

# SQUARE PEGS, ROUND HOLES AND MISSING PUZZLE PIECES — THE CONUNDRUM OF ADMINISTERING COMMUNITY TITLES SCHEME TERMINATIONS: AN ARGUMENT FOR LAW REFORM

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*The Body Corporate and Community Management Act 1997 (Qld) facilitates termination of a Queensland community titles scheme ('CTS') in two ways — by resolution of the owners, or a District Court order that it is just and equitable to terminate the CTS. This article investigates the court-ordered terminations of Nobbys Outlook CTS 14822 and Village Square CTS 24175. Through an interpretive research approach informed by a qualitative case study, the authors investigated the Village Square termination and identified three concerns. When compared to Village Square, the approach adopted in the Nobbys Outlook termination raised jurisdictional problems relevant for future terminations. Secondly, the termination process is largely undefined as compared to the statutory trustee for sale process in the Property Law Act 1974 (Qld), despite the arguably greater potential for complexity in CTS terminations. Finally, there is a lack of prescription around administrators' roles, powers, obligations and protections, unlike the equivalent provisions in the Corporations Act 2001 (Cth). The authors provide recommendations for statutory reform to protect CTS owners.*

## I INTRODUCTION

Since strata legislation was introduced in the 1960s, marked growth in the construction of apartment-style buildings has occurred.<sup>1</sup> In 2016, 26% of Australian dwellings were strata and CTSs.<sup>2</sup> It is estimated that 9% of Australia's

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1 Hazel Easthope et al, 'How Property Title Impacts Urban Consolidation: A Life Cycle Examination of Multi-Title Developments' (2014) 32(3) *Urban Policy and Research* 289, 292.

2 Australian Bureau of Statistics, *Census of Population and Housing: Australia Revealed, 2016* (Catalogue No 2024.0, 27 June 2017).

population reside in apartments.<sup>3</sup> Investment in strata and CTSs is significant; nationally, insurance coverage is estimated to exceed \$1.117 trillion<sup>4</sup> and is growing.<sup>5</sup>

Strata and CTSs reflect a method of structuring real property developments through land titling. This article focuses on Queensland CTSs in particular. Creation of a CTS in Queensland requires a minimum of two fee simple lots and additional common-use property held by the owners as tenants in common in predefined shares,<sup>6</sup> and managed by a separate legal entity (a body corporate).<sup>7</sup> The body corporate is established upon registration of the plan of survey and recording of the community management statement with the Titles Registry.<sup>8</sup>

CTSs house 7% of Queensland's population,<sup>9</sup> and have an estimated insurable value of \$203 billion.<sup>10</sup> As at January 2020, 49,821 CTSs were registered, containing a total of 497,903 lots.<sup>11</sup> Construction of a large proportion of these

3 Ibid.

4 Hazel Easthope, Sian Thompson and Alistair Sisson, 'Australasian Strata Insights 2020' (Research Report, City Futures Research Centre, University of New South Wales, June 2020) 7 <<https://cityfutures.be.unsw.edu.au/research/projects/2020-australasian-strata-insights/>> ('Australasian Strata Insights 2020').

5 One factor contributing to this growth is the adoption of urban consolidation policies by Australia's six largest cities. Sydney, Melbourne, Perth, Brisbane, Adelaide and the Gold Coast have all adopted policies to alleviate urban sprawl from, among other factors, changing population demographics: Easthope et al (n 1) 293; Hazel Easthope, Sarah Hudson and Bill Randolph, 'Urban Renewal and Strata Scheme Termination: Balancing Communal Management and Individual Property Rights' (2013) 45(6) *Environment and Planning A* 1421; Hazel Easthope and Bill Randolph, 'Governing the Compact City: The Challenges of Apartment Living in Sydney' (Working Paper No 2, City Futures Research Centre, University of New South Wales, September 2008) <[http://www.be.unsw.edu.au/sites/default/files/upload/pdf/cf/research/cityfuturesprojects/higherdensity/DP0773388WorkingPaper2\(Governance\).pdf](http://www.be.unsw.edu.au/sites/default/files/upload/pdf/cf/research/cityfuturesprojects/higherdensity/DP0773388WorkingPaper2(Governance).pdf)>; Strata Community Australia, 'Community Renewal' (Discussion Paper, 2012) <[https://nsw.strata.community/wp-content/uploads/2014/04/community\\_renewal\\_2012.pdf](https://nsw.strata.community/wp-content/uploads/2014/04/community_renewal_2012.pdf)>. Both dwelling starts and approvals for the construction of lots have exceeded those of detached dwellings in Australia: Australasian Strata Insights 2020 (n 4) 30–1; Australian Bureau of Statistics, *Building Approvals, Australia* (Catalogue No 8731.0, April 2016) <<https://www.abs.gov.au/AUSSTATS/abs@.nsf/allprimarymainfeatures/66BD0227C6EED21ECA257FE300158C51?opendocument>>. Lifestyle, location and access to facilities have also ensured the increasing popularity of strata and CTSs.

6 *Body Corporate and Community Management Act 1997* (Qld) s 35(1) ('*BCCM Act*') provides that '[c]ommon property for a community titles scheme is owned by the owners of the lots included in the scheme, as tenants in common, in shares proportionate to the interest schedule lot entitlements of their respective lots'. This applies despite title to the common property being held by the body corporate: at s 35(2).

7 Ibid ss 94–5.

8 Ibid s 24.

9 'Australasian Strata Insights 2020' (n 4) 12.

10 Ibid 13.

11 Office of the Commissioner for Body Corporate and Community Management, Department of Justice and Attorney-General (Qld), 'Issue 24' (March 2020) *Common Ground* 7

CTSs has occurred since the 1980s,<sup>12</sup> and consistent with the Australia-wide estimates, further growth is expected.<sup>13</sup> In this respect, an average of 1,000 CTSs were registered annually in the 1970s. That figure has jumped to 1,400 schemes per year over the last 25 years.<sup>14</sup> CTSs have weathered the aging process differently,<sup>15</sup> some being maintained to a high standard and others deteriorating. This is unsurprising given the relatively recent introduction of an obligation to establish a capital repairs and maintenance fund (a ‘sinking fund’).<sup>16</sup>

As CTSs age, they approach and eventually exceed their economic lifespan. Economic lifespans of improvements are reduced where both preventative and reparative maintenance are not undertaken to a high standard. Without the benefit of a period of significant saving for repairs and maintenance, older CTSs potentially have insufficient funds available to carry out necessary preservation works.<sup>17</sup> Without a sinking fund, current owners must raise the funds required to pay for maintenance, rather than the obligation being disbursed among generations of owners. Nevertheless, the statutory obligation for maintenance to a good, structurally sound condition<sup>18</sup> still applies,<sup>19</sup> irrespective of the potentially

<<https://www.publications.qld.gov.au/ckan-publications-attachments-prod/resources/1207a42a-87cf-4126-b38a-5496c5bf27aa/common-ground-issue-24.pdf?ETag=d91e9f459764e23695929452d95a4123>>.

- 12 Sacha Reid and Melissa Pocock, *Strata Title Scheme Termination* (Final Report, 2016) 7.
- 13 Easthope et al (n 1) 292–3.
- 14 Reid and Pocock (n 12) 7.
- 15 Strata and community titles laws were introduced in various jurisdictions around Australia in the 1960s, and the buildings constructed under those early laws are aging: Gary Bugden, ‘What Are the Practical Options to Regulate Long Term Contracts?’ (Conference Paper, Strata and Community Title in Australia for the 21<sup>st</sup> Century Conference, 9 September 2011).
- 16 Under Queensland’s historical CTS laws, there was no obligation to plan for or seek contributions towards long-term maintenance and capital repair. Owners of lots in CTSs created pursuant to the *Building Units and Group Titles Act 1980* (Qld) and the earlier *Building Units Titles Act 1965* (Qld) and *Group Titles Act 1973* (Qld) were not statutorily obliged to contribute towards expenses of a capital or non-recurrent nature at all until 11 April 1988: *Building Units and Group Titles Amendment Act 1988* (Qld) ss 25–6, amending and inserting *Building Units and Group Titles Act 1980* (Qld) ss 38–38A. The requirement (if any) to contribute to expenses of a capital or non-recurrent nature with respect to company title properties is dependent on the provisions of the company’s constitution.
- 17 See, eg, *Body Corporate for Nobbys Outlook CTS 14822 v Lawes* [2013] QDC 301 (‘*Nobbys Outlook CTS 14822*’). See also *Village Square*, which refers generally to the proceedings and court documents exchanged between Falconrest Pty Ltd (rec and mgr apptd) and the Body Corporate for Village Square CTS 24715.
- 18 *Body Corporate and Community Management (Standard Module) Regulation 2020* (Qld) reg 180 (‘*Standard Module*’); *Body Corporate and Community Management (Accommodation Module) Regulation 2020* (Qld) reg 170 (‘*Accommodation Module*’); *Body Corporate and Community Management (Commercial Module) Regulation 2020* (Qld) reg 127 (‘*Commercial Module*’); *Body Corporate and Community Management (Small Schemes Module) Regulation 2020* (Qld) reg 99 (‘*Small Schemes Module*’); *Body Corporate and Community Management (Specified Two-Lot Schemes Module) Regulation 2011* (Qld) reg 31 (‘*Two-Lot Schemes Module*’).
- 19 Owners are required to contribute to a sinking fund for future maintenance costs and any shortfall in paying for maintenance works must be paid by owners by way of a special levy. Where

escalating costs.<sup>20</sup> While not always the case, as maintenance costs increase, owners may receive more economic benefit from terminating the scheme and selling the land than from paying for ongoing maintenance costs.<sup>21</sup> However, a CTS exists in perpetuity under the *Body Corporate and Community Management Act 1997* (Qld) (*'BCCM Act'*). Termination is only by the provisions in the *BCCM Act* ch 2 pt 9, which may be achieved in one of two ways:

1. the body corporate may resolve without dissent to terminate the CTS,<sup>22</sup> and enter into an agreement 'about termination issues' with the lot owners and any lessee under a short or registerable lease of a lot or the common property in the CTS;<sup>23</sup> or
2. the District Court may order that it is just and equitable to terminate the CTS.<sup>24</sup>

The *Land Title Act 1994* (Qld) (*'Land Title Act'*) contains the procedural provisions relating to the registration of the plan and removal of the CTS structure from the Titles Registry.<sup>25</sup>

Two cases have been decided under the *BCCM Act* s 78(2). The first is related to Nobbys Outlook CTS 14822 (*'Nobbys Outlook v Lawes'*).<sup>26</sup> The case was initially heard by the District Court,<sup>27</sup> and referred to mediation to resolve numerous outstanding issues before the CTS could be terminated.<sup>28</sup> The parties could not reach agreement on those outstanding issues, and the District Court finally handed down an order for termination on 20 November 2013 in *Body Corporate for*

insufficient retained funds are held to carry out maintenance works, a special contribution is levied on current owners to contribute to the required maintenance works: *Standard Module* (n 18) reg 162(2); *Accommodation Module* (n 18) reg 152(2); *Commercial Module* (n 18) reg 112(2); *Small Schemes Module* (n 18) reg 81(2).

- 20 Bruce William Bentley, 'Termination: Developing a Framework' (Conference Paper, Australian College of Community Association Lawyers Annual Conference, 1 September 2009) 6.
- 21 William Duncan et al, Commercial and Property Law Research Centre, 'Body Corporate Governance Issues: By-Laws, Debt Recovery and Scheme Termination' (Options Paper Recommendations, 2017) 57  
<[https://www.justice.qld.gov.au/\\_\\_data/assets/pdf\\_file/0007/508714/qut-recommendations-by-laws-debt-recovery-and-scheme-termination.pdf](https://www.justice.qld.gov.au/__data/assets/pdf_file/0007/508714/qut-recommendations-by-laws-debt-recovery-and-scheme-termination.pdf)> ('Recommendations Paper').
- 22 *BCCM Act* (n 6) s 78(1)(a). A motion decided in a general meeting of the body corporate is passed as a resolution without dissent if no vote is counted against the motion. It is not a unanimous vote, as voting at the meeting is not compulsory: at s 105.
- 23 *Ibid* s 78(1)(b).
- 24 *Ibid* s 78(2).
- 25 *Land Title Act 1994* (Qld) ss 115U–115V (*'Land Title Act'*).
- 26 *Nobbys Outlook v Lawes* refers generally to the proceedings between the Body Corporate for Nobbys Outlook CTS 14822 and Scott Lawes.
- 27 *Nobbys Outlook CTS 14822* (n 17).
- 28 *Ibid* [7]–[8] (Kingham DCJ).

*Nobbys Outlook CTS 14822 v Lawes*.<sup>29</sup> The second case related to Village Square CTS 24715 (*Village Square*).<sup>30</sup>

This article investigates these two cases and the deficiencies in the orders sought in respect of the Nobbys Outlook CTS and the resulting jurisdictional issues. In addition, the process for termination set out in the *BCCM Act* and *Land Title Act* is considered and compared to the requirements for appointing statutory trustees for sale under the *Property Law Act 1974 (Qld)* (*Property Law Act*). It recommends reforms to ensure equity, fairness and efficiency in the termination process, and consistency between CTS law and the *Property Law Act*.

In 2017, Duncan et al of Queensland University of Technology's Commercial and Property Law Research Centre published 'Body Corporate Governance Issues: By-Laws, Debt Recovery and Scheme Termination' ('Recommendations Paper').<sup>31</sup> Duncan et al recommended a change to *BCCM Act* ch 2 pt 9 by adopting a 'prescribed procedure'<sup>32</sup> for terminations where it is economically justified.<sup>33</sup> Once relevant information such as consultants' reports are obtained,<sup>34</sup> Duncan et al advocated that bodies corporate prepare a termination plan in the form of a collective sale agreement, or other proposal, to wind up the CTS.<sup>35</sup> Proceeds would then be distributed according to the market value of each lot as a proportion of the total value.<sup>36</sup> Either a minimum of 75% of lot owners,<sup>37</sup> or an order of the District Court, where termination was just and equitable, would be required to execute the termination.<sup>38</sup> Duncan et al also supported District Court applications in the following circumstances only:

1. when a resolution to adopt the termination plan is not approved by the body corporate, an owner or the body corporate may seek its approval; or
2. where the resolution to adopt the termination plan was approved, a dissenting owner may seek to stay its implementation.<sup>39</sup>

29 Order of Judge Kingham in *Body Corporate for Nobbys Outlook CTS 14822 v Lawes* (District Court of Queensland, 1957/2013, 20 November 2013) ('Judge Kingham Orders').

30 *Village Square* (n 17).

31 'Recommendations Paper' (n 21).

32 *Ibid* 11.

33 *Ibid* 65.

34 These reports include reports from a structural engineer, quantity surveyor, valuer for a valuation of both the common property and all lots, including an individual valuation of each lot, together with a draft statement of assets and liabilities: *ibid* 11.

35 *Ibid* 12.

36 The *BCCM Act* (n 6) s 81(2) requires that upon a CTS' termination, proceeds be distributed according to the interest schedule lot entitlements for the CTS.

37 'Recommendations Paper' (n 21) 75.

38 *Ibid* 13.

39 The *BCCM Act* (n 6) s 78(1) requires that a motion to terminate a CTS be passed by a resolution without dissent. This option would only be adopted if the threshold to terminate a scheme was also reduced, as recommended by 'Recommendations Paper' (n 21) 12.

Duncan et al advocated defining what the District Court should have regard to when determining whether the termination plan proposed was just and equitable.<sup>40</sup> In addition, the authors recommended better defining administrators' duties, powers and obligations in the *BCCM Act* or regulation modules, rather than leaving this up to the parties to determine.<sup>41</sup>

The proposals in this article do not depend on adoption of any or all of the recommendations contained in the Recommendations Paper. They apply to both the current *BCCM Act* ch 2 pt 9 provisions and the reforms in the Recommendations Paper. This article seeks to provide fairness for stakeholders through certainty and consistency in approach. Therefore, it does not discuss the merits of wholesale amendments to the termination provisions,<sup>42</sup> but rather recommends more controls around the termination process and better definition of administrators' duties, powers and obligations.

This article is divided into six parts. Part II discusses the research methodology undertaken in the study. Part III provides an overview of the background to *Village Square*. Part IV discusses the interview findings and identifies inadequacies in the *BCCM Act* and *Land Title Act* in the management and later termination of a CTS. Part V examines how these provisions fail to protect CTSs' stakeholders and ties themes identified in the interviews and recommends reform of the *BCCM Act* and *Land Title Act* to ensure consistency with the *Property Law Act*. Part V also considers corporate law principles to demonstrate the lack of definition of administrators' roles, powers and obligations in the *BCCM Act*. Various

40 'Recommendations Paper' (n 21) 13 advocated that the District Court consider factors including:

- the reports collected from selected experts;
- any 'termination plan, collective sale[s] agreement or redevelopment plan prepared by the person proposing the termination' of the CTS;
- economic justification for termination;
- consequences for owners individually and as a whole if the CTS is or is not terminated;
- the age and condition of any improvements on the land forming part of the CTS;
- sinking fund forecasts and balances;
- the 'aggregate market value of individual lots' as compared to the market value of the entirety of the site sold as one to enable development at its 'highest and best use'; and
- any other factor noted in the Regulation Modules or that the Court considers relevant.

41 Ibid 71.

42 For a detailed discussion on this, see Melissa Pocock, 'An Examination of the Need for Legislative Reform Arising from the "Holdout" Phenomena in the Reassembly and Termination of Community Titles Schemes' (PhD Thesis, Griffith University, 2016); Melissa Pocock, 'Holdouts, Site Amalgamations and Renewal of Urban Areas: A Call for Legislative Reform' (Conference Paper, Pacific-Rim Real Estate Conference, 15 January 2012); Melissa Pocock, 'Intersections and Adaptations: Utilising Corporate Law Principles to Avoid Greenmail in Developer-Initiated Multi-Owned Property Terminations' (2017) 26(2) *Australian Property Law Journal* 248.

recommendations for reform are also discussed in Part V and the article concludes in Part VI.

## II RESEARCH METHODOLOGY

*Village Square* was the second District Court case decided under the *BCCM Act* s 78(2) since the introduction of the *BCCM Act* in 1997. It provided a unique opportunity to investigate the interplay between property theory and practice in the context of both the parties' decision-making characteristics in presenting their cases and Muir DCJ's decision.

The project aimed to build on earlier CTS termination research and provide guidance to stakeholders considering seeking termination orders from the District Court. Funded by a Griffith University New Researcher Grant, the project sought to identify what factors contributed to the Court determining it was just and equitable to terminate the *Village Square* CTS, and whether these factors could be applied more generally to other CTSs.<sup>43</sup> As the project progressed, however, certain inadequacies were also highlighted. In particular, a comparison with the termination of the *Nobbys Outlook* CTS identified where jurisdictional issues arose, hindering the effective management and distribution of proceeds from the sale of scheme land.<sup>44</sup> In addition, it became apparent that the role and responsibilities of the administrator were inadequately defined in the *BCCM Act*. As a key actor in the termination process, the administrators have little to work with in terms of statutory powers. Their role is ill-defined in the legislation and, in *Village Square*, the scope of their duties and any protections offered were reliant upon rigorous drafting of the consent orders. A similar comment may be made in respect of the termination of the *Body Corporate for Nobbys Outlook* CTS: the orders made by Judge Kingham were drafted by the applicant's legal representatives with reference to the *Property Law Act*.<sup>45</sup>

The researcher adopted an interpretive research approach informed by a qualitative case study. She utilised a three-stage design to carry out the project. Stage one comprised a literature review investigating how property theories may reflect competing stakeholders' opinions of terminating a CTS. It considered the implications on recognised property rights, including loss of ownership where a court-ordered termination was sought.

In stage two, a content analysis of Muir DCJ's Orders and the *Village Square* District Court file was performed. The content analysis provided the background to the CTS and arguments raised in submissions to the Court. In addition, adjudicators' orders for the CTS were analysed to identify recurring themes.

43 See Letter from Griffith University to Melissa Pocock, 23 January 2019; Griffith University, *New Researcher Grant (NRG) Scheme* (Conditions of Award, 2019).

44 Order of Muir DCJ in *Falconrest Pty Ltd (rec and mgr apptd) v Body Corporate for Village Square Community Titles Scheme 24715* (Queensland District Court, D54/18, 29 May 2018) ('Muir DCJ Orders'); *Nobbys Outlook CTS 14822* (n 17).

45 Judge Kingham Orders (n 29).

The literature review and results from the content analysis of both the District Court file and the adjudicators' orders aided to develop interview questions for participants. In addition, they enabled development of a stakeholder map of potential primary and secondary participants (for example, industry experts).<sup>46</sup>

In stage three, representatives on the stakeholder map, including owners of lots within the CTS, industry experts and other researchers participated in 30 to 45 minute in-depth, semi-structured interviews. Theoretical saturation was anticipated to be achieved after 20 to 25 stakeholder interviews.<sup>47</sup> It occurred after completion of 23 interviews.

Interviews were conducted between May and October 2019 with the following classes of stakeholders:

1. former owners of lots within the Village Square CTS (or their representatives);
2. Queensland legal practitioners with expertise in CTS law, who represent numerous stakeholders in the sector;
3. Australian strata and CTS academic researchers;
4. body corporate managers; and
5. owner representative groups.

Data collection was undertaken to allow an independent, holistic interpretation. Interviews were conducted by the researcher, a qualitative research specialist with expertise in CTS law, after obtaining ethical approval from the institution for the study.

Interviews were digitally recorded and transcribed, and transcripts provided to owner participants for cross-checking. Data was analysed using an iterative thematic content analysis to identify key themes emanating from the interviews.<sup>48</sup> This article seeks to expand on the themes identified, recommending law reform.

### III VILLAGE SQUARE CTS

Village Square CTS, located at 2 Sickle Avenue, Hope Island on the Gold Coast, was constructed in approximately 1998,<sup>49</sup> and the scheme registered pursuant to the *Building Units and Group Titles Act 1980* (Qld). Upon enactment of the *BCCM*

46 See, eg, Sacha Reid, 'Event Stakeholder Management: Developing Sustainable Rural Event Practices' (2011) 2(1) *International Journal of Event and Festival Management* 20; Nicole Renae Johnston and Sacha Reid, 'Multi-Owned Developments: A Life Cycle Review of a Developing Research Area' (2013) 31(5) *Property Management* 366.

47 Patricia I Fusch and Lawrence R Ness, 'Are We There Yet? Data Saturation in Qualitative Research' (2015) 20(9) *The Qualitative Report* 1:1408–16; Luciana de Cassia Nunes Nascimento et al, 'Theoretical Saturation in Qualitative Research: An Experience Report in Interview with Schoolchildren' (2018) 71(1) *Revista Brasileira de Enfermagem* 228, 229, 232.

48 See, eg, Graham R Gibbs, *Analyzing Qualitative Data* (Sage, 2007).

49 Falconrest Pty Ltd (rec and mgr apptd), 'Affidavit of James Thompson', Affidavit in *Falconrest Pty Ltd (rec and mgr apptd) v Body Corporate for Village Square Community Titles Scheme 24715, D54/18, 14 February 2018, exhibit JT-2* ('Thompson Affidavit').



*Act*, the transitional provisions applied, bringing the CTS under the scope of that Act.<sup>50</sup> The original scheme comprised of 294 lots spread throughout numerous single and double-storey buildings constructed on the 34,390 square metre waterfront site.<sup>51</sup> Arts and crafts markets operated at the Village Square CTS on two separate occasions, approximately 10 years apart. However, both attempts failed within two years of commencement.<sup>52</sup> The latest, Marina Quays Market Village, ceased operation around December 2013.<sup>53</sup> Individual lots in the CTS were small, ranging from 13 to 78 square metres,<sup>54</sup> with limited individual facilities and access through a garage roller door.<sup>55</sup> Accordingly, the alternate use of the structures was limited without undertaking significant renovations.

The markets failing rendered many of the lots vacant and numerous owners ceased paying body corporate levies. The body corporate managers resigned in mid-November 2013, citing non-payment of their fees.<sup>56</sup> From that date, a committee of interested owners sought to self-manage the Village Square CTS,<sup>57</sup> but failed to comply with the requirements of the *BCCM Act*. No general meetings were held between November 2013 and February 2017, so no levies for that period were raised.<sup>58</sup> At a general meeting on 8 February 2017, the proposed budget presented to owners failed to pass, so once again, no levies were struck.<sup>59</sup>

Twenty-six dispute resolution applications for the Village Square CTS were made under the *BCCM Act* between 2000 and 2016.<sup>60</sup> The 2015 and 2016 disputes

50 *BCCM Act* (n 6) ch 8 pt 1.

51 Thompson Affidavit (n 49) exhibit JT-2. In about April 2011, a number of the lots were amalgamated in order to save on local government rates, reducing the number of lots in the CTS to 102: Falconrest Pty Ltd (rec and mgr apptd), 'Affidavit of John Mervyn Thomas Fish', Affidavit in *Falconrest Pty Ltd (rec and mgr apptd) v Body Corporate for Village Square Community Titles Scheme 24715*, D54/18, 20 February 2018, [7]–[8] ('Fish Affidavit'); Muir DCJ Orders (n 44) sch A.

52 Falconrest Pty Ltd (rec and mgr apptd), 'Affidavit of Vikki Jayne Cook', Affidavit in *Falconrest Pty Ltd (rec and mgr apptd) v Body Corporate for Village Square Community Titles Scheme 24715*, D54/18, 29 March 2018.

53 Falconrest Pty Ltd (rec and mgr apptd), 'Affidavit of James Raymond Bernie', Affidavit in *Falconrest Pty Ltd (rec and mgr apptd) v Body Corporate for Village Square Community Titles Scheme 24715*, D54/18, 14 February 2018 ('Bernie Affidavit').

54 Thompson Affidavit (n 49) exhibit JT-2 annex 2.

55 Bernie Affidavit (n 53).

56 Ibid [13].

57 Fortieth Defendant, 'Submissions for the Fortieth Defendant', Submission in *Falconrest Pty Ltd (rec and mgr apptd) v Body Corporate for Village Square Community Titles Scheme 24715*, D54/18, 18 May 2018 ('Fortieth Defendant Submissions May').

58 Bernie Affidavit (n 53) [29].

59 Ibid [30].

60 *Village Square* [2000] QBCCMCmr 457; *Village Square* [2001] QBCCMCmr 521; *Village Square* [2001] QBCCMCmr 556; *Village Square* [2001] QBCCMCmr 605; *Village Square* [2001] QBCCMCmr 606; *Village Square* [2002] QBCCMCmr 32; *Village Square* [2002] QBCCMCmr 167; *Village Square* [2002] QBCCMCmr 380; *Village Square* [2002] QBCCMCmr

revealed noncompliance with maintenance and administration obligations under the *BCCM Act*, including the requirements for annual general meetings, budgeting and levying of administration and sinking fund contributions, debt collection and record keeping.<sup>61</sup>

The Village Square CTS fell into significant disrepair from 2013. Given the lack of budgeting and consequent levies to pay maintenance expenses, together with protracted non-payment of significant outstanding levies, the body corporate was unable to function.<sup>62</sup> The secretary estimated that outstanding levies totalled approximately \$717,000, with creditors owed approximately \$89,000.<sup>63</sup> Outstanding levies were subsequently revised down to approximately \$559,000 when an offset of about \$290,000 was granted to an owner for providing ‘caretaking/management services’ to the Village Square CTS between November 2011 and October 2013.<sup>64</sup> It appears that the caretaking and management services provider was also the owner, or related to the owner, of the majority of lots in the Village Square CTS.<sup>65</sup>

That owner also owed the most significant debt to the body corporate for outstanding levies. Both the secretary of the body corporate, and a director of the majority owner, attested that the caretaker’s appointment was agreed to informally by the then chairperson of the Village Square CTS via a series of emails between him and representatives of the caretaker company.<sup>66</sup> Once self-management of the Village Square CTS commenced, the secretary continued offsetting those fees

462; *Village Square* [2002] QBCCMCmr 484; *Village Square* [2002] QBCCMCmr 550; *Village Square* [2002] QBCCMCmr 699; *Village Square* [2002] QBCCMCmr 700; *Village Square* [2003] QBCCMCmr 25; *Village Square* [2003] QBCCMCmr 364; *Village Square* [2003] QBCCMCmr 368; *Village Square* [2003] QBCCMCmr 369; *Village Square* [2003] QBCCMCmr 543; *Village Square* [2005] QBCCMCmr 214; *Village Square* [2015] QBCCMCmr 258; *Village Square* [2015] QBCCMCmr 442; *Village Square* [2015] QBCCMCmr 443; *Village Square* [2006] QBCCMCmr 599; *Village Square* [2016] QBCCMCmr 17; *Village Square* [2016] QBCCMCmr 154; *Village Square* [2016] QBCCMCmr 448.

61 *Village Square* [2015] QBCCMCmr 442, [37]; *Village Square* [2015] QBCCMCmr 443; *Village Square* [2016] QBCCMCmr 17; *Village Square* [2016] QBCCMCmr 154, [24], [27], [29]; *Village Square* [2016] QBCCMCmr 448, [20], [22]–[24].

62 Bernie Affidavit (n 53) [19]–[40].

63 Ibid [19].

64 Ibid [34].

65 Ibid.

66 Ibid [34]–[40]; Fish Affidavit (n 51) [25]. The validity of this appointment was questionable. A service contractor may only be appointed upon the passage of an ordinary resolution decided by a secret ballot at a general meeting of the body corporate approving the engagement where no votes are exercised by proxy: *Standard Module* (n 18) regs 114(2)(a)–(b). The term of the engagement must also be provided to owners pursuant to the *Standard Module* (n 18) reg 114(2)(c)(i). There is no evidence that either of these requirements were complied with. However, see *Lakelands Signature Living* [2019] QBCCMCmr 608 (‘*Lakelands*’) in which the adjudicator was called upon to determine whether the committee resolution approving the casual appointment of a committee member as caretaker was valid. Adjudicator Stone held that the ‘caretaker’ was not a service contractor as defined by the *BCCM Act* (n 6) s 15 because the appointment was not for a minimum of 12 months: *Lakelands* (n 66) [9]. Rather it was on a month-to-month basis, determinable by the parties on one month’s notice.

against outstanding levies owed by the caretaker/owner.<sup>67</sup> The main objection that the dissenting owners raised to the application for termination related to this lack of a proper accounting of the outstanding levies.<sup>68</sup>

Pursuant to an adjudicator's order, a general meeting was called on 16 November 2015.<sup>69</sup> Motion two of the agenda proposed that the Village Square CTS be terminated,<sup>70</sup> but the motion failed to pass by a resolution without dissent.<sup>71</sup>

A new committee for the Village Square CTS was elected at the general meeting, which commissioned a safety audit.<sup>72</sup> That audit identified numerous risks to the body corporate exposing it, and owners, to possible penalties for breaches of both statutory and common law obligations.<sup>73</sup>

The poor condition of the common property prompted the insurer to refuse to renew the Village Square CTS' insurance after it expired in January 2016.<sup>74</sup> Access to the land was restricted from that date,<sup>75</sup> and all utilities disconnected by February 2017.<sup>76</sup> The site remained largely abandoned and in a parlous state, with further deterioration occurring after completion of the safety audit.<sup>77</sup>

At the general meeting on 8 February 2017, termination (motion two) and a levy to raise funds for a District Court application to terminate the Village Square CTS and sell the property (motion three), were again considered,<sup>78</sup> but were unsuccessful.<sup>79</sup>

On 21 February 2018, Falconrest Pty Ltd (rec and mgr apptd) ('Falconrest') applied to the District Court for termination of the Village Square CTS under the *BCCM Act* s 78(2).<sup>80</sup> At the time, Falconrest owned lots with a combined interest

67 Bernie Affidavit (n 53) [34]–[40].

68 Fortieth Defendant Submissions May (n 57).

69 Bernie Affidavit (n 53) [52].

70 Ibid [54].

71 *BCCM Act* (n 6) s 78(1). Seventy-one votes were cast in favour of the motion, with 9 against: *ibid*.

72 Bernie Affidavit (n 53) [56].

73 Penalties included fines, prosecution or liability for injuries: *ibid* exhibit JRB-38.

74 Ibid [61], [99].

75 Fish Affidavit (n 51) [30].

76 Bernie Affidavit (n 53) [93]–[97].

77 Ibid [86], [90]–[91].

78 Ibid [78].

79 With respect to motion two, 78 votes were cast in favour and 9 against. Fifty-three votes were counted in respect of motion three, with 46 for and 7 against: *ibid* exhibit JRB-50.

80 See Muir DCJ Orders (n 44).

schedule lot entitlement approximating 73% of total interest entitlements for the Village Square CTS.<sup>81</sup>

Falconrest argued that it was just and equitable to terminate the Village Square CTS because:

- a) it was in a ‘serious state of disrepair’;<sup>82</sup>
- b) given individual titles were issued for each of the lots — consistent with the CTS model — significant costs were imposed on owners in the form of local government rates and body corporate levies (despite levies not being struck since at least 2013);<sup>83</sup>
- c) both attempts at using the land for its intended and approved purpose had failed;<sup>84</sup> and
- d) it was ‘appropriate from a planning perspective’ to reassemble titles and sell the entirety for redevelopment, rather than retaining the Village Square CTS and trying to sell lots individually.<sup>85</sup>

Two owners objected to the orders sought, but not the termination itself. One owner argued that the Village Square CTS’ decline was attributable to the unpaid levies, predominantly owed by the majority owner.<sup>86</sup> Therefore, an appropriate adjustment for the debt should be made by the Court.<sup>87</sup> The owner argued that:

Failing to make such amendments would result in the ‘unjust and unequitable’ situation whereby [the majority owner], the party responsible for making the Body Corporate financially unviable, is the majority beneficiary when the sale proceeds are distributed but does not bear ... responsibility for the very ... debts which crippled the Scheme in the first place ...<sup>88</sup>

The owner also objected to the caretaking services agreement, and the fees being offset against the quantum of levies Falconrest owed, arguing insufficient documentary support for the agreement. The owner sought a proper account of the fees and outstanding levies.<sup>89</sup>

81 Fish Affidavit (n 51) [11].

82 Ibid [32(a)].

83 Ibid [32(b)].

84 Ibid [32(c)].

85 Ibid [32(d)].

86 Fortieth Respondent, ‘Affidavit of Roseanna Marie Kokshoom’, Affidavit in *Falconrest Pty Ltd (rec and mgr apptd) v Body Corporate for Village Square Community Titles Scheme 24715, D54/18, 27 April 2018, [7]*.

87 Fortieth Defendant, ‘Submissions for the Fortieth Defendant’, Submission in *Falconrest Pty Ltd (rec and mgr apptd) v Body Corporate for Village Square Community Titles Scheme 24715, D54/18, 27 April 2018, [6]–[7]* (‘Fortieth Defendant Submissions April’).

88 Ibid [9] (citations omitted).

89 Ibid [17].

The second owner also argued that the arrears in levies must be considered to ensure that the outcome was just and equitable for the other owners.<sup>90</sup>

Both respondents faced some difficulty mounting their arguments. The decision in *Body Corporate for Mount Saint John Industrial Park CTS 18632 v Superior Stairs & Joinery Pty Ltd* ('Mount Saint John')<sup>91</sup> misinterpreted the *Body Corporate and Community Management (Standard Module) Regulation 2008* (Qld) s 145(2) ('Standard Module'), but it remained in force at the time.<sup>92</sup> Falconrest relied on the case, arguing that ordering an account would avoid the statutory limitation period established in *Mount Saint John*.<sup>93</sup> Falconrest also posited that levies paid for ongoing administration and maintenance of the Village Square CTS and collected amounts would merely be redistributed to owners upon the final accounting. Instead, it agreed to make a notional payment of body corporate debts, capped at \$300,000, out of its allocation of distributed proceeds.<sup>94</sup>

On 25 May 2018, Muir DCJ signed consent orders, ordering the termination of the Village Square CTS.<sup>95</sup> Two administrators were appointed to reconfigure the land into one title, sell it, and discharge body corporate debts and lot owners' liabilities to pass unencumbered title to the buyer. The administrators were then required to distribute the net proceeds, after payment of all debts and expenses, to owners.<sup>96</sup>

## IV INTERVIEW FINDINGS

### A Feelings of Failure

Owner participants expressed frustration that the asset failed, and disappointment at the CTS' decline. Once the Village Square CTS District Court proceedings commenced, interviewees felt powerless to prevent the termination. They described feeling marginalised and disempowered. One interviewee explained

90 Sixty-First Respondent, 'Submissions on Behalf of the Sixty-First Respondent', Submission in *Falconrest Pty Ltd (rec and mgr apptd) v Body Corporate for Village Square Community Titles Scheme 24715*, D54/18, 27 April 2018, [4].

91 [2017] QDC 245 ('Mount Saint John').

92 In that case, the Court ruled that the *Standard Module* (n 18) reg 145(2) set a limitation period of two years and two months in which a body corporate could recover outstanding levies: *ibid* [46]. Debts owed to the Body Corporate for Village Square CTS were aged well outside of that timeframe. The decision in *Mount Saint John* was not overturned until 31 July 2018 when the Queensland Court of Appeal in *Body Corporate for Mount Saint John Industrial Park CTS 18632 v Superior Stairs & Joinery Pty Ltd* [2019] 2 Qd R 73 ruled that the District Court's decision was incorrect: at [25] (McMurdo JA, Mullins J agreeing at [26], Bond J agreeing at [27]).

93 Falconrest Pty Ltd (rec and mgr apptd), 'Applicant's Supplementary Outline of Argument', Submission in *Falconrest Pty Ltd (rec and mgr apptd) v Body Corporate for Village Square Community Titles Scheme 24715*, D54/18, 18 May 2018, [19].

94 *Ibid* [20].

95 Muir DCJ Orders (n 44).

96 *Ibid*.

thus: ‘I have no rights ... I’ve lost all of my [rights]’.<sup>97</sup> These emotions were not experienced in respect of challenging the termination itself; most owners favoured termination.<sup>98</sup> Rather, interviewees who had paid all levies issued by the body corporate perceived the lack of accounting as if they were being penalised, and noncompliant owners rewarded.

Other interviewees acknowledged the limited lifespan of buildings in general, arguing that ‘the starting point [in the *BCCM Act*] is that buildings are immortal ... [It] is just bloody minded and stupid to enforce a system where buildings must be maintained perfectly forever’.<sup>99</sup> They indicated that the *BCCM Act* had ‘come of age’ and some buildings had reached the end of their economic lifespan.<sup>100</sup> It was a ‘normal’ occurrence, rather than construction of ‘disposable’ structures.<sup>101</sup> The Recommendations Paper acknowledged that the failure to pay body corporate levies meant that the body corporate had to ‘make up the shortfall or do without important services and possibly even postpone important maintenance work’.<sup>102</sup> In respect of *Village Square*, one owner commented on the deterioration of the buildings: ‘[W]e just didn’t have the money and even if we did ... I would think that might be like throwing money down a well’.<sup>103</sup> Once the scheme reached a certain point of decline, there appeared to be a perception that carrying out repairs and maintenance was in vain. The damage already done from years of neglect through insufficient funding appeared to have been regarded as irreversible.

Professional advisors interviewed compared other CTSs displaying similar patterns of low, or zero maintenance.<sup>104</sup> In those CTSs, maintenance failed to be carried out because levies payable by a majority of owners in the CTSs remained unpaid. The interviewees’ concerns for those CTSs related to the apparent acts of strategic noncompliance with legislative obligations by owners.<sup>105</sup> There, it appeared that owners sought to prompt the decline and potential devaluation of lots in the CTSs to limit saleability, except in connection with a redevelopment.<sup>106</sup>

The examples given in interviews demonstrate the competing and potentially incompatible interests of owners. There is an implicit assumption in the *BCCM Act* that a functioning body corporate will be achieved by complying with the meeting

97 Interview with Interviewee 1 (Melissa Pocock, Telephone Interview, 24 May 2019).

98 Bernie Affidavit (n 53) [54] including AGM Minutes dated 8 February 2018 noted as Attachment JRB-50.

99 Interview with Interviewee 15 (Melissa Pocock, Telephone Interview, 20 September 2019) (‘Interview 15’).

100 Ibid.

101 Ibid.

102 ‘Recommendations Paper’ (n 21) 52.

103 Interview with Interviewee 6 (Melissa Pocock, Telephone Interview, 9 May 2019).

104 See, eg, Interview 15 (n 99).

105 Ibid.

106 Ibid.

and management provisions in the Act. The assumption seems to rest on the idea that the *BCCM Act* places owners into a management structure and names them as members, and as such, they work cohesively and ‘reasonably’ in the best interests of the collective to achieve that functionality.<sup>107</sup> However, co-ownership of common property and geographic proximity of individually held assets does not necessarily align owners’ interests sufficiently to achieve cohesiveness or functionality. It is evident from *Village Square* that individuals’ competing interests, financial capacities, a lack of understanding of statutory obligations and owners’ presumptions that a regulatory body failed to protect minority owners, all demonstrate that this assumption must be reconsidered. Dispute resolution provides enforcement options against non-complying owners and CTSs. However, one must question whether they are effective or, perhaps were effectively utilised, when one interviewee correlated the ‘unruliness’ of the scheme to the movie, *Lord of the Flies*.<sup>108</sup> Had owners educated themselves on what their obligations as CTS members were? Did they understand what the dispute resolution options were and what they could achieve by seeking dispute resolution? Was there a collective exhaustion around noncompliance that rendered any enforcement action *too hard*? Was the culture in the scheme such that owners stopped availing themselves of the dispute resolution and information services of the Office of the Commissioner for Body Corporate and Community Management? Was action left to a small, vocal minority? Or did the scheme simply not have the resources to appoint advisors? These are not necessarily questions relating to the *BCCM Act* itself, but rather issues of community and collective behaviours. Nevertheless, the answers may impact directly on the effectiveness of the legislative structure. Have the tensions between individual versus collective behaviour, and the inherent selfishness of human beings been disregarded in favour of a false utopia which can be supposedly achieved merely by adopting a legislative structure for administration of a management entity?

## B Getting Paid

The ‘dramatic consequences’ of a failure by owners to pay levies to ensure the administration and sinking funds were properly funded was recognised by Duncan et al.<sup>109</sup> Interviewees described the failure as a perceived lack of transparency in the latter years’ dealings of the Body Corporate for Village Square CTS.<sup>110</sup> Some interviewees considered that reconstructing the financial records for the CTS before termination was necessary but acknowledged the difficulties of doing so where incomplete information was held.<sup>111</sup> Another interviewee believed that the District Court should have considered why termination was being sought, arguing that the breach of obligations to maintain, and the cause of that breach — the

107 *BCCM Act* (n 6) s 94.

108 Interview with Interviewee 5 (Melissa Pocock, Telephone Interview, 2 October 2019) (‘Interview 5’).

109 ‘Recommendations Paper’ (n 21) 15.

110 Interview with Interviewee 4 (Melissa Pocock, Telephone Interview, 24 September 2019) (‘Interview 4’).

111 Interview 5 (n 108).

unpaid levies — were relevant.<sup>112</sup> They believed that if failing to pay levies forced a building into ‘wrack and ruin’ owners should be penalised rather than ‘profiting’ from noncompliance.<sup>113</sup> It is questionable whether this could be achieved in a CTS with a history of dysfunctionality like Village Square CTS; levies were owed by multiple parties, all of whom contributed to the cash flow difficulties.

Further, no body corporate meetings were held for years. No levies were struck, or action taken to collect payments owing over this time. In these types of cases, perhaps investigating reasons for the CTS’ decline would be beneficial to owners, as would reconstructing records. But what would such an exercise achieve without penalties being incorporated into the *BCCM Act*? The cost of retrospectively reinstating the body corporate’s financial records, particularly where negative equity exists in the asset must also be considered. Requiring owners to pay for an investigation into and reconstruction of the accounts may reduce an already small amount available for distribution. Worse still, it may potentially increase the amount payable by owners to exit the CTS where the sale price of the land in toto is insufficient to discharge both individual and body corporate debts. In this regard, recovery of body corporate debts from bankrupt, insolvent or deceased owners is unlikely, raising the possibility of a contribution by other owners being required.

### C Good Drafting

When termination was discussed in the Village Square CTS meetings, interviewees expressed feeling alone and that ‘nobody had their back’.<sup>114</sup> The brevity of the *BCCM Act* ch 2 pt 9 was a concern for other interviewees. The lack of guidance on process, advisory reports to aid owners’ decision-making, information on funding the termination, the perceived lack of government assistance and legal advice to owners in need, alternative options to termination, and help in determining the best option, were all raised as relevant concerns.<sup>115</sup> While many are issues that professional advisers acting for owners or a body corporate would cover, the difficulty lies with protecting impecunious owners who cannot retain professional advisers, or a body corporate whose members are trapped in a ‘spiral of depreciating wealth’ and cannot invest more to retain advisors to achieve a termination.<sup>116</sup> There, the only option may be to rely on a *champion* who funds the termination, much like that which occurred in *Village Square*.

Interviewees also criticised the phrasing of the *BCCM Act* ch 2 pt 9.<sup>117</sup> To effect a termination, the *BCCM Act* s 78(1) requires that it be approved by a resolution without dissent, and a ‘termination issues’ agreement is entered into dealing with:

112 Interview 15 (n 99).

113 Ibid.

114 Interview 4 (n 110).

115 Interview 5 (n 108).

116 Bentley (n 20) 6.

117 Interview with Interviewee 10 (Melissa Pocock, Face-to-Face Interview, 29 May 2019) (‘Interview 10’); Interview 15 (n 99).



- a) the sale and distribution of proceeds from the sale of the CTS land and any body corporate assets; and
- b) how liabilities of the body corporate for the terminated CTS are to be shared.<sup>118</sup>

In an order terminating a CTS under the *BCCM Act* s 78(2), the District Court may deal with ‘termination issues’.<sup>119</sup> The self-management<sup>120</sup> bodies corporate may exercise by negotiating their own termination issues agreement explains the lack of process defined in the *BCCM Act* ch 2 pt 9, and the need for a broad definition. However, the authors dispute the desirability of leaving such procedural issues to a CTS to determine, particularly because this may impose a significant cost on the owners. Provisions setting out the required procedural steps to effect the termination of a CTS, the priorities of debts, including those secured by statutory charges, the requirement to release encumbrances,<sup>121</sup> and clarity on the effective date for termination would simplify the process and reduce costs.<sup>122</sup> Owners and affected stakeholders would no longer need to negotiate these matters; they would be provided for by statute, ensuring equity and equality of rights between different CTSs and their respective owners. When regard is had to systems outside the CTS environment, these factors have clearly been legislated. The statutory trustee for sale provisions in the *Property Law Act* are detailed,<sup>123</sup> as are the receivership and

118 *BCCM Act* (n 6) sch 6 (definition of ‘termination issues’).

119 *Ibid* s 78(3).

120 *Ibid* s 4(a).

121 Note, the authors argue below that the *BCCM Act* (n 6) and *Land Title Act* (n 25) should be amended to reflect the provisions of the *Property Law Act 1974* (Qld) s 38(1) (*Property Law Act*) which requires that statutory trustees for sale take the property ‘subject to encumbrances affecting the entirety, but free from encumbrances affecting any undivided shares’.

122 There is some uncertainty around the effective date for termination of a CTS. The *BCCM Act* (n 6) s 79(2) provides that termination takes effect under the *Land Title Act* (n 25) s 115V. The *Land Title Act* (n 25) s 115V(2) states that ‘termination takes effect when the registrar completes the action mentioned in subsection (1)’. That subsection requires the registrar to ‘register the termination in the freehold land register’ and ‘cancel the particulars ... recorded in the freehold land register about scheme land’. The *Land Title Act* (n 25) s 30(1) provides that ‘[o]n lodgement of an instrument, the registrar must register the instrument’. The *Land Title Act* (n 25) s 32 stipulates:

- 1) When an instrument is lodged in the land registry, the registrar must note on the instrument—
  - a) the date and time of lodgement; and
  - b) an identifying reference.
- 2) When the instrument is registered, the registrar must record the information mentioned in subsection (1)(a) and (b) in the appropriate register.

One interviewee questioned whether this meant that registration was effectively backdated to the date of lodgement, or whether it was the date recording in the registers occurred: Interview with Interviewee 23 (Melissa Pocock, Face-to-Face Interview, 29 October 2019) (‘Interview 23’). In circumstances where the documents were not lodged and registered on the same date, this uncertainty impacts on the calculation of rates and land tax owed by owners on their individual lots versus the co-owners on the assembled parcel.

123 *Property Law Act* (n 121) pt 5 div 2.

voluntary administration provisions in the *Corporations Act 2001* (Cth) (*'Corporations Act'*).<sup>124</sup>

Professional advisor interviewees raised concerns with implications associated with joint and several liability of co-owners once a termination occurred,<sup>125</sup> describing it as 'scary'.<sup>126</sup> Upon a termination occurring, conversion of owners' interests into tenant in common shares of a reassembled parcel and removal of the governing CTS structure was also problematic. One interviewee stated that

you leave a community-based living structure without the vehicle for ... those things that a body corporate is charged with doing under the Act ... [Termination] takes away that community living and puts the onus on a group of like-minded owners to do the right thing without the rigour and discipline and legislative framework that exists with the body corporate structure ...<sup>127</sup>

In circumstances where a body corporate is dysfunctional, and there are no *like-minded owners* or no established system of co-operation and community,<sup>128</sup> owners are effectively cast adrift from the legislative system. They become purely reliant upon the orders appointing an administrator to deal with *termination issues*. Termination of the CTS only removes the titling structure. It does not necessitate sale of the site. Nevertheless, there may be delays between termination and settlement of a sale, depending on market conditions and contract timeframe. Termination also does not cancel owners' rights to, for example, reside in the property or mortgage their share as a tenant in common.

The *BCCM Act* arguably fails to protect owners from liability arising from the co-ownership created under law. That, in combination with insufficient regulation of the process itself, the lack of prescription around administrators' duties, powers and protections is concerning. When a comparison is made with the statutory trustee for sale process under the *Property Law Act*, there is a *perceived disjunction* between it and termination under the *BCCM Act* and *Land Title Act*.<sup>129</sup> This disjunction raises two issues. First, in a termination, the District Court has jurisdiction. However, it is the Supreme Court which makes orders to sell co-owned property under the *Property Law Act*.<sup>130</sup> The Supreme Court's inherent jurisdiction is broader than the District Court's, particularly relating to the adjustment of the parties' rights including orders affecting registered

124 *Corporations Act 2001* (Cth) pts 5.2, 5.3A (*'Corporations Act'*).

125 *BCCM Act* (n 6) s 81(2).

126 Interview 23 (n 122).

127 Interview with Interviewee 12 (Melissa Pocock, Face-to-Face Interview, 31 May 2019).

128 Michael A Heller, 'The Tragedy of the Anticommons: Property in the Transition from Marx to Markets' (1998) 111(3) *Harvard Law Review* 621, 653 n 157, citing Robert C Ellickson, 'Property in Land' (1993) 102(6) *Yale Law Journal* 1315, 1330 n 56.

129 Interview 15 (n 99).

130 *Property Law Act* (n 121) s 38(1), sch 6 (definition of 'court').

encumbrances.<sup>131</sup> One must question why a difference exists in the originating jurisdiction when the effect of the provisions is the same — to devolve a person of their property when another owner makes application to sever that co-ownership. Different terminology is utilised in the *BCCM Act*; it reclassifies termination as an administrative task rather than the severing of co-ownership which occurs under the *Property Law Act*. However, termination does more than simply wind up the administrative vehicle. It effectively varies the owners' rights in their lots, the common property<sup>132</sup> and management of those assets. Yet, it is not granted the same status as the severing of other types of co-ownership. Ironically, CTS terminations involve a multitude of stakeholders, and are potentially 'far more complex' than the sale of co-owned parcels under the *Property Law Act*.<sup>133</sup> In addition to being subject to a lower court's jurisdiction with narrower inherent powers, termination itself receives virtually a token mention in the Acts. One interviewee considered the diminution of CTS matters creates a fundamental problem because

we have mistakenly forfeited strata disputes ... [treating them] like neighbourhood disputes ... like people fighting about where the bins are ... [but this is] not the case. We're often talking about very serious property rights ... and very often those things are not dealt with properly ...<sup>134</sup>

The authors question whether the same fundamental mistake has been made in the termination provisions, effectively demoting the serious implications for real property rights triggered by a termination into something lesser when compared with non-CTS land.

The second issue raised by the disjunction between the respective legislative regimes is the level of detail in the provisions. Statutory trustees for sale are appointed under the *Property Law Act* pt 5 div 2. Trustees' common law fiduciary obligations are supplemented by the *Trusts Act 1973* (Qld) ('*Trusts Act*'). By way of comparison, the *BCCM Act* empowers the District Court to make orders 'to the extent necessary for the effective termination of the scheme, about termination issues'<sup>135</sup> and 'appoint an administrator and give the administrator authority to put the order into effect in the way directed by the court'.<sup>136</sup> Administrators' roles are not defined in the *BCCM Act*, nor are they expressly subject to the obligations of the *Trusts Act* as are statutory trustees for sale. Arguably the *BCCM Act* perpetuates a further derogation of CTS property rights by treating an administrator as a lesser role than that of a trustee,<sup>137</sup> concentrating on termination as an administrative

131 See, eg, *ibid* s 42(b).

132 In the case of a body corporate, owners own the common property as tenants in common in the shares set out in the interest schedule lot entitlements: *BCCM Act* (n 6) s 35(1).

133 Interview 10 (n 117).

134 Interview with Interviewee 8 (Melissa Pocock, Telephone Interview, 14 June 2019).

135 *BCCM Act* (n 6) s 78(3).

136 *Ibid* s 78(5).

137 In *Fordyce v Kordamentha Real Estate Pty Ltd* [2017] QSC 289 ('*Nobbys Outlook*'), Bond J considered the appointment of a statutory trustee for sale at the time of a termination application was made to the District Court. His Honour concluded that the District Court likely did not have

process without expressly protecting owners' property rights. However, this is arguably a narrow interpretation of the legislation too. The Court must consider lot owners', the local governments', and if the land is in a priority development area, the Minister for Economic Development Queensland's ('MEDQ')<sup>138</sup> views when determining whether termination is *just and equitable*. Is this another example of a demotion of CTS owners' property rights? No comparable requirement exists for the Supreme Court to consider external influences when appointing statutory trustees for sale under the *Property Law Act*. However, arguably the sale of a single parcel of land is less likely to have the same impact on the surrounding community than the termination of a CTS, which has the potential to be built to a much higher density. In those circumstances, perhaps consultation with the local government and the MEDQ is appropriate. Regardless of the conclusion reached on this point, the disparities between the defined and undefined roles and responsibilities of trustees and administrators, respectively, are unjustifiable.

Part V now considers the authors' recommendations for reform.

## V AREAS FOR REFORM

### A Payment of Debts

The *Village Square* orders required Falconrest to procure registration of the plan reassembling the lots and terminating the CTS. The administrators were then to take possession of the books and body corporate assets, identify body corporate liabilities, market and sell the land and assets, and finally account to the parties entitled to the proceeds of sale in the priority set out in the orders.<sup>139</sup> Liabilities and expenses were payable in the following order:

1. statutory charges, levies, rates or taxes accrued over individual lots before termination, and subsequently on the reassembled parcel;
2. amounts owing under registered mortgages;
3. costs of selling the land;
4. administrators' agreed remuneration;

jurisdiction to make the order in the form sought by the parties to that litigation. As to the obligations of the 'trustees' appointed in respect of the termination in that case, his Honour concluded at [39] that

[t]he trustees are in fact registered under the *Land Title Act* as the registered proprietors of an estate in fee simple of the land. They have an indefeasible legal title to that interest by force of the Act. Even if the process by which they became registered in that way was by an order made by the District Court without jurisdiction, there is no analysis of the events which permits of the conclusion that (i) they do not hold the fee simple, and (ii) they do not hold the fee simple on trust for the former lot owners. It is inevitable that their legal title must be regarded as held by them on trust for the former lot owners.

138 MEDQ, or the Minister for Economic Development Queensland, is defined as 'MEDQ under the *Economic Development Act 2012* [(Qld)]': *BCCM Act* (n 6) sch 6 (definition of 'MEDQ').

139 The precise powers of the administrator were set out in Muir DCJ Orders (n 44) [4]–[19], which formed the bulk of the orders sought by the applicant.

5. body corporate liabilities capped at \$300,000, payable from Falconrest's notional allocation;<sup>140</sup> and
6. the balance of net proceeds to the owners of the former CTS lots.<sup>141</sup>

For liabilities attributable to particular lots within the CTS, the maximum amount payable to creditors was limited to the relevant owners' portion of the total funds,<sup>142</sup> defined as the 'owner's notional allocation', and calculated using the following formula:

$$\text{Owner's notional allocation} = \frac{\text{ISLE for the owner's slot}}{\text{Total ISLE for the CTS}}$$

where ISLE is the interest schedule lot entitlement.<sup>143</sup>

The formula arguably seeks to supplement the position in the *BCCM Act* s 80(1) with respect to body corporate debts,<sup>144</sup> which provides that liability for rates, taxes, charges or levies assessed on lot<sup>145</sup> within that CTS is not affected when a termination occurs. They are 'taken to have been levied on the former owner's interest in the land as tenant in common'.<sup>146</sup>

140 If body corporate expenses exceeded this amount, the administrators could apply to the court seeking an apportioned contribution by the other owners: *ibid* [17].

141 *Ibid* [14].

142 *Ibid* [14(a)]–[14(b)].

143 The *BCCM Act* (n 6) s 47(3) states that interest schedule lot entitlements are utilised as follows:

The interest schedule lot entitlement for a lot is the basis for calculating—

- a) the lot owner's share of common property; and
- b) the lot owner's interest on termination of the scheme, including the lot owner's share in body corporate assets on termination of the scheme; and
- c) the value of the lot, for the purpose of a charge, levy, rate or tax that is payable directly to a local government, the Commissioner of State Revenue appointed under the *Taxation Administration Act 2001* [(Qld)] or other authority and that is calculated and imposed on the basis of value.

144 *Ibid* s 81(2)(b) provides that debts are 'vested jointly and severally in the former owners, but they are entitled to contribution against one another *in proportion to their respective interest schedule lot entitlements* immediately before the termination' (emphasis added).

145 The *Local Government Act 2009* (Qld) authorises local governments to levy general rates, special and other rates, and utility charges: at s 94. Overdue rates and levies are a charge on land: at s 95; and local governments may sue for payment, sell the land or acquire it to recover the outstanding amount: *Local Government Regulation 2012* (Qld) pt 12 sub-div 2–3. The latter appears to have occurred with two of the lots in *Village Square* with the Council of the City of the Gold Coast being listed as the Seventeenth Respondent in the District Court proceedings. Similarly, unpaid land tax is a debt, secured as a first-ranking charge over the land upon which the tax is levied: *Land Tax Act 2010* (Qld) ss 59(1), 60(1)–(2). Both rates and land tax (where the owner is liable) are levied against the individual lots in a CTS. In this regard, the *BCCM Act* s 194(2) specifically allocates a proportion of the common property value to each lot for rating and taxation purposes so that there is no separate assessment over the common property. Example one in the section discusses apportionment of the \$120,000 valuation of scheme land across the three lots in the scheme at \$40,000 each (assuming an equal interest schedule lot entitlement).

146 *BCCM Act* (n 6) s 80(1)(b).

Upon termination of the CTS, individual lots within the former CTS cease to exist<sup>147</sup> and the owners become tenant in common owners of the newly assembled parcel.<sup>148</sup> Registered encumbrances, including government charges for outstanding rates and land tax incurred before termination over individual lots are retained, and encumber the newly assembled parcel.<sup>149</sup> In this regard, the *Land Title Act* s 115V(5) provides: ‘If a lot included in the scheme was subject to a mortgage immediately before the scheme was terminated, the former owner’s interest in the land as tenant in common is subject to the mortgage.’<sup>150</sup>

## **B Statutory Trustees for Sale and the Nobbys Outlook CTS Experience**

Where co-owners ‘fail themselves to agree’,<sup>151</sup> on the dissolution of a co-ownership, they may petition the Supreme Court to appoint statutory trustees for sale under the *Property Law Act* s 38(1). Jurisdiction may be transferred to the District Court if the property does not exceed the Court’s jurisdictional limit of \$750,000,<sup>152</sup> or the parties consent in writing prior to the proceedings commencing.<sup>153</sup> By way of contrast, an order for termination of a CTS may be made by the District Court. The point was raised in Part IV that the delegation of termination to a lower court than the Supreme Court is an example of the diminution of CTS owners’ property rights when compared with non-CTS land. This point is even more pertinent when regard is had to the likelihood that many CTS terminations would exceed the District Court’s jurisdiction, requiring the consent of all parties to be obtained prior to commencing proceedings,<sup>154</sup> and the complexity of dealing with multiple stakeholders including mortgagees, statutory chargees and owners. The consequences of failing to comply with these requirements were demonstrated in *Fordyce v Kordamentha Pty Ltd* (‘*Nobbys Outlook*’).<sup>155</sup>

In that case, the applicant commenced proceedings in the District Court in compliance with the *BCCM Act* s 78(2). The mortgagees of lots in the scheme were not joined as parties to the litigation, nor had their consent been obtained pursuant

147 *Land Title Act* (n 25) s 115V(3).

148 The shares are defined by the interest schedule lot entitlements of the former CTS: *BCCM Act* (n 6) s 81(2)(a).

149 *Land Title Act* (n 25) s 115V.

150 *Ibid* s 115V(5).

151 *Nullagine Investments Pty Ltd v The Western Australian Club Inc* (1993) 177 CLR 635, 650 (Brennan J).

152 *District Court of Queensland Act 1967* (Qld) ss 68(1)(b)(vi), 68(2).

153 *Ibid* s 72(1).

154 *Ibid* s 72.

155 *Nobbys Outlook* (n 137).

to the *District Court of Queensland Act 1967* (Qld) s 72.<sup>156</sup> Nevertheless, the District Court ordered termination of the scheme and consequently, the plan of survey reassembling the land was registered.<sup>157</sup> The plan noted each mortgagee's interest against title of the reassembled parcel, consistent with the *Land Title Act* s 115V(5). The District Court also purportedly appointed statutory trustees for sale under the *Property Law Act* s 38(1).<sup>158</sup> The *Property Law Act* s 38(1) provides:

Where any property (other than chattels personal) is held in co-ownership the court may, on the application of any 1 or more of the co-owners, and despite any other Act, appoint trustees of the property and vest the same in such trustees, subject to encumbrances affecting the entirety, but free from encumbrances affecting any undivided shares, to be held by them on the statutory trust for sale or on the statutory trust for partition.<sup>159</sup>

Under the *Property Law Act* s 38(1), upon an order appointing statutory trustees for sale being made, the land is transferred to the trustees free from encumbrances affecting the former co-owners' shares.<sup>160</sup> Mortgagees' rights change from the holders of a registered encumbrance to become a co-owner. This grants them a beneficial interest under a constructive trust, entitling them to proper management of the trust and receipt of the amount required to discharge the debt owed to them up to the indebted owners' portion of the proceeds of sale.<sup>161</sup> Appointment of the statutory trustees for sale and removal of the encumbrance from the title, therefore, does not defeat the creditors' claims.

In addition, protections are not limited to registered security holders. 'Co-owner' is broadly defined and includes 'an encumbrancee of the interest of a joint tenant or tenant in common',<sup>162</sup> protecting both the interests of formerly registered, and unregistered security holders.<sup>163</sup>

156 Ibid [30], [48].

157 Ibid [12] (Bond J).

158 Ibid [7].

159 *Property Law Act* (n 121) s 38(1) (emphasis added).

160 Ibid s 38(3) provides that one statutory trustee corporation, or a statutory trustee corporation and one or two individuals, or between two and four individuals may be appointed as statutory trustees.

161 *Crocombe v Pine Forests of Australia Pty Ltd* (2005) 219 ALR 692, 703 [76] (Young CJ). The former mortgagees do not have a caveatable interest, but their interests are protected as beneficiaries of the trusts.

162 *Property Law Act* (n 121) s 37.

163 *Bunnings Group Ltd v Asden Developments Pty Ltd* [2014] 1 Qd R 493, 507–8 [44]–[49] (Margaret Wilson J). A party holding the benefit of a guarantee, for example, would have their security interest converted into an interest against so much of the trust property, including proceeds of sale that would otherwise pass to the former co-owner but for the debt. The holders of an unregistered interest in respect of the property are treated in the same way as a formerly registered mortgagee: at 508–9 [52]–[54].

As is the case with the *Land Title Act* s 115V(5), an encumbrancee's interest pursuant to the *Property Law Act* s 38(1), extends only so far as the proportion of proceeds that would otherwise pass to the former co-owner.<sup>164</sup>

In carrying out their functions under the orders purportedly made by the District Court, the trustees sought directions from the Supreme Court regarding discharge of the mortgages, among other issues. However, Bond J in *Nobbys Outlook* concluded that the District Court did not have jurisdiction to make the termination order.<sup>165</sup> His Honour, however, regarded noncompliance as having been waived by the parties through their conduct.<sup>166</sup>

This jurisdictional issue created by the application should have impeded the parties from obtaining the termination order from the District Court; however, it appears not to have been raised as an issue. Given Bond J's determination in *Nobbys Outlook*, it will certainly be relevant to any future applications for termination of CTS.

There were in addition, two other critical issues that were not as readily resolvable. The first was whether the *Property Law Act* s 38(1) applied. To apply, property must be held in co-ownership when the Court's order is made.<sup>167</sup> When Kingham DCJ ordered the termination, the CTS still existed. Each owner held their individual lot, rather than being co-owners of a reassembled parcel. The District Court order provided for termination, but that termination only took effect when the matters in the *Land Title Act* s 115U were complied with.<sup>168</sup> Given termination occurred after the plans were registered pursuant to the orders, Bond J held that no co-ownership existed at the time of the orders.<sup>169</sup> His Honour opined that a better approach would have been to seek termination, the appointment of an administrator and authorisation for that administrator to make application for the appointment of statutory trustees for sale.<sup>170</sup> However, this would have necessitated two applications before the courts, potentially increasing the costs of termination. The lack of procedures for effecting a termination in the *BCCM Act* placed the onus on the parties in the *Nobbys Outlook* CTS to determine the most effective way to deconstruct the administrative vehicle, together with devolution of the co-owned property. Each time a scheme is terminated, this exercise must be

164 If the proceeds of sale are insufficient to discharge the debts of the indebted owner, priority lies with formerly registered security holders. Insolvency and bankruptcy laws would regulate the recovery of any debts in the situation where an owner's debts exceeded their assets, rendering them insolvent or bankrupt.

165 *Nobbys Outlook* (n 137) [7], [30].

166 *Ibid* [32]–[34]. While Bond J determined that Kingham DCJ of the District Court likely did not have jurisdiction to make the orders, the trustees were recorded as the registered proprietors of an estate in fee simple and held indefeasible title, meaning that their 'legal title must be regarded as held by them on trust for the former lot owners': at [39].

167 *Ibid* [35] (Bond J).

168 *Land Title Act* (n 25) ss 115V(1)–(2).

169 *Nobbys Outlook* (n 137) [35]–[38].

170 *Ibid* [36].



undertaken by the owners. The authors argue that both the optimal and equitable solution would be to standardise these procedures through statutory amendment.

The second difficulty Bond J encountered with the termination orders was the inconsistency between the *Land Titles Act* s 115V(5) and the *Property Law Act* s 38(1). His Honour noted the continued registration of the mortgages<sup>171</sup> conflicted with the requirement in the *Property Law Act* s 38(1) that title be ‘free from encumbrances affecting any undivided shares’.<sup>172</sup> The trustees sought release of the mortgagee’s security at settlement, arguing that their right to recover outstanding debts was limited to the indebted former co-owner’s share of the property.<sup>173</sup> This position was consistent with the decisions in *Crocombe v Pine Forests of Australia Pty Ltd*<sup>174</sup> and *Giacci v Giacci Holdings Pty Ltd*.<sup>175</sup> However, the debt secured by the mortgages exceeded the amount the co-owners would be entitled to at settlement.<sup>176</sup> This meant that if the orders were granted, the mortgagees would be required to discharge their security without full payment. The failure to join the mortgagees to the initial proceedings,<sup>177</sup> and the District Court’s lack of jurisdiction in the case concerned Bond J. His Honour questioned whether the mortgagees could be required to release their security without full payment, particularly given they were not party to the litigation and could not take steps in the proceedings to protect their interests.<sup>178</sup> A different scenario may have arisen had the mortgagees been joined as parties to the consent order. Arguably, this may have been evidence that a negotiated outcome had been achieved and the mortgagee was required to release their security without full payment. However, in the absence of the mortgagees being a party to the consent orders, both the likely contractual provisions and indefeasibility of the mortgage obtained on registration resulted in Bond J refusing to make orders that negatively affected the mortgagees’ registered interest in the land.<sup>179</sup> In this regard, Bond J was not privy to the terms of the mortgages, but his Honour inferred that a right to full payment of the debt would likely be included in the security documents.<sup>180</sup>

The mortgagees’ refusal to release the security without receiving full payment, left the mortgagors in a difficult, if not impossible situation. If a negotiated outcome could not be reached, the statutory trustee could not provide unencumbered title to the property to a purchaser. Given the reassembly of the lots forming the CTS had

171 This was consistent with the *Land Title Act* (n 25) s 115V(5).

172 *Nobbys Outlook* (n 137) [49], quoting *Property Law Act* (n 121) s 38(1).

173 *Nobbys Outlook* (n 137) [45].

174 (2005) 219 ALR 692, 703 [76] (Young CJ).

175 [2010] WASC 349, [49] (Heenan J).

176 *Nobbys Outlook* (n 137) [44].

177 *Uniform Civil Procedure Rules 1999* (Qld) r 62.

178 *Nobbys Outlook* (n 137) [48].

179 *Ibid* [47]. The authors thank the anonymous referee for invaluable guidance on the points raised in this section.

180 *Ibid* [46].

already occurred, this situation impacted more than just the relevant mortgagor co-owner. The inability to secure a release at settlement meant that the statutory trustee was unable to settle the entirety of the reassembled parcel, affecting all the owners. Arguably, it is even more important to afford the protections in the *Property Law Act* s 38(1) to both mortgagees and co-owners in the context of a CTS termination for this very reason. The financial impact and legal risks imposed on owners who are otherwise independent from the other co-owners but for the termination is significant.

While the provisions of the *BCCM Act* and *Land Title Act* did not create the situation arising in *Nobbys Outlook*, the authors argue that consistency between the termination of a CTS resulting in a co-ownership arrangement, and termination of a traditional co-ownership is warranted. The authors agree with Bond J's determination in *Nobbys Outlook*. However, they question why it is acceptable that the statutes are drafted in such a manner to create the problem. The *Land Title Act* does not treat termination and the appointment of an administrator as equivalent to the appointment of statutory trustees for sale, despite the clear parallels. The effect is to essentially regard the termination of a CTS as the winding up of an administrative vehicle without granting the same level of protection of property rights to both owners and encumbrancees. The inconsistency between the *Property Law Act* and *BCCM Act* and *Land Title Act*, has and will continue to cause co-owners to bear the unfair costs of negotiating the rights and responsibilities of the parties, the role of the administrator and priorities of payments. This is untenable, particularly in circumstances where the termination of a CTS may be significantly more complex than the termination of other co-ownership arrangements. However, reforms are relatively simple.

The final section in this Part considers the role, powers, obligations and protections of the court-appointed administrators. While on the face of it, it appears logical to look to other state and territory termination regimes, the authors have adopted a different approach. This article has highlighted the diminution of the property rights of lot owners in a CTS, demonstrating the underlying bias against CTSs in which we have *forfeited strata disputes*, by failing to recognise the complex property law implications that often arise. Given this, we have sought to avoid replicating the inherent biases other jurisdictions may have unwittingly made. We argue that the *Property Law Act* provisions should be replicated for land related aspects in a CTS termination. In relation to the administrative processes of winding up the structure and the rights, responsibilities, powers and obligations associated with the parties administering the termination, the authors have considered the *Corporations Act*.

### **C Powers of Administrators**

The role of administrators in the *BCCM Act* is undefined. Numerous references are made to them; however, the scope of their duties and responsibilities are determined on a case by case basis by the relevant decision maker. Administrators may be appointed 'to perform the obligations of the body corporate', its committee,