,

(c) taking out insurance for the strata scheme as provided by Part 4,

(d) keeping accounts and records for the strata scheme as provided by Part 5.

(3) Other functions of an owners corporation are included in Part 6.

Chapter 3 Key management areas

Introductory note. This Chapter sets out the key areas of management for a strata scheme, that is, the main responsibilities of an owners corporation for a strata scheme.

Part 1 Introduction

Introductory note. This Part provides an overview of the Chapter.

61 What are the key management areas for a strata scheme?

(1) An owners corporation has, for the benefit of the owners:

(a) the management and control of the use of the common property of the strata scheme concerned, and

(b) the administration of the strata scheme concerned.

(2) The owners corporation has responsibility for the following:

(a) maintaining and repairing the common property of the strata scheme as provided by Part 2,

(b) managing the finances of the strata scheme as provided by Part 3,

(c) taking out insurance for the strata scheme as provided by Part 4,

(d) keeping accounts and records for the strata scheme as provided by Part 5.

(3) Other functions of an owners corporation are included in Part 6.

Part 2 Maintenance, repairs, alteration and use of common property and fire safety inspections

Introductory note. This Part sets out the duties of an owners corporation to maintain and repair the property of a strata scheme and to arrange access for fire safety inspections. Certain powers are given to an owners corporation to recover money for work required to be carried out and to enter property to carry out certain necessary work. The Part also deals with certain powers of an owners corporation in relation to alterations or additions to common property and the granting of licences over common property.

62 What are the duties of an owners corporation to maintain and repair property?

(1) An owners corporation must properly maintain and keep in a state of good and serviceable repair the common property and any personal property vested in the owners corporation.

(2) An owners corporation must renew or replace any fixtures or fittings comprised in the common property and any personal property vested in the owners corporation.

(3) This clause does not apply to a particular item of property if the owners corporation determines by special resolution that:

(a) it is inappropriate to maintain, renew, replace or repair the property, and

(b) its decision will not affect the safety of any building, structure or common property in the strata scheme or detract from the appearance of any property in the strata scheme.

Note. The decision of an owners corporation under subsection (3) may be reviewed by an Adjudicator (see section 138).

63 What power does an owners corporation have to carry out work and recover costs?

(1) **Application of section**

This section applies if a person who is required to carry out work as referred to in this section fails to carry out the work.

Part 2 Maintenance and repairs

Introductory note

This Part sets out the duties of an owners corporation to maintain and repair the property of a strata scheme. Certain powers are given to an owners corporation to recover money for work required to be carried out and to enter property to carry out certain necessary work.

62 What are the duties of an owners corporation to maintain and repair property?

(1) An owners corporation must properly maintain and keep in a state of good and serviceable repair the common property and any personal property vested in the owners corporation.

(2) An owners corporation must renew or replace any fixtures or fittings comprised in the common property and any personal property vested in the owners corporation.

(3) This clause does not apply to a particular item of property if the owners corporation determines by special resolution that:

(a) it is inappropriate to maintain, renew, replace or repair the property, and

(b) its decision will not affect the safety of any building, structure or common property in the strata scheme or detract from the appearance of any property in the strata scheme.

Note. The decision of an owners corporation under subsection (3) may be reviewed by an Adjudicator (see section 138).

63 What power does an owners corporation have to carry out work and recover costs?

(1) **Application of section**

This section applies if a person who is required to carry out work as referred to in this section fails to carry out the work.

(2) **Work required by public authority**

An owners corporation may carry out work that is required to be carried out by an owner of a lot under a notice served on the owner by a public authority and may recover the cost of carrying out the work from the owner or any person who, after the work is carried out, becomes the owner.

74 Account of owners corporation

(1) An owners corporation must pay any amounts that are received by it and are not otherwise invested in accordance with this Act into an account established in a financial institution in the name of the owners corporation.

(2) This section does not apply to an owners corporation that has appointed a strata managing agent to whom the duty of the owners corporation under this section is delegated in accordance with this Act.

Division 2 Levy of contributions

75 Estimates to be prepared of contributions to administrative and sinking funds

(1) An owners corporation must, not later than 14 days after the constitution of the owners corporation and at each annual general meeting after that, estimate how much money it will need to credit to its administrative fund for actual and expected expenditure:

(a) to maintain in good condition on a day-to-day basis the common property and any personal property vested in the owners corporation, and

(b) to provide for insurance premiums, and

(c) to meet other recurrent expenses.

Note. Recurrent expenses would include such regular expenses as insurance, water charges, electricity charges, carpet cleaning, lawnmowing services and the like and minor expenses relating to maintenance of the common property.

(2) An owners corporation must, at each annual general meeting, estimate how much money it will need to credit to its sinking fund for actual and expected expenditure:

(a) for painting or repainting any part of the common property which is a building or other structure, and

(b) to acquire personal property, and

(c) to renew or replace personal property, and

(d) to renew or replace fixtures and fittings that are part of the common property, and

(e) to replace or repair the common property, and

(f) to meet other expenses of a capital nature.

Note. Expenses of a capital nature would include expenses in relation to major repairs or improvements to the common property or personal property of the owners corporation, such as painting of a building or replacement of roofing, guttering or fences and the like.

(3) When estimating amounts needed to be credited to the administrative fund or the sinking fund the owners corporation must have before it, and take into account, a statement of the existing financial situation of the strata scheme and an estimate of receipts and payments.

76 Owners corporation to set levy for contributions *to* administrative and sinking funds

(1) The owners corporation must determine the amounts to be levied as a contribution to the administrative fund and the sinking fund to raise the amounts estimated as needing to be credited to those funds.

(2) That determination must be made at the same meeting at which those estimated amounts are determined.

(3) The owners corporation must levy on each person liable for it such a contribution.

(4) If the owners corporation is subsequently faced with other expenses it cannot at once meet from either fund, it must levy on each owner a contribution to the administrative fund, determined at a general meeting of the owners corporation, in order to meet the expenses.

(5) A contribution is, if an owners corporation so determines, payable by such regular periodic instalments as are specified in the determination setting the amount of the contribution.

(2) A distribution to an owner of a lot or a person entitled to receive it under subsection (3) must be made in the same proportion as is borne by the unit entitlement for the lot to the aggregate unit entitlement.

(3) Any money payable under subsection (1) in relation to a lot that is subject to a mortgage or covenant charge shown on the strata roll is to be paid:

(a) in accordance with the joint directions of the owner of the lot and the mortgagee or covenant chargee, or

(b) if they cannot agree—in accordance with an order of the court that, under subsection (4), has jurisdiction in the matter.

(4) An application for an order to resolve a dispute under subsection (3) may be made:

(a) in the case of a dispute where the amount of the payment does not exceed $500 and the title to land is not in question or is in question only incidentally—to the Local Court, or

(b) in the case of an application where the amount of payment does not exceed $500 and the title to land is in question otherwise than incidentally—to the District Court of New South Wales, or

(c) in the case of an application where the amount of the payment exceeds $500 but does not exceed $10,000 and the title to land is not in question or is in question only incidentally—to the District Court of New South Wales, or

(d) in any other case—to the Supreme Court.

73 Can money in administrative fund or sinking fund be invested?

(1) An owners corporation may invest any money in its administrative fund or sinking fund in any manner permitted by law for the investment of trust funds or in any prescribed investment.

(2) Any interest received on an investment made under this section forms part of the fund to which the investment belongs.

74 Account of owners corporation

(1) An owners corporation must pay any amounts that are received by it and are not otherwise invested in accordance with this Act into an account established in a financial institution in the name of the owners corporation.

(2) This section does not apply to an owners corporation that has appointed a strata managing agent to whom the duty of the owners corporation under this section is delegated in accordance with this Act.

Division 2 Levy of contributions

75 Estimates to be prepared of contributions to administrative and sinking funds

(1) An owners corporation must, not later than 14 days after the constitution of the owners corporation and at each annual general meeting after that, estimate how much money it will need to credit to its administrative fund for actual and expected expenditure:

(a) to maintain in good condition on a day-to-day basis the common property and any personal property vested in the owners corporation, and

(b) to provide for insurance premiums, and

(c) to meet other recurrent expenses.

Note. Recurrent expenses would include such regular expenses as insurance, water charges, electricity charges, carpet cleaning, lawnmowing services and the like and minor expenses relating to maintenance of the common property.

(2) An owners corporation must, at each annual general meeting, estimate how much money it will need to credit to its sinking fund for actual and expected expenditure:

(a) for painting or repainting any part of the common property which is a building or other structure, and

(b) to acquire personal property, and

(c) to renew or replace personal property, and

(d) to renew or replace fixtures and fittings that are part of the common property, and

(e) to replace or repair the common property, and

(f) to meet other expenses of a capital nature.

Note. Expenses of a capital nature would include expenses in relation to major repairs or improvements to the common property or personal property of the owners corporation, such as painting of a building or replacement of roofing, guttering or fences and the like.

(3) When estimating amounts needed to be credited to the administrative fund or the sinking fund the owners corporation must have before it, and take into account, a statement of the existing financial situation of the strata scheme and an estimate of receipts and payments.

(4) In estimating amounts to be credited to the sinking fund, an owners corporation that is required to prepare a plan under section 75A is to take into account anticipated major expenditure identified in the plan for the 10-year period to which the plan relates.

(5) An owners corporation of a large strata scheme must include in the estimates prepared under this section at an annual general meeting specific amounts in relation to each item or matter on which the owners corporation intends to expend money, or on which the owners corporation is aware money will be likely to be expended, in the period until the next annual general meeting.

75A Owners corporation to prepare 10-year sinking fund plans

(1) This section applies to owners corporations established on or after the commencement of this section.

(2) An owners corporation to which this section applies is to prepare a plan of anticipated major expenditure to be met from the sinking fund over the 10-year period commencing on the first annual general meeting of the owners corporation.

(3) The initial plan is to be finalised by the end of the second annual general meeting of the owners corporation.

(4) The plan is to be reviewed and (if necessary) adjusted no later than at the fifth annual general meeting of the owners corporation.

(5) An owners corporation to which this section applies is to prepare a plan as referred to in subsection (2) for each 10-year period following the period referred to in that subsection and is to finalise and review the plan in accordance with the requirements of subsections (3) and (4) at the corresponding annual general meetings in the relevant 10-year period.

(6) An owners corporation may engage expert assistance in the preparation of a plan under this section.

(7) The regulations may extend the operation of this section to all owners corporations or to such classes of owners corporations established before the commencement of this section as are specified in the regulations.

Chapter 7 General

Introductory note

This Chapter contains miscellaneous provisions relating to the operation and management of strata schemes and the administration of the Act.

The Chapter contains a regulation-making power that enables regulations to be made in relation to such matters as the fees for applications to the Commissioner, an Adjudicator or the Strata Schemes Board, mediation and other matters of a procedural or administrative nature.

Part 1 Matters relating to proceedings

225 Proceedings for offences

Proceedings for an offence against this Act or the regulations may be dealt with summarily before a Local Court constituted by a Magistrate sitting alone.

226 Other rights and remedies not affected by this Act

(1) Nothing in this Act derogates from any rights or remedies that an owner, mortgagee or chargee of a lot or an owners corporation or covenant chargee may have in relation to any lot or the common property apart from this Act.

(2) In any proceedings to enforce a right or remedy referred to in subsection (1), 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 Part 4 of the *Community Land Management Act 1989* makes adequate provision for the enforcement of those rights or remedies.

(3) The defendant's costs are to be as determined by the court.

227 Owners corporation may represent owners in certain proceedings

(1) This section applies to proceedings in relation to common property.

(2) If the owners of the lots in a strata scheme are jointly entitled to take proceedings against any person or are liable to have proceedings taken against them jointly, the proceedings may be taken by or against the owners corporation.

(3) Any judgment or order given or made in favour of or against the owners corporation in any such proceedings has effect as if it were a judgment or order given or made in favour of or against the owners.

(4) A contribution required to be made by an owner of a lot to another owner in relation to such a judgment debt is to bear the same proportion to the judgment debt as the unit entitlement of the contributing owner bears to the aggregate unit entitlement.

228 Structural defects—proceedings as agent

(1) An interested person may take proceedings for the rectification of the condition of a part of a building, or a part of the site of a building, if that condition affects or is likely to affect the support or shelter provided by that part to any other part of the building or its site.

(2) Any such proceedings may be taken only if

(a) they could have been taken by an owner of a lot or by another person in whom is vested an estate in fee simple in a part of the building or its site, and

(b) they have not been taken by the owner or other person within a reasonable time.

(3) Any such proceedings are taken by an interested person as agent for the person who might have taken the proceedings and at the cost of the interested person.

(4) In this section, ***interested person*** means:

(a) the owners corporation for the strata scheme for the building or, if part of the building is included in a stratum parcel, of any strata scheme for part of the building, or

(b) the lessor of a leasehold strata scheme, or

community titles scheme.

(3) An owner's interest in a lot is inseparable from the owner's interest in the common property.

Examples—

1. A dealing affecting the lot affects, without express mention, the interest in the common property.

2. An owner cannot separately deal with or dispose of the owner's interest in the common property.

(4) If the occupier of a lot is not the lot's owner, a right the owner has under this Act to the occupation or use of common property is enjoyed by the occupier.

(5) The way the body corporate for a community titles scheme (**"scheme A"**) may enjoy the occupation and use of the common property for a community titles scheme for which scheme A is a subsidiary scheme is subject to the community management statement for each scheme for which scheme A is a subsidiary scheme.

(6) If a body corporate is authorised under this Act to enter into a transaction affecting common property, it may enter into the transaction, and execute documents related to the transaction, in its own name, as if it were the owner of an estate of fee simple in the common property.

Rights and responsibilities for common property

38.(1) The body corporate for a community titles scheme may sue and be sued for rights and liabilities related to the common property as if the body corporate were the owner of the common property.

Example—

If a person, including the owner of a lot included in the community titles scheme, damages the common property, the body corporate may sue to recover the loss arising from the damage.

(2) For common property other than common property for which an entity other than the body corporate is the occupier, the body corporate may sue and be sued as if the body corporate were the occupier.

Example—

If a person is injured while on the common property (other than common property for which an entity other than the body corporate is the occupier), an action claiming failure by the occupier to exercise a proper standard of care lies against the body corporate.

(3) If, before a community titles scheme is established, a contract is entered into to have work carried out on land that becomes scheme land—

(a) the body corporate is, on the establishment of the scheme, subrogated to the rights (if any) of the original owner under the contract to the extent that the contract applies to work affecting scheme land that is common property; and

(b) a lot owner is, on the establishment of the scheme, subrogated to the rights (if any) of the original owner under the contract to the extent that the contract applies to work affecting scheme land that is the lot.

Creating common property (no new scheme)

39.(1) If authorised by resolution without dissent, the body corporate for a community titles scheme may acquire, and incorporate with the common property for the scheme—

(a) land in fee simple contiguous to scheme land; or

(b) a lot included in the scheme.

(2) Subsection (1) applies only if—

(a) the titling and subdivisional arrangements needed for the acquisition are consistent with the operation of the *Land Title Act 1994*; and

(b) the scheme, as changed by the creation of the new common property, is consistent with the requirements of this Act for a community titles scheme.

Creating common property by subdivision (no new scheme)

40.(1) This section applies if—