

# Common Property

Issue 3

Legal news for the strata and company title management industry

August 2008



## Minority lot owners

How are they  
protected?

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## Meeting etiquette — the p's and q's for an owners corporation meeting

**M**eetings are the forum in which most decisions of an owners corporation relating to the administration of a strata scheme and the common property are made. They provide the venue for decision-making as well as providing a vehicle by which owners, and possibly occupiers, come together for the purposes of making decisions. Meetings, regrettably, often provide the focal point of conflict, dissension, aggression and unnecessary angst. It is important to understand some of the procedural matters which can make the operation of meetings far less contentious, more effective and conducive to their purpose. Three elements, in this context, are instantly recognised but frequently poorly understood. They are adjournments, amendments and points of order. What are these various elements and how are they better understood?

### Adjournments

Adjournments are referred to in clause 13 Part 2 Schedule 2 of the Management Act. A general meeting of an owners corporation may be adjourned for any reason if a motion is passed at the meeting for the adjournment. Where such adjournment occurs, the time and place at which the adjourned meeting is to be resumed must be fixed by the person who was presiding at the meeting. Notice of the adjournment must be served by the secretary on all persons entitled to attend the meeting.

In addition to the power given under the Management Act, a chairperson also has power to adjourn a meeting. The chairperson has the responsibility for maintaining order and for ensuring that the agenda is observed. In pursuance of these objects, the chairperson has the power to adjourn a meeting or declare a recess.

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An adjournment is a postponement of a meeting to another time or to another time and place. The decision to take a short break may, technically, be called an adjournment in so much as the meeting's deliberations are postponed for, say, a quarter of an hour. The term "recess" is more accurately used for a short break. A "recess" may be defined as a short intermission in proceedings—it does not close the meeting and, after it, business will immediately be resumed at exactly the point at which it was interrupted.

A chairperson may, in order to maintain order, adjourn a meeting for a short period, or until another day and leave the chair. An adjournment for a short period is also proper for the purpose of allowing a quorum to assemble or for the purpose of taking a poll.



If the notice of the meeting or an agenda that has been properly adopted indicates when the meeting will close, the chairperson is responsible for implementing this agenda. If the chairperson does not do this without prompting, any person having the power to vote at the meeting may raise the point.

A chairperson may, in addition, declare a meeting closed when the business before it has finished, but not otherwise. An erroneous declaration that the business is finished is not sufficient.

### Can anyone other than the chairperson decide to adjourn a meeting?

Apart from the chairperson's powers as outlined above, the right to decide whether the meeting should be stopped either for a short or long period belongs to the meeting itself. Such a decision is within the power of the majority of those present.

A motion suggesting an immediate recess can be made at any time even if another question is pending. A motion to take a recess at a future time, however, is only in order when no other question is pending. Before moving a resolution to approve an immediate recess, the proposer must be recognised by the chairperson. The motion must be seconded, is not debatable, but is amendable as to length of recess. It requires a majority vote and cannot be reconsidered. Attendees able to vote should not be forced to continue in session substantially longer than the will of the majority decides. It follows that a motion to adjourn can be proposed at any time. Such a motion is not debatable or amendable.

### Can attendees continue a meeting after an adjournment is declared?

An ineffective adjournment needs to be considered. If the chairperson leaves the chair or adjourns the meeting, without the consent of the majority present or otherwise having the power to do so (such as in circumstances where the meeting had become so unruly that it could not conduct its business), there is in fact no adjournment.

The persons continuing to stay, even though a minority, can elect a chairperson and continue with the business that still remains outstanding if, but only if, the adjournment was not valid. The presence of a quorum, of course, still remains essential.

If the chairperson acts correctly in declaring an adjournment, the meeting cannot be continued by persons remaining, and any attempt to continue it and any resolutions that may be passed will be invalid.

### Can an adjourned meeting deal with new business?

Finally, an adjourned meeting, being for the purpose of completing unfinished business of the previous meeting, is deemed a continuation of that meeting. It is not possible to bring new business forward, in an adjourned meeting, unless proper notice of that business has previously been given.

## Amendments

### Can an owners corporation amend a motion at a meeting?

The question frequently arises as to whether an owners corporation can

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amend a motion and, if so, the extent of an amendment.

Except for clause 35(3) of Part 2 Schedule 2 of the Management Act, the legislation is silent as to whether a motion might be amended. That clause provides as follows:

*“A motion must not be submitted at a general meeting unless notice of the motion has been given in accordance with this clause or the motion is a motion to amend a motion of which notice has so been given.”*

It follows, therefore, that an owners corporation can amend a motion, however, reference must be had to the corporations law to definitively answer the question. It is submitted that the question is well settled.

### What is a proper amendment?

An amendment must relate to the matter involved in the motion and not to something else. The competency of an amendment depends upon the general scope and not the particular terms of a motion. An amendment must not be of such a nature that the original motion loses its nature and purpose. Substantial amendment is permissible so long as the substantial nature and purpose of the motion remains. This applies whether or not notice of motion has been given. The fact that a motion or notice of motion is cast in terms of great particularity does not make the right of amendment subject to any greater restrictions than in the case of a motion or notice of motion in general terms. Any amendment, which is germane to the motion, is permissible.

### Can the chairperson refuse to put an amendment to a meeting?

The refusal of the chairperson to put a proper amendment to a meeting may



invalidate the resolution which is eventually adopted, but only relevant and intelligible amendments should be allowed. A motion of which notice has been given, therefore, may be amended, even if no notice of the proposed amendment was given prior to the meeting, provided the amendment is within the scope of the original motion and does not alter its nature and purpose. Additions to and alterations of, the original motion are allowed, so long as the nature of the motion is not affected, quite irrespective of whether or not notice of amendment was given before the meeting.

### Who may speak to the meeting on a proposed amendment?

Only discussion relevant to the particular amendment that is being dealt with should be allowed.

The mover of an original motion may exercise a right of reply, but this reply should be confined to answering remarks previously made and should not introduce new matter. The mover of an amendment has no right of reply. The right of reply is exercisable at the end of the debate, unless one or more amendments is or are brought forward, in which case the mover of the original motion must reply at the end of the debate on the first amendment. The seconder of a motion

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**“Amendments must relate to the matter involved in the motion and not to something else”**

## Recent amendments to the strata legislation

On 1 August 2008, some significant changes to the strata titles laws came into effect. These changes related to caretakers, by-laws relating to parking made during the initial period, meetings and procedures of owners corporations (particularly proxies), executive committees and building disputes.

### Caretakers

The definition of a caretaker has been widened. A new section 40A(4) has been added to the Management Act whereby a person is taken to be a caretaker for a strata scheme if the person meets the description of a caretaker, as set out in section 40A, regardless of whether the title given to that person's position is caretaker, building manager, resident manager or any other title.

Caretakers will also be subject to restrictions on appointment to the executive committee if there is a connection with another person.

### Executive committees

The changes affecting executive committees introduce an important change to the legislation. Those other persons can include the original owner or caretaker.

A person (**the principal person**) is connected with another person if the other person:

- is a relative (within the meaning of the *Local Government Act*) of the principal person or, where the principal person is a corporation, a relative of the holder of an executive position in the corporation (ie a person having

some role in the management of the company);

- is employed or engaged by the principal person or is a partner of the principal person;
- where the principal person is a corporation, holds an executive position in the corporation;
- is an employer of the principal person;
- is employed or engaged by, or holds an executive position in, a corporation that also employs or engages the principal person or in which the principal person holds an executive position; or

***“New disclosure requirements for persons connected with the original owner or caretaker”***



- has any other connection or relationship with the principal person of the kind prescribed by the Regulations.

Executive position in a corporation means the position of a director, manager or secretary of the corporation or any other executive position of the corporation, however these positions are described.

If a person is connected to the original owner, then their ability to be an executive committee member is subject to disclosure requirements as follows:

- the person discloses the connection that the person has with the original owner or caretaker; and
- the disclosure is made at the meeting of the owners corporation at which the executive committee is to be elected or before the election is conducted.

Any disclosure made is to be included in the minutes of the meeting at which the disclosure is made. A person who is connected with the original owner or caretaker is not eligible for appointment to act in the place of a member of the executive committee unless the person discloses any connection that the person has with the original owner or caretaker and the disclosure is made in writing to the executive committee before the consent of the executive committee is given.

A person who becomes connected with the original owner or caretaker of a strata scheme after being appointed as, or to act in the

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## Recent amendments to the strata legislation

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place of, a member of the executive committee must disclose any connection that the person has with the original owner or caretaker to the secretary or, if the person is the secretary, to the chairperson. The disclosure must be made as soon as possible after the person becomes aware of the connection. The secretary or chairperson to whom a disclosure is made must ensure that the disclosure is included on the agenda for the next general meeting of the owners corporation and in the minutes of that meeting.

**“A proxy or power of attorney granted to an original owner under a contract for sale of land will be of no effect”**

### Proxy restrictions

By virtue of the amendments, an original owner cannot use any proxy they hold to vote on decisions to remove an executive committee member from their office. In addition, whenever an original owner votes on a decision to remove an executive committee member from their office, their vote is reduced to one-third.

An original owner cannot vote by proxy or power of attorney on any matter if that proxy or power of attorney was given to it under a contract for the sale of land. This means that if there is any provision in a contract which requires the lot owner to give the original owner a proxy or power of attorney, will be ineffective since that proxy or power of attorney cannot be used. The amendments also provide that any contract to that effect or a term of a contract of that kind is unenforceable.

There is a saving provision for existing proxies and powers of attorney and they continue to be effective for their current terms provided they were in force prior to 1 August 2008. The holder of a power of attorney or the proxy cannot be renewed or extended after the commencement of 1 August 2008.



### Exclusive use by-laws relating to parking

Section 56 of the Management Act has been repealed. That repeal, however, does not affect any by-law that was made before 1 August 2008. The repeal removes the exemption to the restriction on making an exclusive use by-law in the initial period for by-laws for parking, if the exclusive use by-law had the approval of the local council.

### Building disputes

The amendments made changes to the *Home Building Act* 1989. A strata or community lot owner can now notify the Office of Fair Trading of a building dispute for common or association property as well as their lot property. An Office of Fair Trading inspector can also enter common property or association property to inspect work, provided they do so at the request of the lot owner. Obligations are imposed on owners corporations, community associations and anyone else who has rights over common or association property to reasonably assist the Office of Fair Trading inspectors in their investigation of a complaint.

The intention behind this change is to encourage resolution of disputes, particularly those relating to building defects. ■

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## Minorities: how are they protected?

*“An owners corporation must act with care and fairness when dealing with minority lot owners. Failure to do so may result in a significant award of damages.”*



What happens in the situation where owners, who own a majority of the lots, vote to transfer to themselves a portion of common property for a nominal sum? Or, when an owner requests the owners corporation upgrade the common property in order to service the needs of that owner, and the owners corporation refuses to undertake the appropriate upgrade? How is a minority owner protected from what might be described as an oppressive situation?

The answer lies in the application of what is formally styled as the

doctrine of fraud on the minority. Its application and how it operates is best illustrated by a discussion of the cases which give rise to the two questions posed at the outset of this article.

### Houghton's case

In *Houghton v Immer (No. 155) Pty Ltd* (1997) 44 NSWLR 46, the Court of Appeal was confronted with an owners corporation which subdivided a lot and common property on the roof of a building in East Sydney, then used for commercial purposes to create two penthouse lots and authorised the

transfer to some of the lot owners of the interests in the common property in the penthouses for \$1. Those owners, voting in favour of the development had 80% of the aggregate unit entitlement. The Court held that the resolution authorising the appropriation of the former common property for the exclusive benefit of some lot owners was a fraud on the minority and voidable in equity. The Court, in the particular circumstances (the construction of the penthouses had occurred), allowed the owners corporation to transfer its interests, but awarded the plaintiff (the minority lot owner) equitable compensation.

Equitable compensation is intended to compensate for loss caused by conduct which equity holds to be fraudulent. The loss suffered by the plaintiff had been its undivided interest in the common property on and above the roof in its improved condition when the strata plan was registered.

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Minorities: how are they protected?

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“Lot owners have a proprietary right in common property - an owners corporation may be required to upgrade an element so that all lot owners can exercise their rights”

The Court examined the doctrine of fraud on a power, and considered it to be of general application. It accepted the explanation of Lord Parker in *Vatcher v Paull* (1915) AC 372, who observed that “the term fraud in connection with frauds on a power does not necessarily denote any conduct ... which could be properly termed dishonest or immoral. It merely means that the power has been exercised for a purpose, or with an intention, beyond the scope of or not justified by the instrument creating the power”. It is considered that this statement represents the clearest expression of the doctrine and its application.

Application to companies

The Court then noted that the application of the doctrine to the exercise of power conferred on a majority of shareholders at a general meeting was well-established. Dixon J had observed, in the High Court case of *Peters’ American Delicacy Co Ltd v Heath* (1939) 61 CLR 457, that the “chief reason for denying an unlimited effect to widely express powers, such as that of altering a company’s articles, is the fear or knowledge that an apparently regular exercise of a power may in truth be but a means of securing some personal or particular gain, whether pecuniary or otherwise, which does not fairly arise out of the subjects dealt with by the power and is outside and even inconsistent with the contemplated objects of the power.”

invalid on the basis that it was oppressive. It could be valid if, at the outset the company’s constitution made provision for it. A later change to the constitution authorising an appropriation to the majority would not be valid if taken simply to benefit the majority. It could be taken if it was for a proper purpose and its exercise did not operate oppressively in relation to the minority shareholders. If the substantial purpose of the alteration was to secure the company from significant detriment or harm, the alteration would be valid if it was not oppressive to the minority shareholders.

The terms of the appropriation must not be oppressive. It would not be valid if the purpose was to obtain some new commercial or material advantage or benefit.

Principle of Houghton’s case

The Court in *Houghton* was of the opinion that the principles, discussed above with respect to companies, applied to owners corporations, and to the powers of the owners exercisable in general meetings.

Lin’s case

The application of these principles was made in *Lin v The Owners—Strata Plan No. 50276* (2004) NSWSC 88. Lin and the other plaintiff owned three lots in the Food Court area of the Hunter Connection in Sydney. Their application to connect improvements to their lots to the exhaust ventilation system, drains and waste lines were rejected by the owners corporation. In essence, the argument of the owners corporation was that the exhaust ventilation system was overloaded. Gzell J did not accept the argument. He said that if the system was overloaded, the owners corporation was in breach of its duties to maintain and replace the system (section 62 of the Management Act). The owners corporation could not rely



In *Gambotto v WDCP Ltd* (1994-1995) 182 CLR 432, the High Court was concerned whether, and if so in what circumstances, the taking of a power by majority shareholders by amendment to the articles to acquire compulsorily the shares of the minority shareholders would be held

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## Minorities: how are they protected?



***“An owners corporation in general meeting or its executive committee can not validly exercise a power for a purpose or intention beyond the scope of the power”***

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on its own default to answer the plaintiffs' claim that they were wrongly excluded from enjoyment of their proprietary right. To deny access was not only a breach of section 62 of the Management Act under which the duty to renew or replace extends to the addition of new parts, it also infringed the proprietary right of a lot owner to have possession of the common property. As far as the requisite upgrade was concerned, the owners corporation had a duty to add new ducting, fans and risers to the exhaust ventilation system to increase its capacity to service all lot owners who might seek reasonable access to the system. The plaintiffs were entitled to succeed in their action against the owners corporation because it had failed in its duty under section 62.

The judge then made reference to the doctrine of fraud on the minority, in comments which are highly relevant in the management of strata schemes. He noted that the formal validity of the exercise of a power is a prerequisite for equitable relief against its wrongful exercise. He

referred to both *Houghton's* case and *Gambotto's* case and, importantly, to *Young v Owners—Strata Plan No. 3529* (2001) 54 NSWLR 60. The conclusion of Mr Justice Santow in that case was quoted with approval, namely, that *“to work a compulsory extinction is just as much a deprivation or expropriation as a compulsory transfer”*. In other words, the word *“expropriation”* was broad enough to comprehend both compulsory acquisition and compulsory destruction of rights. His Honour stated that if the refusal of the executive committee to allow the lots to be connected to the exhaust ventilation system was a proper exercise of power, it destroyed the equitable rights the plaintiffs had in the common property and that destruction was a fraud on the power just as much as if the executive committee had passed a resolution transferring the plaintiffs' equitable interest in the common property to those lot owners already connected to the exhaust ventilation system. He approved the remarks made by Lord Parker in *Vatcher's* case, namely, that a fraudulent

exercise of power is constituted if it is exercised for a purpose or with an intention beyond the scope of the power.

Again referring to *Houghton's* case, Gzell J observed that the principles were not confined to an owners corporation acting only in general meeting, and said that the *“other organ of an owners corporation, its executive committee, exercises significant powers”* and that its exercise of power is no less than that of the owners corporation than is an exercise of power in general meeting.

### Conclusion

The doctrine of fraud on a minority relates to a fraudulent exercise of power. The power is exercised fraudulently if it is exercised for a purpose or with the intention beyond the scope of the power. It can arise either as a result of the exercise of power by an owners corporation in general meeting or by its executive committee. It relates not only to compulsory acquisition but also to compulsory destruction of rights.

An owners corporation should, therefore, also act with care and fairness when dealing with minority lot owners and their rights. Failure to do so may lead to significant damages being awarded to them. Advice should always be sought in order to avoid potential problems. ■

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## Meeting etiquette — the p’s and q’s for an owners corporation meeting

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may reserve the right to speak to the motion until later provided the intention to do so is stated, but thereby runs the risk of the debate concluding before the right is exercised.

Amendments, if possible, should be taken in the order in which they affect the terms of the motion. No amendment should be allowed with regard to those parts of the motion which have already been accepted.

### When can an amendment be put to the meeting?

It is important that amendments should be put to the meeting before the motion is put. They cannot be subsequently moved.

It is a matter for the meeting to decide whether it will deal with amendments one by one, or all together. In order to keep matters clear and to prevent misunderstandings, it is wise to have only one amendment at a time. After it has been voted upon, another amendment may be put and so on.

An amendment of an amendment should be avoided. Where an amendment is carried, it is incorporated in the motion and the motion as amended becomes the motion before the meeting, and, without being further proposed or seconded, is put to the meeting in its amended form, when it may either be carried or lost. If it is lost, the original motion is not revived.

An amended motion is discussed as if it were the original motion. Once a motion has been adopted, it becomes a resolution.

After amendments have been carried, an amendment that proposes to revert to the terms of the original motion, or is inconsistent with what has been carried, is out of order.

### Points of order

Once again, points of order are poorly understood and poorly applied. Exactly what constitutes a point of order is, it must be said, not easy to define. A point of order is one of the few instances where a speaker may be legitimately interrupted. A person may only be interrupted while speaking in three circumstances:

- by a person moving one or two procedural motions, namely, the closure or the gag;
- by the chairperson, to call for order or to ask the speaker to keep to or get to the point;
- on a point of order being raised.

A point of order is not a motion. It is an allowable interjection which directs the chairperson’s attention to an apparent or alleged breach of order. In effect, it is an appeal to the chairperson for a ruling. A point of order is often framed as a question, for example, *“Is the speaker in order by (referring to the speaker’s comments)”*. A point of order should not be expressed as an assertion, for example, *“The speaker is out of order by (referring to the speaker’s comments)”*.



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***“A proposed amendment to a motion cannot be put once the motion itself has been put to the meeting”***

Meeting etiquette —the p’s and q’s for an owners corporation meeting



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**What may be raised as a point of order?**

A point of order usually relates more to procedure or the manner of a speech than to the substance of what has been said, although the latter is sometimes relevant. A point of order is raised validly where it draws attention to an irregularity or impropriety in the proceedings or some other defect in the constitution of the meeting. These matters would include:

- the absence of a quorum;
- some breach of standing orders or the accepted rules of debate;
- introduction by the speaker of subject matter not relevant to the motion or amendment being discussed, or beyond the scope of the notice or the authority of the meeting; and
- offensive or abusive language, or uncalled for insinuations regarding a person’s motives or conduct.

A point of order is not something to be raised because a person wishes to contradict, disagree with or object to what is being said or implied or to contend that it is untrue or misrepresents the facts. Debate should not be subjected to interruption under cover of what are often described as fraudulent points of order.

**Who may raise a point of order?**

Any person entitled to vote at a meeting is entitled to raise a point of order and submit it to the chairperson for immediate decision, regardless of whether that person has spoken during the debate.

**When may a point of order be raised?**

A point of order should be taken, that is, raised, the moment the apparent breach occurs or at least as soon as it is observed. It may, however, be raised at any time during the meeting and is usually raised by being addressed to the chairperson by way of “*I take a point of order*” or simply “*Point of order*”.

**What happens once a point of order is raised?**

The following procedure should be adopted once a point of order has been taken:

- A person takes a point of order.
- The speaker stops and sits down.
- The person taking the point of order states clearly what the point of order is.
- The chairperson briefly considers the matter, makes a decision, gives a ruling either upholding or dismissing the point of order.
- The debate then proceeds in accordance with the chairperson’s ruling and direction.

When raising points of order, a speech is not called for. The person raising the point of order sits down when finished and remains silent unless the chairperson wishes to raise a question. A chairperson should guard against allowing general discussion to develop in relation to the point of order for to do otherwise would run the risk of

allowing contrary views and further debate.

The chairperson has the power to decide all incidental questions which arise at a meeting and require a decision there and then. He has the power to deal with all procedural points which may arise and give a ruling on them.

The chairperson’s ruling may be that the point of order is valid or not. Once a decision is made, the speaker must conform to the ruling and proceed accordingly. A person who is permitted by the chairperson to continue to speak must not persist in any irregular conduct.



A chairperson must always ensure that rulings on points of order are impartial and consistent. He is not obliged to give reasons for the decision, however, if he does so, any comments should be brief.

As a general rule, those present at the meeting should always accept the chairperson’s ruling on a point of order without challenging it or expressing dissent. This should be the case even if it appears to be an unbecoming or unfair ruling.

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## Meeting etiquette – the p’s and q’s for an owners corporation meeting

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### Can the chairperson’s ruling be challenged?

It is possible, however, for a motion of dissent from the chairperson’s ruling to be moved.

A motion of dissent from a chairperson’s ruling needs to be moved immediately. It may be moved by the person who raised the point of order or by any other person. A person moving such a motion should concisely state the basis of the disagreement. The motion itself would be “*That the ruling of the chairperson that (insert) be dissented from*”.

A chairperson who accepts the motion may decide to state briefly the reasons for giving the ruling, and then put the matter to the vote without allowing discussion. It would be normal only for the mover of a motion of dissent and the chairperson to speak.

If a motion expressing dissent is carried, the chairperson should accept the meeting’s judgment graciously.

Disagreement by a person with a ruling on a point of order does not necessarily imply lack of respect for a chairperson’s judgment or authority, or a lack of confidence in the chairperson. It would indicate that the mover feels that there are likely to be a number of other persons who hold a view different from that of the chairperson and that the matter is of sufficient importance to call for a vote on it.

### What should be recorded in the minutes?

Minutes of the meeting, recording the point of order, should be brief and confined

to the ruling, unless the chairperson both explained the reasons and stated a wish for the explanation to be recorded.

Minutes (once adopted by a subsequent meeting) provide prima facie evidence of the proceedings, but not, of course, that the ruling was correct or otherwise. The onus of proving otherwise would fall on any person wishing to take legal steps to upset the ruling or its effect. The dispute resolution provisions available in the Management Act could be used as the proper vehicle to challenge a ruling on a point of order. The relevant section would be section 138 of the Management Act.

### Executive committee meetings

Although the Management Act is silent on the procedures applicable to the conduct of executive committee meetings, the provisions relating to general meetings are of equal application to executive committee meetings.

### General

Conducting meetings of the owners corporation in accordance with these procedural rules should lead to meetings which are far less contentious, more effective and conducive to their purpose. ■

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“Minutes provide prima facie evidence of the proceedings”



## Cases observed

As was pointed out in the first two issues of *Common Property*, it is important to observe the issues which come before the Courts and CTTT. In the past several months, there have been a number of significant cases heard by the Supreme Court, particularly with respect to strata management statements. In this issue, we shall focus on the recent Court of Appeal decision in *Idya* which deals with restrictions on use and their enforcement against tenants.

### Court of Appeal

*Idya Pty Limited v Anastasiou* (2008) NSWCA 102

#### **Strata management statements and how they are interpreted, restrictions on use of lot, and whether rights are enforceable against tenants**

*Idya* was the lessee of shop premises in a strata building in Manly. It conducted a fast food outlet. The building comprised both residential and retail strata lots for which there were separate owners corporations. The first and second respondents in the appeal before the Court of Appeal were the owners of the retail lots and the lessor of the shop in which the fast food outlet was being conducted. The residential owners corporation was also a respondent in the proceedings. The permitted use of the premises under the lease was a restaurant in compliance with the terms of the strata management statement (SMS). Pursuant to the terms of the SMS, use of a retail shop as a restaurant was permitted and there was a prohibition on the

use of the retail shops as a fast food outlet in clause 19.1(a) of the SMS. In the lower court proceedings, the lessees were restrained from using the shop as a fast food outlet. The issue on appeal was whether an injunction lay at the suit of the owners corporation against the shop owners to compel them to enforce against their lessee the covenant relating to the permitted use of the retail lots. The issue involved the construction of certain provisions of the *Strata Schemes (Freehold Development) Act 1973 (the Development Act)* and the SMS and in particular, clause 19.1.

#### **Applicable legislation**

The Court was principally concerned with section 28W of the Development Act which provides, so far as relevant:

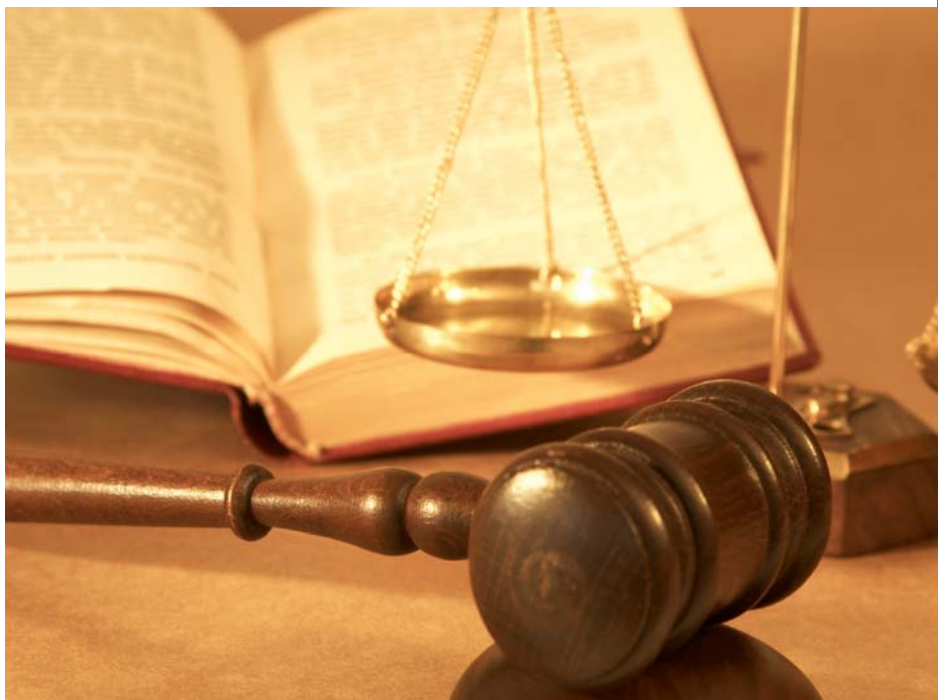
*"(1) A registered strata management statement ... relating to the management of a building has effect as an agreement under seal containing the covenants referred to in subsection (2) entered into by each person who for the time being is:*

*(a) a body corporate of a strata scheme for part of the building, or*

*(b) a proprietor ... or lessee for the time being of any of the lots in such a strata scheme, and ...*

*(2) The covenants referred to in this section are:*

*(a) a covenant by which those persons jointly and severally agree to carry out their obligations under the registered strata management statement ..."*



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Cases observed

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**SMS**

Clause 19.1 of the SMS provided that the residential owners and the retail owners acknowledge that the retail shops may be used and open for trade as restaurants ... the owners of the retail shops must not use a retail shop as a fast food outlet.

The SMS provided that the statement had effect as an agreement under seal binding the owners (being the two owners corporations), owners of the lots and lessees for the time being of any of the lots in either of the owners corporations.

**Interpretation of SMS**

Beazley JA observed that the SMS comprised a contract between the persons specified in the statement and that the provisions of section 28W of the Development Act overcame the problems of privity by statutorily imposing a contractual relationship on certain entities who would otherwise not be bound by the terms of the SMS. Those persons, for the present case, included the appellant, being the lessee of a retail shop. The judge went on to note that an SMS was properly to be construed as a commercial document, thus attracting the principles of construction that applied to commercial contracts. She quoted with approval the House of Lords in *Mannia Investment Co Limited v Eagle Star Life Assurance Co Limited* (1997) AC 749, where Lord Steyn said:

*“In determining the meaning of the language of a commercial contract ... the law therefore generally favours a commercially sensible construction. The reason for this approach is that a commercial construction is more likely to give effect to the intention of the parties. Words are therefore interpreted in the way in which a reasonable commercial person would construe them. And the standard of the reasonable commercial person is hostile to technical interpretations and undue emphasis on niceties of language.”*

Having regard to the above manner of interpreting the SMS, the judge observed that, having regard to the wide meaning of the word “use” bears, depending upon its context, the proper construction of clause 19.1 is that a prohibition upon the owner of the retail shop on using it, including permitting it to be used as a fast food outlet. She observed *“any other construction would be commercially nonsensical”*. The lessee of a retail lot was, therefore, bound by the terms of the SMS.

Handley AJA arrived at the same result, albeit by a slightly different judicial interpretation. He observed that the overriding purpose of the SMS was to make the SMS binding on the bodies corporate and every person in occupation, as of right, of any lot in the building. This being so, it might have been thought that clause 19.1 should be construed to give effect to that purpose. His Honour looked at the use of the word “used” in the SMS. He observed that it was a word of wide import and that its meaning in any particular case depended to a great extent on the context in which it was employed. He said that the construction of the SMS which allowed the use of the particular lot as a fast food outlet to continue without the residential owners and their body corporate having any legal remedy would lead to an absurd result. He noted that the internal planning scheme for the building was quite clear, and the owners, as occupiers of the shop, would be in breach of



(Continued on page 14)

**“A lot owner cannot permit a tenant to do that which they themselves are prohibited from doing”**

## Cases observed

*(Continued from page 13)*

clause 19.1 if they operated a fast food outlet in their shop. He further noted that it was argued that they could, with impunity, permit their tenants to do what they themselves were prohibited from doing. The evident drafting deficiencies in the SMS provide for such an argument but it was one which the Court should reject if an alternative construction was open. Handley AJA then commented that the golden rule for the construction of written instruments was that the grammatical and ordinary sense of the words was to be adhered to unless this would lead to some absurdity or inconsistency with the rest of the instrument in which case

the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity or inconsistency. The recognition of an ad hoc implied term involved the construction of a contract. His Honour observed that the Courts will imply a term where it is necessary to give business efficacy to the contract. In the present case, the learned judge found that an implied term which would add the words “*or permit them to be so used*” at the end of clause 19.1 should be recognised. Such a term satisfied all the tests in the High Court case of *Codelfa Construction Pty Limited v State Rail Authority*. His Honour thus held that the lessees were bound by the terms of

the SMS, even though he implied a term in it to so bind them.

### Conclusion

An SMS will be construed according to the principles of construction that apply to commercial contracts. Words are to be interpreted in a way in which a reasonable commercial person would construe them. Technical interpretations and undue emphasis on niceties of language will be ignored. It is possible, in addition, to imply a term in an SMS which is not otherwise expressed. ■

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## Recordings in the Strata Roll – useful tips

By virtue of section 98 of the Management Act, information relating to particular lots, details for the common property, including the strata plan number and the address of the strata scheme building, the original owner and any strata managing agent and their addresses for service, total unit entitlement and the unit entitlement of each lot, particulars of insurance and the by-laws for the time being in force for the strata scheme, must be recorded in the Strata Roll. When changes are made to common property or when the owners corporation grants a licence to use common property (pursuant to sections 65A and 65B of the Management Act, respectively), there is no absolute requirement for such changes and details of any

licences, to be recorded or registered either in the Strata Roll or on the Certificate of Title to the Common Property. To ascertain details of these matters in the absence of any recording or registration, it would be necessary to search through the minute books back to the registration of the Strata Plan.

To overcome this problem and for ease of future reference, it is suggested that relevant details be recorded in the Strata Roll under appropriate headings. When changes have been made to common property (without a by-law having been made), it is recommended that the following particulars be recorded in the Strata Roll:

- date of meeting;
- details of resolution;

- particulars of additions, alterations or erections of new structures on common property, including any plans.

With respect to licences granted, the following details might be recorded:

- name of owner to whom licence is granted and relevant lot number;
- particular purpose for which licence has been granted;
- details of the meeting at which the motion was passed; and
- the terms of the licence.

The recording of such details can lead to future ease of reference and precise information being obtained. ■

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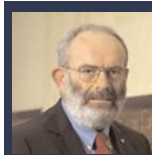
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Issue 3

Legal news for the strata and company title management industry

August 2008

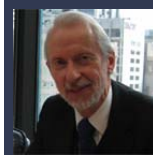
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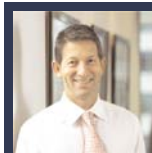
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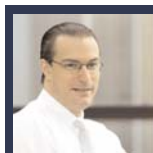
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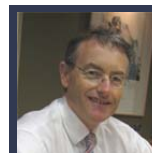
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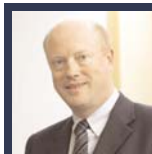
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## Back issues

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### Issue 2, May 2008

- They cannot vote but can they speak?
- Strata scheme and owners corporation: what's the difference?
- Management of building management committees
- Cases observed
- Torrens Title and its relevance to strata title and management
- When is a motion for a special resolution NOT passed?

### Issue 1, August 2007

- Introduction
- Address unknown
- Enforcing by-laws
- The anonymous tenant
- Cases observed
- A model for building websites

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