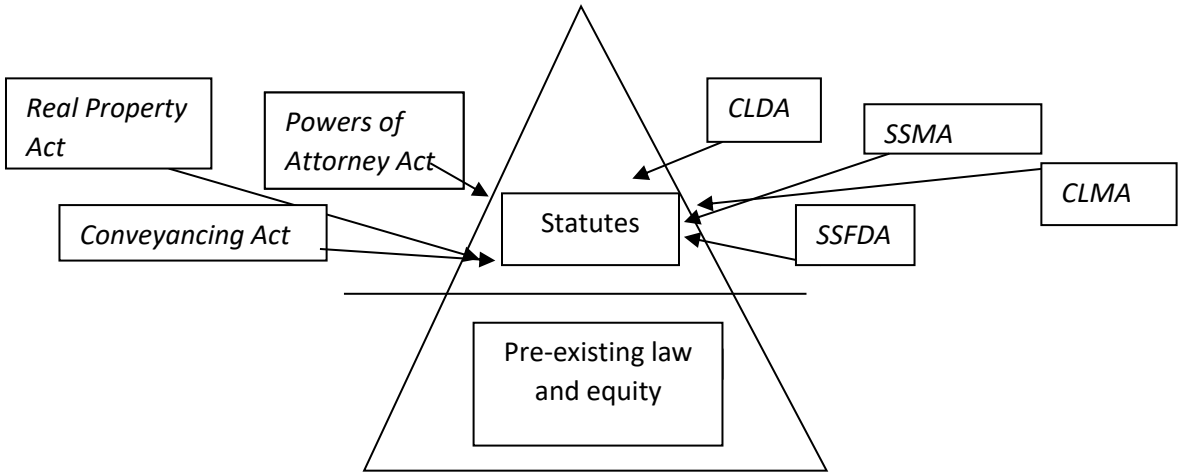
Oh, what a tangled web we weave: Strata title legislation, equity and the common law.

Dr Cathy Sherry, Faculty of Law, UNSW



No one told me there'd be equity

One of the fundamental aims of property statutes is to clarify the complexity of hundreds of years of judge-made property law. Some of that judge-made law is common law and some of it is equity. Equity presents particular challenges because remedies are discretionary and not available as of right. The state Torrens Acts, which all strata and community title Acts work in conjunction with, attempted to eradicate the operation of considerable equitable property rights, most notably the enforceability of equitable interests in land as a consequence of notice. The Torrens legislation removes the bona fide purchaser rule, replacing it with a rule that the registered proprietor is not bound by equitable interests even if he or she had notice of them.

However, it is impossible to eradicate equity altogether and to do so would result in a very heavy handed, unsophisticated property system. The complex interactions of human beings

can never be fully anticipated and thus completely dealt with by statutory rules. It doesn't help that many people continue to fail to use the statute, forgetting to register interests in land. Even if parties do comply with legislation, outcomes can remain unsatisfactory. For example, while the developer in *Community Association DP No 270180 v Arrow Asset Management Pty Ltd* [2007] NSWSC 527 had complied with the relevant New South Wales legislation when it compelled a body corporate to enter into a long-term management agreement and pocketed a healthy sum for its trouble, the result did not sit well with either the ultimate members of the body corporate, (the purchasers of the lots), or with the New South Wales Supreme Court. The Court held that in addition to duties and obligations owed under the statute, the developer stood in a position of sufficient power relative to the body corporate that it needed to be constrained by the imposition of fiduciary duties. Fiduciaries are not permitted to make a profit from their position and if they do so, they must disgorge that profit. The money earned by the developer in the sale of the management rights was handed to the body corporate.

It is possible that equity holds more fascination in New South Wales than any other state in Australia, or even any other jurisdiction in the common law world, as a consequence of New South Wales fusing its administration of law and equity a full century after England and most other jurisdictions.[1] Perhaps that is the reason that the New South Wales strata legislation, when re-enacted in 1973, opted to vest legal title to common property in a body corporate, which then it holds on trust for the lot owners. At least that is what the legislation seems to do, although it is less clear than it could be and as a result, has had to be considered by courts on a number of occasions.

The *Strata Schemes Freehold Development Act* 1973 (SSFDA), s18, states that on registration of a strata plan, title to the common property 'vests' in the body corporate, and s20 states that the body corporate holds the common property as 'agent' for the lot owners as tenants in common in proportion to their unit entitlements. However, as Gzell J observed in *Lin v The Owners - Strata Plan No 50276* [2004] NSWSC 88 at [7],

> The notion of an agency in this context is odd. If common property is vested in the body corporate for the benefit of the lot owners, one would expect the relationship to be that of trustee and beneficiary rather than that of agent and principal. That something more than the relationship of principal and agent was intended by the

[1] *Judicature Act* 1873 (UK); *Judicature Act* 1876 (Qld); cf *Law Reform (Law and Equity) Act* 1972 (NSW).

> legislation was clear from the terms of the *Strata Schemes (Freehold Development) Act* 1973, s 24(2) which spoke of the beneficial interest of a proprietor of a lot in the estate or interest in the common property held by the body corporate as agent for that proprietor.

This is a prime example of the way in which strata legislation, like all legislation, operates over the top of an existing body of law and makes use of that law. The law has long dealt with the concept of one person acting on behalf of another and has a number of categories for those people; agents and trustees are two. The reason that agency is 'odd' in this context is that while agents act on behalf of others (their principal) and are controlled by fiduciary duties, agents do not typically have title to property. They can deal with the principal's property, if authorised, by signing contacts and transfers on a principal's behalf, but they do not own the property. While the initial *Conveyancing (Strata Titles) Act* 1961 (NSW) was silent on this issue, the *Strata Titles Act* 1973 (NSW), s18, made it clear that title to common property was vested in the body corporate. A person or entity who has legal title to property but only for the benefit of another is most obviously analogous to a trustee. That a body corporate's relationship to lot owners vis a vis the common property is more accurately described as a trustee/beneficiary relationship than agent/principal, has been approved on numerous occasions in New South Wales.[2]

Along with general law notions such a trust, the strata legislation relies on general law concepts of co-ownership. There are now only two forms of co-ownership in Australian law, joint tenancy and tenancy in common. While other states' legislation does not create a trustee/beneficiary relationship between the body corporate and lot owners, all states' legislation stipulates that common property is owned by lot owners as tenants in common in proportion to their unit entitlement.

In New South Wales, (beneficial) ownership of common property has been held to affect a body corporate's statutory obligations to repair. In *Lin v The Owners - Strata Plan No 50276* [2004] NSWSC 88, Gzell J held that by failing to upgrade an exhaust system so that all lot owners could connect to it, the body corporate had infringed the plaintiff's proprietary right as a tenant in common of common property. As a matter of general property law, tenants in

---

[2] *Carre v Body corporate - Strata Plan 53020* [2003] NSWSC 397; (2003) 58 NSWLR 302, per Barrett J at [28]-[29]; *Owners-Strata Plan No 43551 v Walter Construction Group Limited* [2004] NSWCA 429 per Spigelman CJ at [42]-48], Ipp JA and McColl JA agreeing; *The Owners Strata Plan 50276 v Thoo* [2013] NSWCA 270 per Tobias JA at [135]-[146].

common are entitled to 'occupy the whole' and cannot be excluded from common property by their co-owners.[3] This general rule applied to strata owners and if upgrading the ventilation system was necessary for a lot owner to enjoy their property rights, upgrading had to be done.

In *Young and 1 Ors v The Owners S/P 3529 and 2 Ors* [2001] NSWSC 1135, Santow J considered that the s52 *Strata Schemes Management Act* 1996 (NSW) requirement for the body corporate to obtain the written consent of the owners of lots 'concerned' when creating an exclusive-use by-law,[4] had to be interpreted with reference to the general law concept of a tenancy in common.[5] The creation of a new exclusive-use by-law in favour of some lots would strip other lots of their right to use the common property or to 'occupy the whole' and as a result, they were 'concerned' with the new exclusive-use by-law; their written consent was necessary. While the balance of authority is now against Santow J,[6] and this might seem more convenient for the management of schemes, it is hard to fault his Honour's reasoning. There are fact scenarios in which it might prove crucial.[7]

Owners Strata Plan 50276 v Thoo [2013] NSWCA 270

Recent cases have been more circumspect in their use of general law. Ironically, when considering exactly the same ventilation system in the Hunter Arcade in Sydney the subject of *Lin*, the Court of Appeal in the *Owners Strata Plan 50276 v Thoo* [2013] NSWCA 270

---

[3] *Bull v Bull* [1955] 1 QB 234

[4] SSMA, s52 also requires a special, not unanimous resolution, to create an exclusive-use by-law, unlike *Body Corporate and Community Management Act* 1997 (Qld), s171(2) and *Building Units and Group Titles Act* 1980 (Qld), s30(7), both of which require a resolution without dissent.

[5] Santow J in *Young and 1 Ors v The Owners S/P 3529 and 2 Ors* [2001] NSWSC 1135

[6] *Chauhan v Jaynrees Services Pty Ltd* [2008] NSWSC 969 Young CJ in Eq said at [63] that the lots 'concerned' were only those that were *acquiring* exclusive-use rights to common property, and would have to pay additional money as a result. Ball J in *Jennifer Elizabeth James v The Owners Strata Plan No. SP 11478 (No 4)* [2012] NSWSC 590, confirmed Young CJ's approach, saying at [88] that 'within that framework, the owners of the lots "concerned" with the proposed resolution are the owners on whom the rights and privileges are conferred.'

[7] For example, imagine a three storey, six lot strata scheme with a common property garden. The two ground floor lots want exclusive use of the garden, which is outside their back doors. Two of the upper storey lot owners might be amenable to an exclusive-use by-law because they never use the garden and it would reduce their annual levies which currently include garden maintenance. The remaining two upper storey lot owners strongly oppose the idea because they use and enjoy the garden. Four owners could pass a special resolution to create the exclusive-use by-law and the opposing owners are apparently not 'concerned' by this decision and do not have to consent. It would be difficult for them to argue that the special resolution was fraud on the minority because the threshold for this doctrine is high and lot owners are entitled to vote in their own interests: *Houghton v Immer (No 155) Pty Ltd* (1997) 44 NSWLR 46, 52-3.

found that the body corporate did not have an obligation to upgrade the ventilation system again so that a lot owner, Dr Thoo, could connect to the system.

Tobias JA's judgement focused on two issues. First, his Honour held that contrary to the reasoning of Gzell J in *Lin*, the body corporate's obligation under s62(2) 'is confined to the renewal or replacement of an exhaust system which is not operating in a manner sufficient to service the lots which it was designed to service',[8] and did not extend to 'the renewal or replacement of the existing [ventilation system] for the purpose of enhancing its capacity to the point where it will be capable of servicing the anticipated reasonable demands of all lots within the Food Court and/or the basement area of the Building.'[9] Dr Thoo had to take the ventilation system as he found it and the body corporate was not required to replace or upgrade it to meet his needs.

Secondly, Tobias JA dismissed Dr Thoo's reliance on Gzell J's ruling in *Lin* that an inability to access the ventilation system amounted to an infringement of the property rights of a co-owner of common property. Tobias JA said that,

> The difficulty with this proposition is that, whereas Dr Thoo as a lot owner has a right as an equitable tenant in common with other lot owners, the Owners Corporation is not such an owner. It is therefore erroneous to fasten upon the interest of a lot owner as one of several equitable tenants in common of the common property and to seek to construct on that basis some positive general law duty on the part of the owners corporation...It is because the owners corporation holds the common property as trustee under a statutory trust that it is possible to identify the equitable interests of the lot owners in the common property…[G]eneral law duties do not include positive duties or, more precisely, duties to act in any positive way. They are negative duties not to profit or benefit from the trust, not to prefer one's own interests, not to allow one's own interests to come into conflict with those of the beneficiaries, not to impeach the title of the beneficiaries, not to depart from the terms of the trust and not to delegate the trust except as permitted by its terms. Thus the general law duties are necessarily confined so that they do not conflict with any of the statutory duties of the owners corporation. To put this another way, the general law duties complement the statutory duties but cannot modify them.[10]

[8] Tobias JA at [122]
[9] Tobias JA at [127]
[10] Tobias JA at [134], [137].

In other words, while a body corporate might have positive duties – such as to repair – they come from the statute and not from the trustee-beneficiary relationship.

Tobias JA concluded,

> The important point for present purposes is that the rights and obligations of equitable tenants in common as regards the use and enjoyment of land exist only among themselves. Their status as equitable owners is not the source of any right against or obligation of the trustee who holds the land upon trust for them. The rights that they have against the trustee and the obligations the trustee owes to them derive from the trust and the relationship of trustee and beneficiary. It follows that if the owners corporation, duly and faithfully performing the terms of the trust as embodied in the 1973 and 1996 Acts, acknowledges the interests of the lot owners as a body in the common property and performs the functions otherwise imposed upon it by statute, any complaint that the activities of one owner impair another owner's enjoyment of the common property is a dispute to which the owners corporation, as trustee, is a stranger… As indicated above, a lot owner cannot be excluded from the common property, but the owner is not entitled to require the owners corporation in its capacity as a trustee to provide the owners with any particular share of the common property.[11]

With all due respect to Tobias JA, while the ultimate conclusion seems sound, the reasoning at some points seems to conflate two separate issues – the ownership of common property as a tenant in common and the vesting of legal title to the common property in the body corporate. These are not the same thing, and as those who work in states that do not vest legal title in the body corporate know, the former does not necessarily flow from the latter. The first is a question of property law and the second a question of trusts.[12] The property question is, 'is anyone entitled to exclude a co-owner from the property?' and the general answer is no. It makes no difference if a person is an equitable or legal co-owner, their right to occupy the whole cannot be infringed. A trustee, at least under a bare trust, is no more entitled to exclude a beneficial co-owner from property than anyone else.

If a trustee did exclude a beneficial co-owner from the property, this would be characterised as impeaching the title of the beneficiaries, which as Tobias JA acknowledges at [137], is a

[11] Tobias JA at [145]-[146].
[12] This is demonstrated clearly by the fact that in other states, common property is owned by all lot owners as tenants in common at law; no title vests in the body corporate. It

breach of trust. However, there remains two separate questions – first, 'is there a violation of a property owner's title?', and then, 'was that done by their own trustee, amounting to a breach of trust?'

It is not at all uncommon in cases of co-ownership for equitable title to be different from the legal title. If A and B pay the purchase price for property, but the legal title is registered in C's name, C will hold the property on automatic resulting trust for A and B as equitable tenants in common in equal proportions. If C then prevents A from using all or part of the property, C will be infringing A's property right to occupy the whole as a tenant in common and consequently in breach of trust. A, an equitable owner, has clear rights against C, the trustee, just as they would against B and a stranger. In a strata scheme, although a body corporate has the statutory authority to manage common property and could theoretically pass a by-law to exclude a group of owners from the common property pool or tennis courts, (because they have not paid their levies for example), such a by-law would be invalid as it would violate the property rights of the lot owners as tenants in common of the common property. That this may also amount to a breach of trust is merely the icing on the cake.

It is arguable that the crux of the issue in *Thoo* was not, 'can an equitable co-owner defend their right to possession against the whole world, including their own trustee?' but 'can a trustee body corporate justifiably infringe a co-owners property rights in the process of properly managing the common property and strata scheme?'

The answer to that question is quite probably 'yes', because one of the terms of the statutory trust under s61 of the *Strata Schemes Management Act* 1996, is that the body corporate must 'manage and control' the use of the common property for the benefit of all lot owners. There are a number of provisions that impose express duties and restrictions on the body corporate to achieve that aim, and after considering all of the statutory provisions, it is possible to conclude that a body corporate can and should restrict access to common property at certain times. This may be a *prima facie* violation of a lot owner's property rights, but it is justified by the terms of the trust. It is exactly the same as an ordinary trust that might leave a hunting estate to a group of four siblings as tenants in common, with a provision in the trust deed that the trustee must manage the estate and its flora and fauna, for the benefit of the siblings. In order to carry out the trust, the trustee may limit each sibling's use of the hunting estate to once every four years so that animals are not over hunted. If it were a bare trust, a trustee excluding any beneficial co-owner for three out of every four years would be breaching

beneficiaries' property rights in a way not justified by any terms of the trust. However, if the trust deed expressly empowers the trustee to manage the trust property for a particular purpose, it is permissible. The terms of the trust qualify the otherwise unqualified property rights.

Although Tobias JA made a number of other statements, above, that are possibly too broad, he did state at [142] that 'any equitable right of a lot owner to require the owners corporation to replace the MEVS, as Dr Thoo seeks, would be trumped by a valid special resolution passed pursuant to s 62(3)'.[13] This is arguably the correct way to characterise the issue – that equitable ownership of common property entitles the lot owners to occupy the whole in exactly the same way as legal ownership of common property, but that those *prima facie* rights can be trumped by the terms of the trust, in this case, the statutory provisions. It is neither necessary nor correct to argue that lot owners have no *prima facie* property rights as tenants in common that are capable of being enforced against their own trustee and statements to this effect may preclude future legitimate claims by lot owners against a body corporate.

Another way of approaching the issue in *Thoo* is that say that failure to upgrade common property does not factually amount to interfering with a co-owner's right to possession of common property. Again, this is a property question, not a trust question. In *Lin*, the plaintiff had been denied access to the ventilation system altogether,[14] while in *Thoo*, perhaps intentionally, the plaintiff had not been denied access entirely, but had merely been denied a sufficiently high guaranteed exhaust airflow. However, it is possible that such an argument might be considered specious; connecting to an exhaust system and not getting sufficient airflow is essentially tantamount to not being connected at all.

This highlights one of the uncomfortable consequences of the decision in *Thoo*, that Dr Thoo was effectively excluded from using an entire section of the common property, which he was still paying for in annual levies. An exclusive-use by-law in favour of the lot owners using the ventilation system would have remedied this, but it is unlikely any of those owners would

[13] SSMA, s62(3) states that a body corporate can resolve by special resolution not to renew, repair or replace an item of common property if it determines it is inappropriate to do so and the decision will not affect the safety of any building, structure or common property or detract from the appearance of any property in the strata scheme.

[14] *Lin* at [69].

have been quick to suggest such a solution. This situation seems analogous to buying into a residential scheme only to find the tennis court, of which you are a co-owner, is permanently booked by existing lot owners. It is one thing to say that co-owners must share common property, which will include the necessary exclusion of some co-owners while others are using the tennis court; it is another to say that some co-owners can use the court while others never can at all. The latter seems to be the upshot of *Thoo*.

Alternatively, *Thoo* could be viewed as analogous to caveat emptor or the common law's refusal to imply a covenant into a lease that the premises are fit for the purpose for which they are leased.[15] When Dr Thoo acquired the strata lots it was his responsibility to check that the premises were physically able to be used for the purpose for which he wanted them. It is the very nature of older buildings that they will not necessarily be fit for all the new-fangled uses and activities that have been developed since they were constructed. For example, older buildings are unlikely to be cabled for intensive computer and internet usage. It would not seem reasonable for purchasers to be able to buy into an older building, presumably at a discount, and then demand that their fellow co-owners fund an upgrade.

Taking a step back and looking at the bigger picture, it is clear that the decision in *Thoo* will have an impact on our strata building stock, by making it easier for schemes to allow their building to become outdated and obsolete. This will in turn result in the under-economic exploitation of property over time. Very little ventilation is needed to heat up a soggy sausage roll or make a ham salad 'sanger'; quite a lot of ventilation is needed to make a hot Asian stir fry. Given the choice, most Australians now chose the latter over the former, and if the Hunter Arcade cannot be used to cook stir fries, the land will be economically (not to mention culinarily) under-exploited.

Of course the issue is not that a single arcade in Sydney is not going to be upgraded, but that *Thoo* provides the authority for an unlimited number of buildings to avoid upgrading. The impact of property law is never restricted to individual entitlements such as the right of one body corporate to not replace their ventilation system. Property rights can be exercised by multiple parties, across multiple parcels of land, now and in the future.[16] As a result of *Thoo*,

[15] *Hill v Harris* [1965] 2 QB 601; 2 All ER 358.
[16] Joseph William Singer, *Entitlement: The Paradoxes of Property* (Yale University Press, 2000), 143; Cathy Sherry, 'Lessons in Personal Freedom and Functional Land Markets: What Strata and Community Title Can Learn From Traditional Doctrines of Property' (2013) 36(1) *University of New South Wales Law Journal* 280.

multiple bodies corporate will be able to resist pressures to upgrade common property. That might be good for their annual levies, but not for our aging building stock.

Platt v Ciriello [1997] QCA 33

While the trust issues discussed above are peculiar to New South Wales, all states' legislation stipulates that lot owners own the common property as tenants in common in proportion to their unit entitlement and so there may be questions about the relevance of the general law in relation to tenancies in common.

Platt v Ciriello [1997] QCA 33 is the leading Queensland case. The dispute related to land in Nerang governed by the provisions of *Building Units and Group Titles Act* 1980 (Qld) (BUGTA). The appellant owned a 60% share of the lots and the respondent 40%. The appellant objected to the respondent's placement of display stands, signs, tables and chairs, rubbish bins and pallets on common property. The dispute in *Platt* was analogous to the majority of common law and equitable cases relating to tenants in common in that it was a conflict between co-owners, not conflict between a co-owner and a third party or a co-owner and their trustees, (as was the case in *Thoo*).

All three judges made reference to the common law in relation to co-owners, in particular the rule that co-owners will be guilty of ouster and liable to an action for trespass if they exclude their other co-owner(s) from all or even part of the property. Pincus JA referred to the finding in *Steadman v. Smith* [1857] EngR 679; (1857) 8 El. & B.1 that a co-owner was guilty of ouster by building a washhouse whose roof rested on the entire top of a co-owned wall. This amounted to ouster as his other co-owner, should he so desire, would no longer be able to train fruit trees on the top of the wall or amusing himself by running along it. Other than suggesting a tragic lack of genuine entertainment in rural England in 1857, *Steadman* remains legally sound.

Pincus JA disagreed with the trial judge's finding that exclusive use of common property without an exclusive-use by-law was not necessarily unlawful and that it was a question of whether the use unreasonably interfered with other occupies enjoyment of common property contrary to s51(1)(c) of BUGTA. Pincus JA noted that while standing on common property necessarily excludes others from that space, as a general rule the law does not permit one tenant in common to do anything which could properly be described as an absolute exclusion of other tenants in common from the whole, or any part, of the common property.

The common law rule applied in addition to the rule in s51(1)(c). Demonstrating that the question is one of degree, Pincus JA found that the affixing of a sign on common property and a claim for parking spaces would both amount to outer at common law, while the placing of tables and chairs would not. If an action was analogous to ouster at common law, it could only be sanctioned by an exclusive-use by-law.

McPherson JA was reluctant to rely on the common law to the same extent as Pincus JA. He held that

> Although the common law rules are helpful as a starting point, it is not necessary to determine to what extent they continue to apply to common property under the *Building Units and Group Titles Act 1982*. The Act contains provisions that for the most part govern the questions arising here.

Ambrose J was more amenable to consideration of the common law, but perhaps surprisingly, the common law of easements, not co-ownership. Ambrose J said that,

> We were not referred to any authority and I have been unable to discover any which deals with disputes between co-owners of property as to the use which each may make of it for his own purposes without regard to the inevitable constraint which it may place on a use at the same time being made by other co-owners.

Although *Steadman*, which his Honour referred to along with his fellow judges, is precisely such a case, it is fair to say that it is one of few. That is because the vast majority of co-owners actually live together on the co-owned land; living together requires their relationship to be functioning and intact, which in turn militates against litigation between them. Most co-ownership disputes arise when relationships breakdown and there is no question of how to physically share the land, (because that is precisely what the parties do not want to do), but rather how to share the proceeds of sale. However, body corporate communities are a significant divergence from this general rule; they create circumstances of co-ownership where relationships may have broken down irretrievably, and yet the parties will remain co-owners of land. They present the potential for significant numbers of disputes that may need to be resolved by the common law of co-ownership if the relevant state statute does not provide explicit or implied solutions.

In substitution for co-ownership cases, Ambrose J cited a number of easement cases. While easement cases do illustrate the way in which the law can facilitate the sharing of land, it is suggested that caution should be exercised when drawing analogies from other areas of property law. There are two crucial differences between easements and co-ownership. The first is that the rights of the dominant and servient tenement are necessarily different. The servient tenement has possession of the land and by definition, the dominant tenement must not, otherwise their rights will be too great to be an easement.[17] In contrast, co-owners have the same rights to land; they are all entitled to possession of the whole. Second, easements typically originate in a grant which will have expressly or impliedly set out the rights of the dominant tenement; for example, to run a pipe over the servient tenement, to walk or to drive over it. In contrast, co-owners must have the same rights to possession of the whole, otherwise they cannot be co-owners.[18]

However, drawing on easement cases, Ambrose J held that

> To the extent that the appellants' rights to use any part of the common property are substantially impeded or interfered with by the use which other co-owners of the common property make of it, it is my view that the appellants' would be given a right to take action in nuisance the success of which would depend upon whether, to use the words of Cozens-Hardy MR in Pettey v. Parsons, they could show such impediment or interference constituted a real and substantial interference with their use and enjoyment of the common property in common with the other persons entitled to a reciprocal use and enjoyment of it with them. I can find nothing in the Act or By-laws to suggest that they need establish anything less than a real and substantial inference with their use and enjoyment of the common property to obtain the relief they sought from the referee.

In other words, Ambrose J relied entirely on the common law, albeit the law of easements, to resolve the issue.

Interestingly, *Platt* has been more frequently cited by higher courts in New South Wales than in Queensland, suggesting certain reluctance on the part of lawyers to pursue common law or

[17] *Re Ellenborough Park* [1956] Ch 131; (1955) 3 All ER 667; *Bursill Enterprises Pty Ltd v Berger Bros Trading Pty Ltd* (1971) 124 CLR 73

[18] *Commonwealth Bank of Australia v MacDonald* [2000] NSWSC 553, per Young J at [46]-[53].

equitable claims, preferring the approach of McPherson JA who considered the statutory provisions sufficient.

McDonough v The Owners Strata Plan No 57504 [2014] NSWSC 1708

The first question was whether the District Court had equitable jurisdiction to hear a claim for equitable compensation for breach of trust. Under the *District Court Act* 1973 (NSW), s134(1)(h), the District Court has jurisdiction to hear any equitable claim for damages up to its jurisdictional limit of $750,000.[19] The plaintiffs claim fell within this limit. However, the Court only has this jurisdiction in relation to claims that do not fall within any of the other subsections of s134(1). Section 134(1)(e) gives the Court jurisdiction to execute a trust if the subject of the trust does not exceed $20,000.[20] The question arose, is an order for equitable compensation an execution of a trust? The answer to that question is yes, and as a result the claim fell within s134(1)(e) and could not fall within s134(1)(h). Under s134(1)(e), the monetary limit for the Court entertaining a claim was $20,000, being the value of the subject matter of the trust. Here, the subject matter of the trust was the common property and it was more than $20,000 in value.

The important thing to note about this process of reasoning is tension that exists in strata and community title litigation. It has generally held that it is important for strata owners to have access to affordable, informal dispute resolution. Most states have some form of mediation, adjudication, and tribunal hearings, or at the very least, attempt to keep strata disputes in the lower Courts. While there is merit in this system, there is an inherent flaw. Anyone familiar with strata disputes knows that they are frequently socially, economically and legally complicated. They are just not personal conflicts over noisy floorboards or the use of a pool after 10 pm. Many are disputes over complex and valuable contract and property rights, which will need the full armoury of legal and equitable remedies to resolve. And herein lies the tension. Lower courts have limited equitable jurisdiction and the question of whether

---

[19] *District Court Act* 1973, s134(1)(h) states that 'the Court shall have the same jurisdiction as the Supreme Court, and may exercise all the powers and authority of the Supreme Court, in proceedings for…any equitable claim or demand for recovery of money or damages, whether liquidated or unliquidated (not being a claim or demand of a kind to which any other paragraph of this subsection applies), in an amount not exceeding the Court's jurisdictional limit'.

[20] *District Court Act* 1973, s134(1)(e) states that 'the Court shall have the same jurisdiction as the Supreme Court, and may exercise all the powers and authority of the Supreme Court, in proceedings for…the execution of a trust or a declaration that a trust subsists, where the estate or fund subject or alleged to be subject to the trust does not exceed $20,000 in amount or value, as determined by the Court'.

tribunals have equitable jurisdiction in debatable.[21] Of course the solution is for disputes that raise equitable issues to be removed to higher courts, but this requires parties to have the fortitude and finances for litigation. It is likely that many disputes that raise serious legal and equitable questions are never pursued. Further, while the theory of affordable, accessible dispute resolution is sound, it creates a presumption that strata disputes are low level, neighbourhood matters when this is frequently far from the truth.

The equitable claim in *McDonough* was that the Body corporate held the common property upon trust for the lot owners, and it had breached that trust by

1) preferring its own interests to those of the lot owners, or allowing its own interests to conflict with those of the lot owners by failing to perform repairs to the common property until it had recovered damages from the builder to fund the repairs, and
2) breached the trust by failing to perform its obligation under s62 of the *Strata Schemes Management Act* 1996 (NSW), to maintain and repair the common property.

Although recognising a trust relationship, New South Wales courts have In *McDonough*, Brereton J considered Tobias AJA's judgment for *The Owners Strata Plan 50276 v Thoo* [2013] NSWCA 270, which touched on the question of obligations that might arise from the trustee/beneficiary relationship. Brereton J summarised Tobias AJA's findings thus:

> (1) An body corporate holds the common property upon trust for the lot owners as equitable tenants-in-common pro rata to their unit holdings. (2) As a trustee, the body corporate has, as well as its statutory duties, certain general law duties of a trustee, which complement and do not modify its statutory duties. (3) Those general law duties do not include duties to act in any positive way, but are negative duties: not to profit or benefit from the trust, not to prefer its own interests, not to allow its own interests to come into conflict with those of the beneficiaries, not to impeach the title of the beneficiaries, not to depart from the terms of the trust and not to delegate the trust except as permitted by its terms. (4) The circumstance that the lot owners have equitable interests as tenants in common of the common property does not of itself impose any duty upon the body corporate, but has significance only as among the owners themselves; their

21

> rights against the trustee and the obligations the trustee owes to them derive from the trust and the relationship of trustee and beneficiary.

Prima facie, statutes override both the common law and equity and judges must apply statutes according to their clear and plain language. However, most statutes are based and build on the common law, which can result in peculiar or *sui generis* statutory interests that differ from their common law counterparts. Barrett JA in *Thoo* at [20] referred to *Re Christchurch Inclosure Act* (1888) 38 Ch D 520 at 530, where the Court referred to statutory trusts which were ‘unlike any previously known’. The High Court decision in *Wik Peoples v Queensland* (1996) 187 CLR 1 is based on a finding that statutory pastoral leases are not identical to their common law counterparts and may not grant exclusive possession.