

**IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY**

**CIV 2008-404-6294**

BETWEEN

BODY CORPORATE 318566  
Plaintiff

AND

STRATA TITLE ADMINISTRATION  
LTD  
Defendant

Hearing: 13 February 2009

Counsel: T J P Bowler for Plaintiff  
B Rooney for Defendant

Judgment: 17 March 2009

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**JUDGMENT OF HEATH J**

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*This judgment was delivered by me on 17 March 2009 at 2.00pm pursuant to Rule 11.5 of the High Court Rules*

***Registrar/Deputy Registrar***

Solicitors:

Grove Darlow, PO Box 2882, Auckland  
James Keat, PO Box 99-680, Auckland

Counsel:

B Rooney, PO Box 3320, Shortland Street, Auckland

## **Introduction**

[1] Body Corporate 318566 (the Body Corporate) was created on deposit of a unit plan for an apartment building, situated at 508-510 Queen Street, Auckland. On deposit of the unit plan, rules for the body corporate were lodged. The rules contained variations to the default rules set out in Schedule 2 to the Unit Titles Act 1972 (the Act).

[2] Two changes assume importance. The first is the insertion of a rule (r 31) which appoints Strata Title Administration Ltd (Strata) as the first secretary to the body corporate, for a period of two years, and purports to require termination of the appointment of a Secretary to be by “special resolution”. The second (r 40(b)), purports to repose in the Secretary of the Body Corporate the power to exercise votes for proprietors who have not signed an irrevocable power of attorney in favour of the Body Corporate, do not attend a general meeting and have not given a proxy on which their vote can be cast.

[3] Some of the individual proprietors of the Queen Street premises became concerned about the way in which the complex was being managed. An owners’ committee was established. The committee formed the view that Strata’s tenure as secretary should be terminated. The resolution was drafted, by the Secretary, as one seeking to confirm Strata’s appointment, rather than one seeking to remove it. When an Extraordinary General Meeting of the Body Corporate was held on 17 October 2008, to consider that issue, Strata exercised its r 40(b) power to cast votes on behalf of proprietors who neither attended nor gave express proxies. It also ruled on which votes were validly cast and which were not. The upshot was that Strata considered that its continuing role as secretary had been confirmed.

[4] The issue in this proceeding is whether rr 31 and 40(b) are invalid. The contention of invalidity is based on the ground that there was no power to vary the Schedule 2 default rules in that way. If successful, the Body Corporate seeks a declaration of invalidity and a further declaration that the resolution passed on 17 October 2008 is of no effect.

## **The scheme of the Act**

[5] The Act creates a legal framework by which individual units within a multi-unit complex may be owned separately and common areas administered collectively. The Act has been described as a “statutory moulding” of the Torrens system of land registration to provide for the ownership of flats and business premises: see Hinde McMorland & Sim, *Land Law in New Zealand* (2004, Vol 2, para 14.022). The Long Title to the Act sets out three main purposes:

- a) to facilitate the subdivision of land into units that are to be owned by individual proprietors,
- b) to facilitate its subdivision into common property that is to be owned by all the unit proprietors as tenants in common and
- c) to provide for the use and management of the units and common property.

[6] I discussed the general scheme of the Act in some detail in both *World Vision of New Zealand Trust Board v Seal* [2004] 1 NZLR 673 (HC) at paras [21]-[52] and *Body Corporate 188529 v North Shore City Council* [2008] 3 NZLR 479 (HC) at paras [83]-[102]. A body corporate’s functions were outlined in *Body Corporate 188529 v North Shore City Council* at paras [81]-[124]. Shorn to its essence, the Act divides responsibility for areas within the complex between individual owners of particular units and common property. Individual units are the responsibility of the respective owners. Common property is administered by a body corporate.

[7] On deposit of a unit plan, the registered proprietor of the land to which the plan relates (the developer) becomes a body corporate (s 12(1)). Thereafter, the proprietor or proprietors for the time being of all units comprised in the plan constitute the body corporate: s 12(2).

[8] The Act sets out, in Schedule 2, default rules which apply to the operation of every body corporate, in the absence of a unanimous resolution to the contrary.

[9] In *World Vision*, at para [28], I held that those rules created a “democratic framework” within which the affairs of a Body Corporate are managed. In *World Vision*, at para [51], I articulated the underlying principles that could be discerned from the Act:

- a) The need to synthesise the conflicting views, needs and desires of proprietors who have differing interests, through the adoption of a democratic model. That model is designed to enable proprietors to make collective decisions (through the body corporate) about the use of common property and proposals to make structural changes or additions to the property likely to affect the use, enjoyment or value of units owned by other proprietors. Unanimous approval is required (unless s 42 (Court power to dispense with unanimity in certain circumstances) can be invoked) for decisions likely to affect the economic value or use and enjoyment of the units comprised in the plan.
- b) The need to distinguish between decisions to be made by a body corporate that are likely to affect all proprietors and those which are of less significance. The latter category of decisions can, generally, be left to the good sense of a majority of the proprietors to determine. Hence, the distinction between the need for unanimous consent to amend rules set out in Schedule 2 and an ordinary resolution to amend rules set out in Schedule 3.
- c) The need for all owners in a body corporate to be bound by rules adopted from the statute or agreed by them unanimously.
- d) That owners will, occasionally, disagree. For that reason:
  - i) This Court is given power to dispense with the need for a unanimous resolution if a particular act is supported by 80 per cent or more of those entitled to vote: s 42.

- ii) Disaffected members of the body corporate in a minority can seek relief against any resolution passed on the grounds that it “would be inequitable for the minority”: s 43.

### **Background to the proceeding**

[10] Mr Cranshaw is the chairman of the Owners’ Committee (the Committee) for the Body Corporate. He deposes that the owners raised concerns at the Annual General Meeting about costs incurred by Strata without approval, accounts being paid without approval, a lack of transparency in the accounting records kept and general consternation at the level of performance. Those particular concerns are illustrative only and do not represent all issues raised by Mr Cranshaw.

[11] At its Annual General Meeting, held on 8 July 2008, the owners of the Queen Street property resolved to appoint a committee to represent their interests. The Committee held its first meeting on 10 August 2008. Mr Cranshaw deposes that, at its meeting on 10 August 2008, the Committee resolved to undertake responsibility for the management of the Body Corporate, save for functions it would delegate to the secretary. Among other things, the Committee also resolved that an independent auditor be appointed to audit the accounts and all interest earned on moneys deposited in the Body Corporate’s bank accounts.

[12] On 4 September 2008, the solicitors for the Body Corporate wrote to Strata complaining that minutes of the Annual General Meeting of 8 July 2008 did not correctly reflect decisions made. The letter was written to Mr Roux (General Manager of Strata) and referred to discussions between Mr Cranshaw and Mr Lockyer (of Strata) to the effect that a list of proprietors would be made available to the Committee to enable it to communicate directly with fellow owners.

[13] The letter continued:

...

4 It was resolved at the AGM that the security patrols provided by impressions Real Estate Limited were to be terminated effective immediately. This instruction was confirmed by the Committee at

its first meeting. Notwithstanding this you have approved for payment the invoice from Impression Real Estate dated 14 August 2008, which includes the sum of \$972.56 in relation to provision of "Security Patrol".

- 5 The Body Corporate approved at the AGM the establishment of the Body Corporate. Bank account separate from the Strata Trust Account. Account forms were delivered to Strata by the Committee some time ago and these have not been completed and returned. We are advised that in the circumstances the Body Corporate will establish its own bank account signatories which will be any two of four Committee members.
- 6 The Committee has made available Mr Lockyer's notes of 20 August 2008. In terms of paragraph 4, we do not accept your analysis. The Body Corporate Committee has been duly elected to administer the Body Corporate" affairs between Annual General Meetings and pursuant to the Rules 12(c). The onus on maintaining the proper books of accounts and all matters in respect of income and expenditure rests with the Committee. The Secretary's role is simply that of an agent to the Body Corporate and the extent of that agency is limited by its engagement terms from the Body Corporate and its Committee.
- 7 A number of queries have been made of Strata and a response was required within 48 hours. You have failed to respond and supply the information.
- 8 We are now instructed as follows:
  - (a) Within 24 hours the Committee require the full proprietors list.
  - (b) The Committee require a record on a transaction by transaction basis of all receipts and payments from the last balance date until today.
  - (c) Within 5 working days the Committee require a transactional breakdown of income and expenditure for the Body Corporate for the period from commencement of the Body Corporate to last balance date.
  - (d) The Committee require a copy of any contract entered into with the Building Manager to be supplied along with any other contract documentation relating to the Building Manager's role.
  - (e) All Body Corporate funds are to be transferred to our Trust Account within 24 hours. The bank account details are: 030104 0552205 02

For the avoidance of doubt the material requested should be supplied to our firm. In the event that one or more of the five conditions are not satisfied within the timeframe given, the Committee has indicated it is their intention to apply to the High Court for the appointment of an Administrator pursuant to the Act. Should this prove necessary as a result of your failure to comply

with the Committee's reasonable requests, full solicitor client costs will be sought from you in respect of any application.

[14] In a letter to one of the owners, Strata complained about the steps taken by the Committee. Mr Chapman-Smith, a director of Strata, wrote:

Notwithstanding that the rules for Body Corporate 318566 require a committee (if there is one) to comprise the secretary and such number of proprietors as elected by the body corporate at an annual general meeting, the committee has apparently decided not to include Strata and to significantly change the administration of the building and the body corporate. In particular:

- Mr Cranshaw has not been prepared to meet with the onsite building manager and Strata;
- Strata has been explicitly excluded from any committee meeting;
- The committee has not acted according to the body corporate's rules or the provisions of the Unit Titles Act 1972; and
- The committee has issued a number of instructions contrary to resolutions of the body corporate including terminating the services of the building's security patrol, the body corporate's engineer, the body corporate's solicitor and interfering with Strata's role to the extent that we can no longer administer the property in the manner we have for the last few years.

I enclose a letter dated 8 September 2008 from Price Baker Berridge which notes amongst other things that the committee is seeking to change solicitor; that the committee's decision to terminate the employment contract of Mr Todd contradicts the resolution of the annual general meeting; that the committee's decision to terminate the security patrol is also in conflict with the budget approved by the body corporate (and is in conflict with the need for security as set out in Mr Petrie's building manager's report); and that contrary to the instructions of the annual general meeting that "all transactions are made through the trust account of the secretary" the committee is seeking to change significantly how the finances of the body corporate are controlled.

The problems are sufficiently grave that, in accordance with the advice from Price Baker Berridge, Strata believes it is appropriate to convene an extraordinary general meeting to resolve exactly what the body corporate wants to do.

[15] An Extraordinary General Meeting was called by the Secretary and was scheduled for 26 September 2008. Problems continued in respect of provision of a list of proprietors by Strata. On 24 September 2008, Lang J issued an interim injunction which had the effect of postponing the meeting until 17 October 2008, so that the list could be supplied and due process followed.

[16] Strata circulated an agenda for the meeting, including a proposed resolution that:

That Body Corporate 318566 confirms the appointment of Strata Title Administration Ltd as its Secretary and Agent according to the rules of the Body Corporate with all financial transactions of the Boyd Corporate to be made through the trust account of the Secretary.

[17] Mr Cranshaw disputes the accuracy of the minutes of the Extraordinary General Meeting. As I indicated to counsel, I am in no position to resolve disputes about what occurred. Nor is it necessary to do so for the purpose of this proceeding.

[18] Mr Roux chaired the meeting (as the secretary's representative) and, when votes were taken on the resolution relating to the confirmation of Strata's contract, he exercised s 40(b) powers to vote in favour of the resolution on behalf of owners who had not attended. Voting was undertaken by way of poll.

[19] Mr Roux, it appears, also invoked r 31 to indicate that at least 14 days notice would need to be given of a resolution seeking to remove the secretary. Given that Strata knew what was intended when the resolution for the Extraordinary General Meeting was drafted by it, Mr Roux's observation was disingenuous and reflects no credit on Strata.

[20] Assuming, for present purposes, that the minutes of this part of the meeting are accurate, they state:

## **6. STRATA TITLE ADMINISTRATION LTD**

The chair referred to the proposed resolution: "*that Body Corporate 318566 confirms the appointment of Strata Title Administration Ltd as its secretary and agent according to the rules of the body corporate with all financial transactions of the body corporate to be made through the trust account of the secretary*" and advised that Strata is employed in accordance with the body corporate's Second Schedule rules 28, 31, 32 and 34. He asked if attendees wished for these rules to be read out. Proprietors did not want the rules read out. A proprietor did however ask the chair to clarify the process that would need to be followed if the body corporate wished to remove Strata as secretary. The chair clarified that an extraordinary general meeting giving at least 14 days notice would need to be convened at which time a Special Resolution would need to be considered to remove Strata and replace it with another secretary.



## VOTING ON RESOLUTIONS CONTAINED UNDER AGENDA ITEMS 4, 5 AND 6

In accordance with Mr Russ's request that voting be done by poll and the directions of the meeting to vote on agenda items 4, 5 and 6 following the conclusion of the discussion of item 6, the following was resolved.

...

- **STRATA TITLE ADMINISTRATION LTD:** Mr Lockyer, on behalf of the chair, proposed the resolution: *“that Body Corporate 318566 confirms the appointment of Strata Title Administration Ltd as its secretary and agent according to the rules of the body corporate with all financial transactions of the body corporate to be made through the trust account of the secretary”*.

On a vote by poll, the units comprising a total unit entitlement of 34,873 voted **against** the motion and units comprising a total unit entitlement of 43,395 voted **for** the motion. Units comprising a total unit entitlement of 21,732 were **ineligible** to vote due to either invalid proxies or having an outstanding levy due to the body corporate. **The chair declared that the motion was passed.**

***CHAIRMAN'S NOTE:** Subsequent to the meeting and after carefully collating the unit entitlement of all proxy votes it was determined that the units comprising a total unit entitlement of 36,015 voted **against** the motion and units comprising a total unit entitlement 39,795 voted **for** the motion. Units comprising a total unit entitlement of 24,190 were **ineligible** to vote. The difference between the actual votes and those recorded at the meeting was caused by some proprietors not advising Mr Lockyer of their proxy votes when the voting was recorded or because the proxies given by some proprietors to other attendees when they left the meeting early were not recorded. The revised tabulation of the votes did not affect the result of the voting.*

*The unit entitlement register showing how each unit voted, which takes into account the revised voting as determined after the meeting, is attached. (bold and italics appear in the minutes)*

### Variations to the Schedule 2 default rules

[21] Section 37(1) of the Act requires a body corporate to have rules by which all its proprietors are bound. Default rules are set out in Schedules 2 and 3 to the Act. Schedule 2 sets out rules which may only be amended by unanimous resolution (s 37(3) and (5)), while Schedule 3 (relating to the use of individual units) can be changed by ordinary resolution of a general meeting of the body corporate (s 37(4)).

[22] The type of rules which may be amended is circumscribed by s 37(5) and (6):

### **37 Rules**

....

(5) Any amendment of or *addition to any rule shall relate to the control, management, administration, use, or enjoyment of the units or the common property*, or to the regulation of the body corporate, or to the powers and duties of the body corporate (other than those conferred or imposed by this Act):

*Provided that no powers or duties may be conferred or imposed by the rules on the body corporate which are not incidental to the performance of the duties or powers imposed on it by this Act or which would enable the body corporate to acquire or hold any interest in land or any chattel real or to carry on business for profit.*

(6) No rule or addition to or amendment or repeal of any rule shall prohibit or restrict the devolution of units, or any transfer, lease, mortgage, or other dealing therewith, or destroy or modify any right implied or created by this Act.

.... (my emphasis)

[23] The Body Corporate contends that rr 31 and 40(b) infringe both ss 37(5) and (6) and are, for that reason *ultra vires*.

### **The s 37(5) point**

[24] The s 37(5) question turns on whether there are “powers or duties” conferred or imposed on the Body Corporate by the amendments which “are not incidental to the performance of the duties or powers imposed on it by [the] Act”.

[25] The duties and powers of the Body Corporate are set out in ss 15 and 16 of the Act. For present purposes, s 15(1)(h) and 16 are relevant:

### **15 Duties of body corporate**

(1) The body corporate shall—

...

(h) Subject to this Act, control, manage, and administer the common property and do all things reasonably necessary for the enforcement of the rules:

....

## **16 Powers of body corporate**

Subject to the provisions of this Act, the body corporate shall have all such powers as are reasonably necessary to enable it to carry out the duties imposed on it by this Act and by its rules:

Provided that the body corporate shall not have power to carry on any trading activities.

[26] Rule 30 of the default rules, set out in Schedule 2 to the Act, is the equivalent of r 31 of the Body Corporate's rules. Rule 30 provides:

30 A secretary (who may or may not be a proprietor) shall be appointed by the body corporate at its first annual general meeting for such term, at such remuneration, and upon such conditions as it may approve; and any secretary so appointed may be removed by the body corporate, either at a subsequent annual general meeting or at an extraordinary general meeting called for that purpose. At any such meeting the secretary shall have the right to attend and be heard.

There is no equivalent to r 40 in the default rules.

[27] The intention of r 30 of the default rules is clear. It is for the Body Corporate, at a general meeting, to determine who to appoint as its secretary and the terms on which the secretary will be engaged. The Body Corporate may remove the secretary, at any subsequent general meeting called for that purpose. Understandably, because of the possibility of dissatisfaction among particular owners being spread through rumour or innuendo, the secretary has a right to attend such a meeting and to be heard before any vote is taken as to removal.

[28] Rules 31 and 40(b) of the Body Corporate's rules provide:

31. A secretary who shall not be a proprietor shall be appointed by the body corporate for such term, at such remuneration, and upon such conditions as it may approve: provided however, that the secretary shall deposit and disburse all monies for and on behalf of the body corporate through a trust account in the name of the body corporate or its secretary, which account shall be subject to audit; and any secretary so appointed may be removed by the body corporate, either at a subsequent annual general meeting or at an extraordinary general meeting called for that purpose, by special resolution of not less than 51% of all proprietors provided, however, that the first secretary to the body corporate shall be appointed for a period of not less than two years. At any such meeting the secretary shall have the

right to attend and be heard. Strata Title Administration Limited, PO Box 3187, Auckland, Telephone 307 3721, fax 307 3747 is hereby contracted to be and is appointed as the first secretary to the body corporate.

40. Upon settlement of the purchase of any unit, each proprietor shall execute in favour of the body corporate an irrevocable limited power of attorney (and in the absence of such power of attorney shall be deemed to have given such power of attorney to the secretary) which shall empower the secretary to:

...

(b) set as a proxy for that proprietor at any annual general meeting or extraordinary general meeting or any adjournment thereof, only if the proprietor or his or her duly authorised agent (other than the body corporate secretary) is not present in person at that meeting.

[29] In *Velich v Body Corporate No 164980* (2005) 6 NZCPR 143 (CA), the Court of Appeal held that an amendment to the default rules designed to require the consent of the body corporate to any addition or alteration made by an individual proprietor to his or her own unit was *ultra vires*. Delivering the judgment of the Court of Appeal, William Young J took the view that the amendment was outside the powers conferred by the substantive portion of s 37(5) of the Act. The Court held:

[29] Rule 2.1(f) undoubtedly relates to “the powers and duties of the body corporate”. For this reason it is within the scope of the proviso to s 37(5). Accordingly it is only valid if the new powers and duties conferred can fairly be seen as “incidental” to the performance of powers and duties imposed on the body corporate by the Act.

[30] The only duty imposed by the Act which could be invoked to justify rule 2.1(f) is that provided by s 15(1)(a), “to ... carry out any duties imposed on it by the rules”. As a matter of common sense, it is only powers and duties which are extant at the time of the rule change which are relevant. So the only new powers or duties which may be conferred by rule change on a body corporate are those which are “incidental” to existing powers and duties.

[31] At the time rule 2.1(f) was adopted, there was no rule in place which required the body corporate to carry out the functions contemplated by rule 2.1(f) to the extent that they go beyond those required by default rule 1(f). So rule 2.1(f) expanded the powers and duties of the body corporate and further, did so appreciably. *A rule which appreciably expands the existing powers and duties of the body corporate (as rule 2.1(f) purports to do) cannot fairly be regarded as merely “incidental” to those existing powers and duties.*

[32] It follows that rule 2.1(f) is *ultra vires*. (my emphasis)

[30] An authority that more closely resembles the present case is *Chambers v Strata Title Administration Ltd* (2004) 5 NZ ConvC 193,864 (HC). Paterson J held that a power to appoint a management company or professional manager on terms requiring such appointment to be terminated only by unanimous resolution of proprietors was not “incidental to the performance of the duties or powers imposed on the Body Corporate by the Act”, in terms of the proviso to s 37(5). His Honour said:

[44] Rule 9(f) imposing a power, falls within the amending provisions of s 37(5). It adds or amends the original power in the statutory rules. As such, it will be outside the powers of amendment given to the Body Corporate unless it is “incidental to the performance of the duties or powers imposed on the body corporate by the Act.” “Incidental” as used in this context means, in my view, naturally attached to, or arising from, or naturally appertaining to any of the duties and powers set out in the Act. I cannot see that the appointment of a professional manager which can only be terminated by a unanimous resolution of the proprietors is incidental to the performance of any of the duties or powers imposed on the Body Corporate by the Act. A power as defined in the Act is something reasonably necessary to carry out the duties imposed on the Body Corporate. It is not reasonably necessary for a secretary to have a contract that can only be terminated by a unanimous resolution.

[31] At the time the rules of the Body Corporate were lodged, all individual units were owned by the developer. So, it was the developer that passed the unanimous resolution to protect Strata’s tenure as secretary to the Body Corporate.

[32] In the context of the Body Corporate’s duty to manage and administer the common property and to do all things reasonably necessary for the enforcement of the rules, it has power to appoint a secretary. A secretary is engaged to carry out general administrative functions and to undertake such other functions as may, from time to time, be delegated to it by the Body Corporate. Rule 31 of the default rules in Schedule 2 accurately capture the secretary’s primary role:

31 The function of the secretary shall be to keep proper books of account in which shall be kept full, true, and complete accounts of the affairs and transactions of the body corporate and to carry out such other functions as may from time to time be delegated to him by the body corporate.

[33] In the absence of an express delegation requiring the secretary to perform other duties, the secretary acts as an administrative functionary to relieve individual proprietors of the need to manage those aspects of its activities that fall within rr 31

and 31A of Schedule 2. While it has become common for body corporate secretaries to be given responsibility for managing such things as “leaky home” claims, that is because the individual proprietors have elected to delegate that function. The fact that such delegations may occur does not alter the nature of the secretary’s function. The Body Corporate decides what an appointed secretary may do, not *vice versa*. That is confirmed by rr 4-13 of Schedule 2, which deal with the duties and powers of the Body Corporate that can be exercised by an owners’ committee.

[34] Rule 31 of the Body Corporate’s rules adversely affects the rights of individual owners (acting collectively as the Body Corporate) to determine who should be its secretary (and on what terms) by requiring removal to be effected “by special resolution of not less than 51% of all proprietors”, at an annual general meeting or an extraordinary general meeting called for the purpose. Adapting Paterson J’s language, it modifies the power to appoint a secretary, set out in r 30 of Schedule 2. It is not a change that can be seen as “naturally attached to, or arising from” the power concerned. In terms of s 16, r 31 cannot be regarded as reasonably necessary for the Body Corporate to carry out its duties.

[35] Further, r 31 requires a “special resolution” rather than an “ordinary resolution” to remove a secretary. It also requires the resolution to be calculated by reference to 51% “of all proprietors”. While the terms “ordinary resolution” and “special resolution” are not defined in the Act, they are terms used in both the Act and the rules.

[36] Although “special resolution” is not defined by the Act itself, the term is defined by r 27 of Schedule 2 and is linked to the way in which a poll is conducted. Rules 27, 33 and 34 of Schedule 2 provide:

27 Where a poll is demanded or a special resolution is before the meeting, each vote shall correspond in value with the unit entitlement of the principal unit and accessory unit (if any) in respect of which it is exercised. In all other cases each vote shall be of equal value.

...

33 For the purposes of these rules a special resolution means a resolution proposed at a general meeting of the body corporate of which at least 14

days' notice specifying the intention to propose the resolution as a special resolution has been given.

34 Where a resolution is proposed as a special resolution, the vote of the meeting shall be taken in the same way as if it had been proposed as an ordinary resolution and a poll had been demanded:

Provided that a special resolution shall be deemed not to be carried unless persons entitled to exercise not less than three-fourths of the value of the votes and not less than three-fourths of the number of votes exercisable in respect of all the units vote in favour of it.

[37] By requiring, in r 31, a special resolution to remove the secretary the underlying principle of democratic process is infringed. Instead of permitting a majority decision, a vote corresponding in value to the unit entitlement of the principal unit and accessory unit (if any) in respect of which it is exercised is required: see r 27. If an ordinary resolution had been required, it remained open to any owner to demand a poll, in which case the same voting mechanism is used (see r 34).

[38] In my view, the amendment to r 30 of the Schedule 2 default rules is *ultra vires* because a provision that makes it more difficult for owners to remove the secretary cannot be regarded as “incidental to the performance of the duties or powers imposed on the Body Corporate by the Act” for the purposes of the proviso to s 37(5). Just as Paterson J held, in *Chambers*, that it was not reasonably necessary for a secretary to have a contract that could only be terminated by unanimous resolution, it is not reasonably necessary for a secretary to have a contract that the owners can only terminate by special resolution.

[39] To hold that the ability of owners to remove a secretary who is not performing can (legitimately) be made more difficult is to fetter the way in which the Body Corporate elects to carry out its duties under the Act; in particular, how it decides to “control, manage and administer the common property and do all things reasonably necessary for the enforcement of the rules” for the purposes of s 15(1)(h). Rule 31 operates to the benefit of the existing secretary, yet it has no corresponding benefit to the Body Corporate.

[40] There is no default rule akin to r 40(b) of the Body Corporate's rules. This rule is more insidious. It purports to require each proprietor to execute in favour of the Body Corporate an irrevocable power of attorney designed to allow the Body Corporate to act as an express proxy for a proprietor at any general meeting, if the proprietor or proxy is not present in person at that meeting. In the absence of execution of a power of attorney, r 40 purports to "deem" a power of attorney to have been given in favour of the secretary. The reason why it is incidental to or reasonably necessary to enable the Body Corporate's power to perform its duties for the secretary, without consultation, to cast votes for apathetic owners or those who (unavoidably) cannot attend a general meeting escapes me.

[41] I conclude that r 40(b) is also *ultra vires*. A general meeting of the body corporate is held to enable the individual owners, as a collective body, to make decisions about their own economic interests. Those who do not attend meetings personally or by proxy take the risk that any views they may hold will be overridden by the votes of those who are present or entitled to vote by proxy. The ability of the individual owners to "control, manage and administer the common property" in that way is not benefited by either a body corporate or the secretary having power to exercise a non-attending owners' vote as it chooses, when that owner has not been consulted and his/her or its views are not known. Rule 40(b) of the Body Corporate Rules is not reasonably necessary to enable the Body Corporate to undertake its management functions.

[42] There is one further point I wish to make. It is of more general application.

[43] In the context of an Extraordinary General Meeting called for the purpose of determining whether to remove the secretary, it was necessary, on orthodox conflict of interest principles, for someone other than the secretary's representative to chair the meeting, so that no actions taken by the secretary could be seen to influence the decision to be made by the owners.

[44] Further, also in line with such principles, it was wrong for the secretary to exercise any proxy vote of the type to which r 40(b) refers in order to safeguard its own economic interests. Whether or not that was its motive is beside the point: the



perception of bias is enough. And, a conflict between one's duty to cast a vote in accordance with the owners' interests is diametrically opposed to the potential to cast a vote to protect the secretary's economic interest by maintaining an income stream.

[45] If a special proxy were given in favour of the secretary, it would be appropriate for that proxy to be acted upon because it would tell the secretary how to vote on behalf of a particular person. But the suggestion of an implied general proxy is inconsistent with the Body Corporate's needs to act in its own economic interests. See also the views expressed in *World Vision* at paras [28] and [51] as to the infringement of the democratic model principles to which I referred in that decision.

[46] Because I have held that both rules are invalid, through the operation of s 37(5), it is unnecessary for me to consider whether s 37(6) applies.

[47] The present position is that Strata remains as secretary. It will be necessary for the rules to be invoked to call another extraordinary general meeting at which a resolution that Strata be removed as secretary can be considered. Rule 30 of the default rules will apply to that meeting, as will the observations I have made on conflict of interest principles. Removal may be effected by ordinary resolution, unless a poll were demanded.

[48] A representative of Strata will have the opportunity to address the meeting on why it ought not to be removed. Strata may exercise any proxy votes given in its favour, provided the proxy makes it clear whether the owner votes in favour of or against the resolution. As r 40(b) has been held invalid, Strata may not exercise any proxy votes of the type contemplated by that rule.

## **Result**

[49] For the reasons given:

- a) I make a declaration that both r 31 and 40(b) are *ultra vires* and invalid.

- b) I make a declaration that the resolution of 17 October 2008 purporting to confirm Strata's appointment as secretary is invalid and of no effect.
  
- c) I award costs in favour of the Body Corporate, on a 2B basis, together with reasonable disbursements, both to be fixed by the Registrar. Those costs include costs incurred on the interim injunction proceedings before Lang J.

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P R Heath J

Delivered at 2.00pm on 17 March 2009