Goyal v West - [2021] NSWSC 526

Supreme Court

New South Wales

- Amendment notes

Medium Neutral Citation:	**Goyal v West [2021] NSWSC 526**
Hearing dates:	6 May 2021
Date of orders:	7 May 2021
Decision date:	07 May 2021
Jurisdiction:	Equity
Before:	Ward CJ in Eq
Decision:	Orders as per [117]
Catchwords:	LAND LAW — Torrens title — Exceptions to indefeasibility — Overriding statutes — Retirement Villages Act 1999 (NSW), s 182G — Priority of interests STATUTORY INTERPRETATION — Approaches — Mischief rule — Legislative purpose — Interpretation Act 1987 (NSW), s 33 — Extrinsic materials — Interpretation Act 1987 (NSW), s 34
Legislation Cited:	Corporations Act 2001 (Cth), s 568D Interpretation Act 1987 (NSW), ss 33, 34 Real Property Act 1900 (NSW), s 42

Retirement Villages Act 1999 (NSW), ss 3, 129, 181, 182, Pt 10A

Retirement Villages Act 1999 (Qld), s 119

Retirement Villages Amendment Act 2008 (NSW)

Uniform Civil Procedure Rules 2005 (NSW), r 7.36

Cases Cited:

A2 v R; Magennis v R; Vaziri v R [2018] NSWCCA 174

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (2009) 239 CLR 27; [2009] HCA 41

Baini v R (2012) 246 CLR 469; [2012] HCA 59

Calderbank v Calderbank [1975] 3 All ER 333

CIC Insurance Ltd v Bankstown Football Club Ltd (1997) 187 CLR 384; [1997] HCA 2

Coverdale v West Coast Council (2016) 259 CLR 164; [2016] HCA 15

Elliot Tuthill Nominees Pty Ltd v Boele [2010] NSWSC 103

Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2) (2005) 13 VR 435; [2005] VSCA 298

In the Matter of Mendarma Pty Ltd (in liq) (No 2) (2007) 61 ACSR 601; [2007] NSWSC 99

Kirman v RWE Robinson & Sons Pty Ltd (in liq), Re RWE Robinson and Sons Pty Ltd (in liq) [2019] FCA 372

Lacey v Attorney-General (Qld) (2011) 242 CLR 573; [2011] HCA 10

Owen v Woolworths Properties Ltd (1956) 96 CLR 154

R v A2; R v Magennis; R v Vaziri (2019) 373 ALR 214; [2019] HCA 35

Rathborne v Abel (1965) ALR 545; 28 ALJR 293

Saeed v Minister for Immigration and Citizenship (2010) 241 CLR 252; [2010] HCA 23

South Eastern Drainage Board (SA) v Savings Bank of South Australia (1939) 62 CLR 603

SZTAL v Minister for Immigration and Border Protection (2017) 262 CLR 362; [2017] HCA 34

Willmott Growers Group Inc v Willmott Forests Ltd (Receivers and Managers Appointed) (In Liq) (2013) 251 CLR 592; [2013] HCA 51

Texts Cited:

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Richard McCullagh, Retirement Village Law in NSW (2013, Lawbook Company)

Category:

Principal judgment

Parties:

Rahul Goyal (First Plaintiff)
Catherine Margaret Conneely (Second Plaintiff)
Jean Margaret West (First Defendant)
Darrell Maxwell Cameron (Second Defendant)
Shirley Mills (Third Defendant)
Valerie Whittaker (Fourth Defendant)
Stan Partridge (Fifth Defendant)
Shirley Partridge (Sixth Defendant)
Trustees of the Roman Catholic Church for the Diocese of Maitland Newcastle (Seventh Defendant)
Brendan Dixon (Eighth Defendant)

Representation:

Counsel:
H Grace (Plaintiffs)
S K Hill (First and Second Defendants)
I Hoskinson (Third Defendant)
L Chan and S Danne (Fourth and Fifth Defendants)
B Douglas-Baker (Sixth Defendant)
Seventh Defendant (submitting appearance)

Solicitors:
DWF (Plaintiffs)
Curtis Gant Betts Solicitors (First and Second Defendants)
Kate Mailer Solicitor (Third Defendant)
Katherine Green Solicitor (Fourth and Fifth Defendants)
Hoffman & Associates (Sixth Defendant)
Catholic Diocese of Maitland - Newcastle (Seventh Defendant)
Carmody Lawyers (Eighth Defendant)

File Number(s):

2021/00028852

Publication restriction:

Nil

1. **HER HONOUR:** Before me for expedited hearing on 6 May 2021 was an application by summons filed on 1 February 2021 by Rahul Goyal and Catherine Margaret Conneely (in their capacity as the receivers and managers appointed to the operator of a retirement village in Muswellbrook, New South Wales) (the Receivers), seeking orders pursuant to s 182F of the *Retirement Villages Act 1999* (NSW) (*Retirement Villages Act*) for, *inter alia*, the sale of the land on which the retirement village was situated (the Property) and the distribution of the proceeds of sale in accordance with the proper construction of s 182G of the *Retirement Villages Act*.

2. The operator of the retirement village in question is an entity that is now in liquidation (New Aged Projects No 2 Pty Ltd, to which I will refer as the Operator). The appointor of the Receivers is the holder of a registered mortgage over the Property (Zagga Investments Pty Ltd, to which I will refer as Zagga).

3. The first to sixth defendants are former occupants of units in the retirement village. The seventh defendant (the Trustees of the Roman Catholic Church for the Diocese of Maitland Newcastle) is the holder of an unregistered second mortgage over the Property (the Church Trustees). The Church Trustees have filed consent orders consenting to the sale of the Property and the distribution of the proceeds of sale as sought by the plaintiffs or otherwise as the Court orders. I will treat this as a submitting appearance. The eighth defendant is a creditor of the Operator who has already agreed to withdraw a caveat lodged over the Property and against whom the proceeding has been dismissed by orders made by Sackar J on 17 February 2021.

4. The urgency of the matter lies in the fact that the Receivers have entered into a contract for the sale of the Property that is conditional on the making of an order for its sale by the Court pursuant to s 182F of the *Retirement Villages Act.* If completion of the sale does not take place by 1 June 2021, then either the Receivers or the purchaser can rescind the contract. Approval of the sale is necessary by reference to the provisions of the *Retirement Villages Act* to which I will refer shortly.

5. There is no dispute as to the insolvency of the Operator; nor was there ultimately any real dispute as to the need for the Property to be sold (although the alternative way in which the fourth and fifth defendants put their case involves a challenge to the sale process or reasonableness of the sale). The first to sixth defendants (all elderly and some suffering from dementia) have all vacated their units in the retirement village (some by surrendering the contracts under which they were entitled to occupy the units – those being the fourth, fifth and sixth defendants, who did so before the appointment of the Receivers; and some at the request of the Receivers, after which the liquidators of the Operator formally disclaimed their service contracts as onerous contracts pursuant to s 568D of the *Corporations Act 2001* (Cth) – those being the first, second and third defendants).

6. The nub of the dispute (leaving aside the complaint by the third, fourth and fifth defendants as to the sale process or the reasonableness of the sale price achieved for the Property, to which I will return in due course) is as to the manner in which the sale proceeds should be distributed having regard to s 182G of the *Retirement Villages Act*. That gives rise to a question as to the proper construction of that section of the legislation, which does not appear yet to have been the subject of judicial consideration.

7. The former occupants of the retirement village in essence fall into two groups: those who entered into "village contracts" (see below) prior to the creation or registration of the respective mortgage interests of Zagga and the Church Trustees (to whom I will refer collectively as the Mortgagees); and those who entered into "village contracts" after the creation or registration of those mortgage interests.

8. Broadly speaking, the position of the Receivers (and the order of distribution of proceeds in the relief sought by prayer 4 of the summons) is that, on the proper construction of s 182G of the *Retirement Villages Act* the first group of occupants (the first, second and sixth defendants, respectively) rank in priority ahead of the Mortgagees but that the Mortgagees rank in priority ahead of the second group of occupants (the third, fourth and fifth defendants). This construction would, as a practical matter, have the effect that the second group of occupants would not recover their ingoing contributions to the retirement village Operator. By contrast, the primary position of the second group of occupants was that the interests of all holders of statutory charges (i.e., all of the former occupants) rank in priority over the Mortgagees – which would have the effect that all the statutory charges (amounting to some $750,000) would be discharged out of the sale proceeds but that there would be a shortfall in the amount to be recovered out of the proceeds of sale by the Mortgagees. I understand that on either scenario there will be insufficient funds to meet the debt owing to the Church Trustees.

9. The position of the first group of former occupants was, in essence, that they are largely agnostic to the construction argument since, on either side's construction, their statutory charges will be discharged, subject to one qualification; that being, that if the construction put by the Receivers were to be accepted and the construction put on s 182H by the third defendant were to be adopted (such that an order for sale could not be made unless it was in the best interests of the majority of the former occupants – see below), then they would argue against the effect of such a combination of constructions.

10. For the reasons that follow, I have concluded that the proper construction of s 182G of the *Retirement Villages Act* is that for which Counsel for the fourth and fifth defendants contended (and which was supported by Counsel for the third defendant). Therefore, the balance of the issues that have arisen are not strictly necessary to determine, but I will deal with them briefly in due course.

Evidence

11. The Receivers relied upon a number of affidavits affirmed by Mr Goyal (on 1 February 2021, 27 April 2021 and 4 May 2021, respectively), an affidavit affirmed by Ms Conneely on 2 February 2021; and two affidavits sworn by their solicitor, Ms Maria Nemeth, on 3 May 2021 and 5 May 2021; and tendered various documents being the extrinsic materials referred to in the submissions. They were represented by Mr Grace of Counsel.

12. The first and second defendants (Ms West and Mr Cameron) each affirmed an affidavit in the proceedings (on 4 May 2021 and 3 May 2021, respectively) and were represented by Ms Hill of Counsel.

13. The third defendant (Ms Mills) swore an affidavit on 11 March 2021 and was represented by Ms Hoskinson of Counsel. The third defendant also tendered part of a tender bundle, which I admitted subject to relevance, including the liquidators' statutory report to creditors (which suggested that the liquidators had formed the view that the Operator might have been insolvent from June 2018 – an issue that I interpose to note that I consider is of no relevance to the present application).

14. The fourth and fifth defendants, Mr and Mrs Partridge, for whom I appointed their daughter as tutor on 20 April 2021 shortly before the hearing, were represented by Ms Chan and Ms Danne of Counsel (appearing on a pro bono brief after I referred the matter to the registrar for referral for assistance from the Pro Bono Panel pursuant to r 7.36 of the Uniform Civil Procedure Rules 2005 (NSW) . I here record my gratitude to the Pro Bono Panel and Counsel for accepting at such short notice the pro bono referral to represent the interests of the fourth and fifth defendants, each of whom suffers from dementia and had no funds to obtain legal representation). The fourth and fifth defendants tendered various documents, including their surrender agreement dated 24 February 2020 in relation to their village agreement (Ex 1).

15. The sixth defendant (Ms Whittaker), who also suffers from dementia, relied on an affidavit affirmed on 29 April 2021 by her daughter (Ms Roanne Janice Dagg) and an affidavit affirmed by her solicitor, Ms Emily Joyce Pockett on 16 March 2021. The sixth defendant was represented by Mr Douglas-Baker of Counsel.

16. I here record my gratitude for the assistance of all Counsel involved in this expedited hearing for the co-operative way that the matter was conducted and their helpful submissions, consistent with the overriding statutory objective for the just, quick and cheap resolution of the real issues in dispute.

17. At the conclusion of submissions yesterday, I indicated my view as to the principal issue of construction and adjourned the matter to this morning for *ex tempore* judgment, in order to give further consideration to an issue that had arisen in the course of argument in relation to the deductibility of retention sums, which I will explain in due course.

18. The Property was at all relevant times recorded on the title as a retirement village (see the registered dealing lodged on 27 April 2011 – Ex 1). It was formerly owned by the Church Trustees.

19. On 28 February 2018, the Operator entered into a contract to purchase the Property from the Church Trustees and, from February 2018 to June 2020, the Operator operated a "retirement village" (as defined under the *Retirement Villages Act*) trading under the name of "Mount Providence Village" (Mount Providence Village) on part of the Property. It appears that the Operator also for a time rented certain of the units on the Property to a mining company for occupation by miners working at the nearby Wambo Coal Mine (a use not permitted by the Council). I mention this because it is seemingly an explanation for the financial difficulties in due course experienced by the Operator (after that use was discontinued having regard to COVID concerns, it being a retirement village) and because concern as to the potential for the development of the Property appears to have been a factor in the ultimate outcome of the sale process undertaken by the real estate agents appointed by the Receivers.

20. Pausing here, the terms of each of the defendants' "village contracts" with the Operator are relevantly the same and it is not disputed that they are village contracts falling within the *Retirement Villages Act.* Although in some cases the agreement did not bear a date, it is not disputed that the relevant village contracts were entered into on or about the dates here set out.

21. Under their respective village contracts, the former residents were required to pay "ingoing contributions" (as defined under the *Retirement Villages Act*) in the form of loans to the Operator, which ingoing contributions were refundable upon termination of the respective village contracts. It is also relevant to note at this stage that, by virtue of s 182B(1) of the *Retirement Villages Act*, on the date that each former occupant "entered into" his or her respective village contract the former occupant obtained a charge over the Property that secured his or her rights to a refund of his or her "ingoing contributions" (less what is referred to as the Retention Charge – which was defined in the village contracts as 4% per annum for a five year period capped at a particular amount).

22. On or about 24 September 2018, the second defendant (Mr Cameron) entered into a "Loan Agreement" with the Operator pursuant to which he agreed to lend the Operator the sum of $150,000 (this being the "ingoing contribution" for the purposes of the *Retirement Villages Act*, which I will explain shortly). Interdependent with and collateral to the Loan Agreement was a Services Agreement entered into with the Operator pursuant to which Mr Cameron acquired a licence to occupy a particular unit (Unit 8) in Mount Providence Village. These documents formed the "village contract" for the purposes of the *Retirement Villages Act*.

23. On 22 November 2018, the sixth defendant (Ms Whittaker) entered into a "Loan Agreement" with the Operator pursuant to which she agreed to lend the Operator $140,000; and at or around the same time, Ms Whittaker entered into a Services Agreement with the Operator pursuant to which she acquired a licence to occupy a particular unit (Unit 4) in Mount Providence Village.

24. On or about 23 November 2018, the first defendant (Ms West) entered into a "Loan Agreement" with the Operator pursuant to which she agreed to lend the sum of $160,000 to the Operator. Again, at or around the same time, Ms West entered into a Services Agreement with the Operator pursuant to which she acquired a licence to occupy another unit (Unit 2) in the Mount Providence Village.

25. On 15 March 2019, the Contract for Sale between the Operator and the Church Trustees was rescinded (it is not clear to me for what reason but nothing turns on this), and the Operator entered into a new agreement with the Church Trustees to purchase the Property and retirement village as a going concern for the sum of $2,509,090.

26. On or about 18 March 2019, the eighth defendant (Mr Dixon) agreed to lend the Operator the sum of $60,000 with interest chargeable at a rate of 15% of the principal (Dixon Loan). The principal plus interest was repayable on 18 April 2019. The loan was secured by, amongst other things, a charge over the Property. No mortgage has been executed or registered over the Property in respect of the Dixon Loan. As adverted to above, Mr Dixon agreed to withdraw the caveat he had lodged over the Property and he no longer features in the proceedings.

27. On 19 March 2019, the Operator entered into a loan agreement with Zagga, pursuant to which Zagga agreed to lend the Operator the sum of $2,242,500 at a rate of 10.5% per annum (Zagga Loan) (but with a default interest rate of some 16%). As adverted to above, the Zagga Loan was secured, *inter alia*, by way of a first registered mortgage over the Property. At or around the same time, a General Security Deed was entered into by the Operator, the Operator's sole shareholder and director (Mr Dylan Walsh), and Zagga, pursuant to which the Operator granted Zagga a charge over the Property further to secure its obligations under the Zagga Loan. It also conferred upon Zagga the entitlement to appoint a receiver with the power, amongst others, to sell the Property in order to recover any moneys owing to Zagga. (This is the source of the power pursuant to which the Receivers were ultimately appointed.)

28. On 1 April 2019, the Operator entered into a "Loan Agreement" with the Church Trustees pursuant to which the Church Trustees agreed to lend the Operator the sum of $473,584.10 (Church Loan) secured by way of an unregistered second mortgage over the Property (i.e., an equitable mortgage).

29. On 5 April 2019, Zagga registered its mortgage over the Property.

30. On 29 April 2019, the third defendant (Ms Mills) entered into a Loan Agreement pursuant to which she agreed to lend the Operator the sum of $160,000. At or around the same time, Ms Mills entered into a Services Agreement with the Operator pursuant to which she acquired a licence to occupy Unit 1 in the Mount Providence Village.

31. On 7 May 2019, the fourth and fifth defendants (Mr and Mrs Partridge) entered into a Loan Agreement pursuant to which they agreed to lend the Operator $160,000. At or around the same

time, the Partridges entered into a Services Agreement pursuant to which they acquired a licence to occupy Unit 3 in Mount Providence Village.

32. Hence, there is no dispute that the statutory charges created in favour of the third to fifth defendants arose after the creation (and in Zagga's case, registration) of the Mortgagees' interests in the Property.

33. On 24 February 2020 (as adverted to above), Mr and Mrs Partridge surrendered their village contract. Pursuant to s 181(2)(f) of the *Retirement Villages Act*, they thus became contractually entitled to a refund by no later than 24 August 2020 of their ingoing contribution less the Retention Charge.

34. On 23 March 2020, Ms Whittaker surrendered her village contract. Again, pursuant to the legislation, her contractual entitlement to a refund of her ingoing contribution less the Retention Charge was payable within 6 months.

35. On 1 June 2020, the Receivers were appointed by Zagga as joint and several receivers and managers of the Operator and the property and assets of the Operator (which included the Property and the Operator's rights under the village contracts). A copy of the Deed of Appointment of the Receivers is in evidence (Ex A).

36. On 17 June 2020, by resolution of the sole shareholder of the Operator (Mr Dylan Walsh) the Operator was wound up and liquidators were appointed to the Operator.

37. The Receivers received instructions to market the Property for sale and called for submissions from real estate agents seeking to be appointed as sales agents for the Property. On 26 June 2020, the Receivers received submissions from five sales and marketing agents seeking to be appointed as agents on the sale of the Property, who estimated that the Property would sell for between $1.78 million and $4.25 million. On 7 July 2020, the Receivers appointed Savills and Commercial Collective (Sales Agents) as joint sales agents for the sale. The Sales Agents began marketing the Property on 17 July 2020.

38. Meanwhile, at some time in the course of three to four months after the appointment of the Receivers, the remaining residents of the retirement village were asked by the Receivers' staff to find new accommodation. In cross-examination, Mr Goyal explained that the reason for this was that the Receivers had no funds to continue to service the residents (that the kitchen was closed at the time of their appointment; that they could not afford to have staff onsite; and that the health of the residents was a priority) (see T 18).

39. Pausing here, reference was made in submissions to a decision of Rein J (*Elliot Tuthill Nominees Pty Ltd v Boele* [2010] NSWSC 103 at [14]), in which his Honour noted that s 129 of the *Retirement Villages Act* sets out an exclusive code for the termination of village contracts (requiring application to be made to the NSW Civil and Administrative Tribunal other than in the

circumstances specified in s 129(a)-(e)) . No such application was made in relation to the first, second or third defendants' village contracts. However, it was also noted in submissions that the High Court has confirmed in *Willmott Growers Group Inc v Willmott Forests Ltd (Receivers and Managers Appointed) (In Liq)* (2013) 251 CLR 592; [2013] HCA 51 that a liquidator can rely on s 568 of the *Corporations Act* to disclaim a lease (as an onerous contract) (and this would equally apply to contracts such as the village contracts).

40. In effect, that was what happened in the present case in relation to the three defendants who had not yet surrendered their village contracts. By letters dated 24 July 2020, the liquidators (Joshua-Lee Robb and Daniel Jon Quinn of SV Partners Insolvency (NSW) Pty Ltd) formally disclaimed the service agreements with each of Ms West, Mr Cameron and Ms Mills (Exs D, E and F) as onerous property pursuant to s 568A(1) of the *Corporations Act* .

41. That disclaimer, however, does not operate to extinguish the statutory charges (see s 182I of the *Ret irement Villages Act*).

42. Returning to the chronology of events, the Receivers commissioned Preston Rowe Paterson to value the Property. On 6 August 2020, Preston Rowe Paterson valued the Property at $3.3 million. (The Receivers point out that various of the valuations of the Property value it as a going concern and by reference to comparable use of the Property as hostel premises; whereas the permitted use in the present case was as a retirement village – see T 46.5.)

43. The first round of submissions for the sale of the Property closed on or about 27 August 2020. There were nine expressions of interest on that date. The best four offerors were invited to submit second round offers, which occurred on 3 September 2020 (T 6.45-50). Of the four best offerors, only one (Ingenia) submitted an offer, one ceased correspondence and the other two withdrew from the process (T 6-7). The (conditional) offer submitted by Ingenia was in the amount of $3.1 million. Ingenia shortly thereafter indicated that there were difficulties with Council and withdrew its offer. Criticism was made in the course of submissions of the Receivers, which presumably must mean of the real estate agents, for not further following up the Ingenia offer (or expression of interest) or negotiating further with Ingenia.

44. On 8 October 2020, the Receivers requested interested parties to submit their highest and best offer by 4pm on 15 October 2020.

45. On 1 December 2020, the Receivers entered into a conditional contract for the sale of the Property (Conditional Contract for Sale) with Tindale Property Investments Pty Ltd as trustee for Tindale Investment Trust (Tindale) for the sum of $1.5 million.

46. Special Condition 41.3 of the Conditional Contract for Sale provides that "[i]f the vendor has not provided [the purchaser with a copy of a court order permitting the Receivers to sell the land and deal with the caveats registered by the claimants seeking refunds under a retirement village

contract] within 6 months of the date of this contract then either party can rescind this contract by notice in writing to the other party" (the Sunset Clause). The Sunset Clause will expire on 1 June 2021 and, as referred to earlier, is the reason for the expedition of the present hearing.

47. On 1 December 2020, the Receivers also entered into an asset sale agreement pursuant to which the Receivers agreed to sell the Operators' assets to Tindale in consideration of $500,000. Mr Goyal, in his affidavit affirmed 1 February 2021 at [68], referred to his understanding, in his experience, of a preference by some purchasers for separation of the acquisition of land and assets. I also note that the statutory regime in relation to payment of the amount secured by the statutory charges is limited to proceeds of sale in relation to the land and not assets.

48. On 1 February 2021, the Receivers commenced this proceeding by way of Summons. As at 1 February 2021, Zagga was owed approximately $2.55 million with interest accruing at a rate of 10.5% per annum, or alternatively, if the default interest rate applied, 16%. (At the date of hearing, Zagga was owed approximately $2.6 million.)

49. On 12 February 2021, the Court made orders by consent for the removal of the eighth defendant's caveat AQ587411 and the proceedings against the eighth defendant were dismissed.

50. On 20 April 2021, Ms Linda Barwick was appointed to act as Mr and Mrs Partridges' tutor; and an order was made for referral to the Pro Bono Panel (as adverted to above).

51. The Receivers require an order to dispose of the Property because it is subject to the charges created under s 182B of the *Retirement Villages Act*. Section 182C provides that "[a] person must not dispose of land in respect of which a charge is in force under [Pt 10A] except pursuant to an order under section 182F ". A contravention of s 182C carries a maximum penalty of 100 penalty units.

52. The Receivers have standing under s 182E(2) to seek an order for the sale of the Property because the Operator is insolvent and the Receivers are of the opinion that the Operator will be unable to refund all of the ingoing contributions to which the former occupants of the Mount Providence Village are entitled under their respective village contracts.

Issues

53. Four issues were identified by the Receivers as arising on the present application. First, whether orders for the sale of the Property should be made. Second, whether on the proper construction of ss 182F and 182G of the *Retirement Villages Act* the proposed order of distribution of the proceeds of sale should be made. Third, whether on the proper construction of s 182H of the *Retirement Villages Act* that section applies to former occupants of the retirement village (such that an order for sale must not be made if it would not be in the interests of the majority of the former occupants). Fourth, whether other discretionary considerations should affect the grant of the relief here sought.

54. The Receivers say that the critical issue is whether the proceeds of the sale should be distributed in accordance with prayer 4 of the summons (i.e., in accordance with their construction of s 182G of the *Retirement Villages Act*) or in the manner for which the third, fourth and fifth defendants contend. The essence of the Receivers' case is that, on the proper construction of the *Retirement Villages Act*, the Court is required to exercise its discretion under s 182F(d) of the *Retirement Villages Act* conformably with the order of priorities set down in s 182G and that prayer 4 gives effect to that priority regime.

Legal principles

Statutory provisions

55. All parties accept that this application is governed by Pt 10A of the *Retirement Villages Act*. Section 182A prescribes the circumstances in which Pt 10A will apply to a village contract.

56. Part 10A applies because each of the former occupants is entitled to a refund of the "incoming contributions" paid under their respective "village contracts" that exceed the amount prescribed by the regulations, that being $10,000. In summary, s 182B has the effect of creating a statutory charge over all of the land within a retirement village to secure a resident's or former resident's entitlement to a refund under a "village contract". Section 182C prohibits the sale of land that is subject to a charge created under s 182B except pursuant to an order under s 182F . The effect of s 182D is that any charge created under s 182B will be binding upon and enforceable against any successors in title to the land. Section 182E confers standing upon certain classes of persons to bring an application for an order under s 182F and is dealt with above.

57. Sections 182F and 182G provide as follows:

> **182F Order for enforcement of charge**
>
> The Supreme Court may, on an application made under section 182E with respect to land within a retirement village—
>
> a. order that land within the retirement village, in respect of which a charge is in force, is to be sold, and
>
> b. appoint a person to act as the agent for the sale, and
>
> c. make a determination as to the entitlements of each of the residents or former occupants of the retirement village, having regard to—
>
> i. the refund entitlement of each resident or former occupant under their respective village contracts, and
>
> ii. the dates on which charges were created under this Part with respect to those contracts, and

d. make such orders relating to the distribution of the proceeds of the sale as the Court thinks fit, having regard to the order that interests are to be satisfied in accordance with section 182G , and

e. make such other orders as the Court sees fit.

182G Priority of interests

For the purposes of any order made under this Part, interests in the land concerned are to be satisfied in the following order—

a. the costs of the sale of the land and the applicant's costs in seeking the order,

b. any interest, mortgage, lien or other charge on or over the land created or registered before the creation of a charge under this Part, or otherwise taking priority over a charge over the land that has been created under this Part,

c. the entitlements of residents and former occupants of the retirement village arising from village contracts in respect of which a charge over the land has been created under this Part,

d. any interest, mortgage, lien or other charge on or over the land created or registered after the creation of a charge over the land under this Part,

e. the interest of the registered proprietor of the land immediately before the sale of the land.

58. Section 182H provides that the Court "must not make an order under this Part unless satisfied that the order is in the best interests of the majority of the *residents* of the retirement village". The term "resident" is defined under s 4 of the Act.

59. I interpose to note that the Receivers say (and I agree) that the defendants do not satisfy the definition of "resident" because they do not now have a "right to occupy residential premises in a retirement village". I accept that they are properly characterised as "former occupants", which is also a defined term under s 4, and that this has an effect in relation to the non-application of s 182H in the present case.

60. Other relevant defined terms include "operator", "residence contract", "residence right" and "village contract", which are defined under s 4, "retirement village", which is defined under s 5; and, "ingoing contribution", which is defined under s 6 .

61. Section 182I provides that a charge created under s 182B will remain in force until either the village contract that caused the charge to be created is terminated and all of the operator's liabilities under that contract have been met or, relevantly for present purposes, the land is sold in accordance with an order under Pt 10A .

62. Part 10A of the *Retirement Villages Act* was introduced into the legislation by means of the *Retirement Villages Amendment Act 2008* (NSW) (the Amending Act), which commenced on 1 March 2010. Tendered on the present application were copies of the Second Reading speeches; as well as the Office of Fair Trading's "*Review of the NSW Retirement Villages Act 1999: Report*" (March 2005) (Office of Fair Trading Report), which was tabled before the Amending Act was enacted (see below). Various of the defendants rely on this extrinsic material. The Receivers say that these materials are not of assistance; that the legislation is not ambiguous or obscure and that, in enacting the Amending Act, Parliament does not appear to have adopted the recommendations contained in the Office of Fair Trading Report insofar as "ingoing contributions" are concerned. The Receivers say that, to the extent the objects of the *Retirement Villages Act* are relevant to its construction, they may be found in s 3 of the *Retirement Villages Act*.

Relevant principles of statutory construction

63. The relevant principles of statutory construction and the permissible use of extrinsic materials are well known. See the discussion of those principles in *A2 v R; Magennis v R; Vaziri v R* [2018] NSWCCA 174 at [463]-[469]; and in the High Court in *R v A2; R v Magennis; R v Vaziri* (2019) 373 ALR 214; [2019] HCA 35 (*R v Magennis*). In the High Court, Kiefel CJ and Keane J (with whom Nettle and Gordon JJ agreed) stated at [32]:

> [32] The method to be applied in construing a statute to ascertain the intended meaning of the words used is well settled. It commences with a consideration of the words of the provision itself, but it does not end there. A literal approach to construction, which requires the courts to obey the ordinary meaning or usage of the words of a provision, even if the result is improbable, has long been eschewed by this Court. It is now accepted that even words having an apparently clear ordinary or grammatical meaning may be ascribed a different legal meaning after the process of construction is complete. This is because consideration of the context for the provision may point to factors that tend against the ordinary usage of the words of the provision.
>
> [33] Consideration of the context for the provision is undertaken at the first stage of the process of construction. Context is to be understood in its widest sense. It includes surrounding statutory provisions, what may be drawn from other aspects of the statute and the statute as a whole. It extends to the mischief which it may be seen that the statute is intended to remedy. "Mischief" is an old expression. It may be understood to refer to a state of affairs which to date the law has not addressed. It is in that sense a defect in the law which is now sought to be remedied. The mischief may point most clearly to what it is that the statute seeks to achieve.
>
> ....
>
> [37] ... When a literal meaning of words in a statute does not conform to the evident purpose or policy of the particular provision, it is entirely appropriate for the courts to depart from the literal meaning. A construction which promotes the purpose of a statute is to be preferred.
>
> (footnotes omitted)

64. Earlier, in *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384; [1997] HCA 2, the High Court (Brennan CJ, Dawson, Toohey and Gummow JJ) said, of the approach to statutory construction at common law, at 408:

> It is well settled that at common law, apart from any reliance upon s 15AB of the *Acts Interpretation Act 1901* (Cth) [the Commonwealth equivalent to s 34 of the *Interpretation Act 1987* (NSW)], the court may have regard to reports of law reform bodies to ascertain the mischief which a statute is intended to cure. Moreover, the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses "context" in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy. (footnotes omitted)

65. Emphasis on the importance of focussing on the text of the provision itself can be seen in *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252; [2010] HCA 23 (*Saeed*) at [33]-[34] ; and *Baini v R* (2012) 246 CLR 469; [2012] HCA 59 (*Baini*) at [14] . In *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27; [2009] HCA 41 (*Alcan*), the majority (Hayne, Heydon, Crennan and Kiefel JJ) stated (at [47]):

> This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy. (footnotes omitted)

66. However, as was noted by the High Court in *R v Magennis* (at [36]-[37]) with reference to *Saeed, Baini and Alcan,* "[t]hese cases serve to remind that the text of a statute is important", however, "[n] one of these cases suggest a return to a literal approach to construction. They do not suggest that the text should not be read in context and by reference to the mischief to which the provision is directed". Indeed, the position was usefully summarised in *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362; [2017] HCA 34, by Kiefel CJ, Nettle and Gordon JJ as follows (at [14]):

> The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose [citing *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 [69]-[71]; [1998] HCA 28; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46-47 [47]; [2009] HCA 41]. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense [citing *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; [1997] HCA 2]. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context,

> some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.

67. Thus, although statutory construction must begin with a consideration of the text, the statutory text must be considered in light of its purpose and context, that context being often informed by legislative history and extrinsic materials (see, for example, the approach adopted in *Coverdale v West Coast Council* (2016) 259 CLR 164; [2016] HCA 15).

68. Reference was made in the current case to ss 33 and 34 of the *Interpretation Act 1987* (NSW) . Section 33 relevantly provides that:

> In the interpretation of a provision of an Act ... a construction that would promote the purpose or object underlying the Act ... (whether or not that purpose or object is expressly stated in the Act ...) shall be preferred to a construction that would not promote that purpose or object.

69. Section 34 sets out the circumstances in which material not forming part of the legislation in question may be considered either to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision (taking into account its context in the Act and the purpose or object underlying the Act) (see s 34(1)(a)) or to determine the meaning of the provision if the provision is ambiguous or obscure; or if the ordinary meaning leads to a result that is manifestly absurd or unreasonable (s 34(1)(b)).

70. The appropriate use of extrinsic material in identifying a statutory purpose so as properly to construe an Act was addressed by the majority of the High Court in *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573; [2011] HCA 10 at [43]-[44] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

Relevant extrinsic materials

71. In light of the above, I note the relevant excerpts of the extrinsic materials relied on by some of the defendants in their construction of the *Retirement Villages Act.*

Second reading speech

72. On 2 December 2008, the Hon Penny Sharpe (Parliamentary Secretary) on behalf of the Hon Ian Macdonald (as he then was), moved that the bill for the Amendment Act be read a second time, saying:

> Regrettably, there are occasional, albeit rare, instances when a retirement village operator goes broke and the village cannot be sold as an ongoing concern. This can place residents in a difficult position in terms of getting their money back as an unsecured creditor. To address this issue the bill will introduce a statutory charge, which will give those residents

who are not owners or registered long-term leaseholders priority in the event of a Supreme Court ordered sale of the village.

The Office of Fair Trading Report

73. Relevant excerpts from the Office of Fair Trading Report are as follows (at 33-34):

> Currently, many residents pay large amounts of money to enter a retirement village but do not gain ownership of the premises in which they reside. The refund of a resident's ingoing contribution when they vacate in these circumstances is a contractual right enforceable against the operator.
>
> In the event of an operator becoming insolvent, residents rank behind mortgagees and other secured creditors.
>
> ...
>
> The review finds that the preferred approach is to introduce a statutory charge giving residents priority over all other interest holders. This is the approach which most submissions supported. Victoria, Queensland and Western Australia have had a statutory charge system in place for some time and there is no evidence of the charge having a significant negative impact on the industry in these States.

Receivers' submissions

74. The Receivers, in their submissions, noted that each of the former occupants' village contracts provides that the resident is required to pay the Operator the Retention Charge following permanent vacation of the resident's unit, which is deductible from the refund payable to each resident upon termination of their village contract. The Retention Charge payable under each village contract is 4% of the "Accommodation Fee" per year for a maximum of 5 years. (In the surrender agreement signed by Ms Whittaker it was agreed that she would have been required to pay a Retention Charge of $7,456.44 with the effect that she only would have been entitled to a refund of $132,543.56). I interpose to note that an issue arose in the course of oral argument as to whether the Retention Charge could properly be pro-rated having regard to the period of a year over and above that first year in which the respective residents were in occupation of the unit. An issue also arose, albeit perhaps a red herring referred to by me, as to whether or not the disclaimer of three of the defendants' village contracts affected the question as to whether or not the Retention Charge was deductible from the ingoing contribution required to be refunded.

75. Reference is made in the Receivers' submissions to the relevant provisions of the *Retirement Villages Act* that I have set out above. The Receivers submit that, although ss 182F and 182G do not employ the conventional language of "shall" to indicate that compliance with s 182G is mandatory or "may" to indicate that it is discretionary, the language of "are to be satisfied" (which appears in both ss 182F and 182G) is mandatory in nature.

76. It is submitted that to construe ss 182F and 182H in the way in which the Receivers contend is consistent with what appears to be the purpose of Part 10A , which is to protect ingoing contributions paid by residents by creating a particular statutory priority regime which modifies the rights of priority that interest holders would otherwise enjoy at common law and in equity. It is said that it would be inconsistent with that object if the Court were permitted to depart from that priority regime in the exercise of its discretion.

77. It is accepted by the Receivers that the practical effect of the order of priorities set out in prayer 4 in the summons will likely be that, after the costs of the sale of the land and the applicant's costs in seeking the order are paid, Mr Cameron, Ms Whittaker and Ms West would be paid their refund entitlements in full, and the balance of the proceeds would be paid to the Receivers on behalf of Zagga. The Church Trustees, Ms Mills and the Partridges would not receive any moneys out of the proceeds of sale.

78. The Receivers' submission was that, if the construction for which the third, fourth and fifth defendants contended were to be adopted, then subsections (c) and (d) of s 182G would have no work to do (although I note that Counsel for the Receivers ultimately retreated from that submission in reply – see T 72). The Receivers accept that s 182G is intended to benefit residents of retirement villages and to protect their interests. However, the Receivers' submission is that the object and purpose of the legislation do so by providing the particular statutory order of priorities and that just because not everyone is guaranteed to recover his or her money does not mean that the objective purpose is not being fulfilled.

79. It is submitted that the present case well illustrates that proposition because there are unregistered charges that would take priority over a registered mortgage, something that is recognised to be a significant departure from Torrens Title regime and ordinary principles of indefeasibility, noting that the registered proprietor under the order of priority of interests ranks last. It is submitted that the legislation confers significant benefits upon residents under the Receivers' construction, and to read it in any other way would render registered mortgages worthless because lenders would never be able to know in advance what charges might come later in time. It is also submitted that this would allow people who had charges with notice of registered mortgages to take priority, and that that is not what the legislation contemplates.

First and second defendants' submissions

80. The first and second defendants broadly support the regime put forward by the Receivers and, as noted earlier, raise an issue only if a combination of the constructions contended for were to have effect, such that their statutory charges would not be discharged in full. It is noted that Mr Cameron and Ms West both lodged caveats in respect of their statutory charges, but it is said they had no effect on priority and were lodged simply in order to ensure that a sale did not occur without an application being made pursuant to orders under s 182F and each of their charges being enforced.

Sixth defendant's submissions

81. The sixth defendant similarly supports the regime put forward for the payment out of the interests by the Receivers and accepts the pro rata regime that is encapsulated in the surrender agreement signed by Ms Whittaker on 23 March 2020.

Third defendant's submissions

82. The third defendant agrees with the Receivers that the second reading speech does not assist greatly in the construction of Pt 10A of the legislation. However, the third defendant says that the general purpose of the amendments can be gleaned from the second reading speech where the Hon Penny Sharpe said, as detailed above, that "the bill will introduce a statutory charge, which will give those residents who are not owners or registered long-term leaseholders priority in the event of a Supreme Court ordered sale of the village".

83. The third defendant contends that what she is here seeking is priority for all of the residents over the registered unit holders. It is submitted by the third defendant that, taken together, the objects of the Act as listed in s 3 are of a regulatory nature, but that the Act seeks clearly to strike a balance between residents and operators and "strives to stamp out unfair practices by the operators."

84. The third defendant submits that the Receivers' interpretation of s 182H is not correct. It is submitted that, on that interpretation, s 182H might never be engaged. It is said that if the gateway to seeking an order of the Court under Pt 10A is the insolvency of the operator, which in turn triggers the disclaimer of onerous property, then the residents will always fall into the category of former occupants and s 182H will not apply to them. That may well be the case, but that seems to me to be the consequence of the definition of "residents" and the distinction drawn in the legislation between the definition of "residents" and the definition of "former occupants".

85. As to the proper construction of s 182G , the third defendant in effect adopts the submissions for the fourth and fifth defendants, and I will come to that shortly. However, the third defendant goes on to submit that if the construction put forward by the Receivers that the interpretation of s 182G is correct, the Court needs to take into account the permissive language used in s 182F . It is submitted and I think have already indicated my position on this that the words "having regard to" in s 182F(c) , when used in collocation with the list of matters to be taken into account, should be regarded as a not exhaustive expression and the phrase "have regard to" is a guide and not a fetter (citing *Owen v Woolworths Properties Ltd* (1956) 96 CLR 154 at 160, and *Rathborne v Abel* (1965) ALR 545; 28 ALJR 293 at 295). In particular, the submission was made by the third defendant that while regard must be had to the order of priority, it is open to the Court to inquire into the circumstances that led to the appointment of the Receivers. It is submitted that the Operator was insolvent from inception, that the mortgage was so large that it could never have been repaid unless there was a refinance with another financier, that the residents were kept in the dark as to the true nature of the use of their contributions, that there was no attempt made to sell the retirement village as a going concern, that the socalled loan agreements were so in name only, and that there existed an unequal bargaining position between the residents and the operator.

86. The third defendant thus argues that, having regard to the overall position of the residents, as a matter of discretion, the Court should lean towards making orders benefitting the residents in priority to the registered and unregistered mortgages, as I have indicated above. While there is a discretion as to whether to make the order that is sought in relation to the order for sale, I do not accept that there is a discretion as to the order in respect of which the proceeds of sale are to be paid out. I do not regard the third defendant's assertions of unfair practices on the part of the Operator as relevant to the construction of the legislation, nor as to whether there is any discretion to apply an order of priority other than that set out in s 182G of the legislation. I do not accept that s 182G is something of a guideline. I consider that it mandates that, for the purposes of any order made under Pt 10A , interests in the land concerned are to be satisfied in the manner there set out.

Fourth and fifth defendants' submissions

87. The fourth and fifth defendants emphasise the beneficial nature of the legislation. They contend that the order sought in prayer 4 does not reflect a proper construction of s 182G of the Act, in that it proceeds upon the incorrect premise that the six former occupants and the registered mortgagees rank in the order in which the charges under the Act and the registered mortgages respectively were created. It is submitted that the literal words of s 182G do not support such a construction, and that instead s 182G ranks the interests of the residents and the former occupants ahead of the interests of the registered first mortgagee and the unregistered second mortgagee.

88. This is on the basis that, when one approaches the order of priority in s 182G , the first priority in subs (a) is the costs of the sale of the land and the applicant's costs in seeking the order. I interpose to note there is no dispute that those costs rank first. However, turning to subs (b) (see above), it is said that, relevantly, there was no mortgage that was created or registered before the creation of the first residential charge; that being the charge created when Mr Cameron, the second defendant, entered into his village contract. In the course of oral argument, it was initially accepted that that submission, in effect, read the words "before the creation of a charge under this part" as "before the creation of any charge under this part", and I did have pause in relation to whether that was an appropriate way to read subs (b). However, and I will come back to this when I come to my determination, of significance is the fact that subs (b) is placing, in order of ranking, mortgage interests or the like and says nothing about the ranking in priority expressly of charges over the land created under Pt 10A . The fourth and fifth defendants submit that the entitlements of all of the former occupants rank together pursuant to subs (c). It is said that this is clear from the literal construction of subs (c) and the lack of mechanism in Pt 10A to split the ranks of the former occupants into chronological order or to accommodate the mortgagees within that chronology.

89. It is submitted that both mortgages were created after the creation of the first residential charge and therefore fall within subs (d). The last ranking priority, as noted above, is the interest of the registered proprietor of the land immediately before the sale of the land in subs (e).

90. It is submitted for the fourth and fifth defendants that this construction of s 182G is consistent with the construction applied or considered by Richard McCullagh in *Retirement Village Law in*

NSW where he states (see Richard McCullagh, *Retirement Village Law in NSW* (2013, Lawbook Company) at 259 [11.310]):

> If the former occupant is a non-registered interest holder, the *Act* creates a statutory charge in his or her favour in respect of the ingoing contribution that is subject to a refund under the village contract, of an amount exceeding the prescribed minimum, currently $10,000. This does not apply to any part of the village containing residential premises that are subject to the residence right of a registered interest holder.
>
> There is "a charge over all land within the retirement village that secures the entitlement to a refund under the contract", which is binding and enforceable against the owner of the land from time to time while ever a non-registered holder is entitled to a refund. It is not entirely clear how much or exactly which land in the village "secures the entitlement to a refund", other than land the subject of the residence right of the non-registered interest holder, ie the dwelling.
>
> [footnotes omitted]

91. Although, it is accepted that the author does not expressly give reasons for that view, it is submitted for the fourth and fifth defendants that it was the clear intention of the legislature that the indefeasibility provisions of the *Real Property Act 1900* (NSW) were to be overridden by the charges created under Pt 10A of the Act in certain circumstances. It is accepted that the Act does not expressly adopt the formula "to have effect despite anything contained in [s 42 of the *Real Property Act*]" (see s 42(3)) but it is said that this does not preclude the later Act from, on its proper construction, overriding the earlier *Real Property Act* by implication. In support of this submission, the third and fourth defendants cite Brendan Edgeworth, *Butt's Land Law* (7th ed, 2017, Lawbook Company) at 881 [12.940], where it was relevantly noted that:

> As with any legislation, the Torrens statutes are not immune from repeal or amendment by later legislation. Even key provisions, such as those relating to indefeasibility of title, are not sacrosanct. Sometimes, the indefeasibility provisions are assaulted directly, as where a later statute creates an interest in land which it declares to be effective despite non-compliance with the registration provisions of the *Real Property Act 1900* (NSW) . More commonly though, the effect on the indefeasibility provisions is less direct a matter of implication only. Usually, the overriding is by State legislation, not Commonwealth, as the Commonwealth lacks a general power to legislate in relation to land; but in principle, of course, Commonwealth legislation may override the *Real Property Act 1900* . But whether direct or by implication, State or Commonwealth, the result is to engraft exceptions onto a registered proprietor's otherwise indefeasible title. The registered title is then subject to statutorily endorsed interests or qualifications which the register does not disclose.

92. Further, reference was made to what was said in the High Court in *South Eastern Drainage Board (SA) v Savings Bank of South Australia* (1939) 62 CLR 603 at 618 by Latham CJ, 623 by Starke J, 625 by Dixon J and 635 by McTiernan J, namely that:

> Latham CJ: Accordingly, in my opinion, s 6 of the *Real Property Act* cannot operate to deprive of effect any subsequent legislation of the South Australian Parliament which,

upon the natural construction of its terms, enacts a provision which is inconsistent with the *Real Property Act 1886* .

Starke J: In the present case, it is plain, I think, that the *South-Eastern Drainage Act* creates a charge upon all lands benefited by the construction and maintenance of the works mentioned in the Act, whether the lands are subject to the provisions of the *Real Property Act 1886* or not and whether the charge is registered under the Act or not. The Act is explicit, and it must prevail.

Dixon J: In interpreting any later enactment which might otherwise be construed as affecting land under the Act in a manner inconsistent with the *Real Property Act* , in order to give effect to s 6 the court should, in the absence from the enactment of the prescribed words, treat the general expressions as not including land under the Act. But if the later enactment contains clear language from which it is plain that its provisions were intended to apply to land under the Act and to apply in a manner inconsistent with the *Real Property Act* , then they must operate according to their meaning. For the later enactment of the legislature must be given effect at the expense of the earlier. But, unless it is found impossible to reconcile the later statute with s 6 , there is no room for the conclusion that the later Act must be regarded as meaning to operate upon land under the earlier Act and to do so inconsistently therewith.

McTiernan J: In my opinion, the omission of the legislature to use the form prescribed by s 6 of the *Real Property Act* in framing the *Drainage Acts* does not raise any presumption of a legislative intention that those provisions of these Acts which are now material should be reconciled with the *Real Property Act* by implying such other things in the *Drainage Acts* as would be necessary to make the two sets of provisions work together.

93. An alternative submission put forward for the fourth and fifth defendants was that, if the Receivers' construction were to be accepted, then, construed in the context of the Act as beneficial legislation, ss 182F(c) , (d) and (e) and s 182G would empower the determination of the entitlements of the former occupants pursuant to s 182F(c) and the making of an order pursuant to ss 182F(d) and (e) to the effect that the first to sixth defendants be repaid their loans from the proceeds of the sale in priority to the seventh and eighth defendants. I have difficulty with that proposition because I consider s 182G provides a mandatory order in relation to the distribution of the proceeds of sale.

94. If the Receivers' construction of the legislation were to be accepted, a further alternative submission put forward by the fourth and fifth defendants was that the Court should not exercise the discretion to make any order for sale for the following reasons: (i) the Property had been valued at between $3 and $4.5 million (see Mr Goyal's affidavit affirmed 1 February 2021 at [39] -[42]); (ii) there was an offer from Ingenia to purchase the Property for $3.1 million subject to due diligence (Mr Goyal's affidavit at [58]); (iii) Ingenia had decided not to proceed with the purchase after it determined that the cost of installing a pump to boost the main water pressure was in the order of $200,000, and Ingenia was concerned about potential challenges in obtaining approval from council to use the Property for rental to seniors. However, it is said that this has not prevented a development application for change of use from Aged Care Facility to Boarding House and Multiple Dual Occupancy Dwellings being lodged (Ex 1).

95. It is noted that there was no evidence that any negotiations have been entered into with Ingenia or any of the potential purchasers for the Property, and it was submitted that, in the circumstances, accepting an offer of $1.5 million was unreasonable.

Receiver's reply submissions

96. In response to the third and fourth defendants submission that there is nothing in Pt 10A which enables the Court to discriminate between the various charge-holders, Counsel for the Receivers placed emphasis on s 182F(c) which invites the Court to have regard to the refund entitlement of each of the residents or former occupants and the dates on which their charges were created when making a determination as to the entitlement of each (T 31).

97. As regards the Second Reading speech and the Office of Fair Trading Report, it is the Receivers' primary position that neither is of assistance to the Court. In particular, the Receivers submit that the extracts of the Office of the Fair Trading Report to which the Court was taken were not adopted (T 71).

98. In reply, Counsel for the Receivers compared s 182G to similar sections in force in various States. Counsel for the Receivers, while accepting that the proposition could only go so far, submitted that if Parliament had intended the statutory charge to have priority over, for example, all registered securities regardless of whether the security was registered before or after the charge, then it could have made that position much clearer by following the template of provisions such as s 119 of the *Retirement Villages Act 1999* (Qld) (T 71-72).

Determination

99. I have taken into account the objects and purpose of the legislation as set out in s 3 of the *Retiremen t Villages Act*. As far as the extrinsic material is concerned, the submission that there is no ambiguity in s 182G is somewhat paradoxical, having regard to the opposing constructions placed on s 182G by the respective sides. When one refers to the Queensland legislation which, unlike the legislation of other states, appears to make very clear the ranking of the statutory charges, the relative ambiguity of s 182G is evident. However, ultimately, I consider that recourse is not necessary to extrinsic materials in order to construe the relevant provisions. As I have said, I consider that s 182G is mandatory in its terms in relation to the priority of interests, and I place significance on the fact that subs (b) makes no express reference to where holders of a statutory charge over the land created under this part are to rank in priority to other interests. I consider that, read literally, when one approaches the ranking of interests in terms of the priority for distribution of funds out of the net proceeds of sale, there is no dispute that the costs of the sale of the land and the applicant's costs in seeking the order are to have first priority. There is evidence as to what those costs are in the present matter, and there is no dispute as to that.

100. But when one comes to see what ranks second, there is in fact, on the evidence, no interest, mortgage, lien or other charge on or over the land that was created or registered before the

creation of a charge under Pt 10A , or otherwise taking priority over a charge over the land that has been created under that Part. That means that, for the second ranking priority, one must fall to subs (c), and that provides for the entitlements of residents and former occupants of the retirement village arising from village contracts in respect of which a charge over the land has been created under Pt 10A . That will include all of the six defendants. The interests of the mortgagees rank next, because they fall within subs (d) as mortgages created or registered after the creation of a charge over the land under Pt 10A , and the interests of the registered proprietor will rank last.

101. It will not be an issue in this case as I understand it (because the proceeds of sale will be sufficient to pay out the costs of the sale of the land and the applicant's costs in seeking the order, and the statutory charges in full to consider whether, had there been a shortfall) as to how the interests as between the former occupants are to rank. Had that arisen, I would have concluded, by reference to s 182F(c) , that when making a determination as to the entitlements of each of the residents or former occupants of the retirement village, having regard to, amongst other things, the dates on which the charges were created under Pt 10A with respect to the village contracts, that the appropriate order would be to rank the satisfaction of the statutory charges out of the net proceeds of sale by reference to the order in which the statutory charges were created. That would mean that, as between them, the former occupants would rank in the following order: first defendant, sixth defendant, second defendant, third defendant, and then the fourth and fifth defendants. But, as I say, it is unlikely that that will arise.

102. I will come back to the question as to the complaints in relation to the sale process. The only remaining question then, relevantly, is how the Retention Charge is to be dealt with. I have considered this issue further overnight. My view is that there is a difference between the former occupants who entered into surrender agreements and those whose service agreements were disclaimed. That difference is that those who entered into surrender agreements, being the fourth, fifth and sixth defendant respectively, have agreed to the quantification of the Retention Charge to be deducted from the refund of the ingoing contribution being calculated on a pro rata basis. Whereas, there has been no such agreement by those whose service agreements were disclaimed by the liquidators. Therefore, when I come to the orders to be made, the amount to be refunded by way of ingoing contribution for the fourth, fifth and sixth defendants respectively will be their ingoing contribution less the Retention Charge calculated on the pro rata basis that has been set out in the surrender agreements.

103. However, when it comes to the first, second and third defendants, I accept the submissions that were made by Counsel for the Receivers that the fact that the contracts were disclaimed does not affect the calculation of those defendants' entitlements to the refund of the ingoing contribution less the Retention Charge. That said, I do not accept that the contract makes provision for pro rata calculation of the Retention Charge. I see no reason, for business efficacy or otherwise, to read that into the contract. Therefore, the orders in relation to the first, second and third defendants will be for the refund of the ingoing contribution less the Retention Charge calculated at 4% for the one entire year that they were in occupation of the units.

104. Finally, I should say, insofar as there was criticism made of the Receivers in relation to the sale process, I do not accept that there has been any improper conduct on the part of the Receivers. It

seems to me that the Receivers adopted the reasonable and conventional approach of appointing sales agents for the Property, and that those sales agents appear to have sought expressions of interest and to have contacted likely potential purchasers of the Property. There were a number of rounds of expressions of interest and, at the end of the day, the Receivers accepted what was the highest price offered for the Property.

105. I also bear in mind the fact that various of the valuations of the Property that are in evidence appear to have proceeded by reference to comparable sales that, if properly tested, seem unlikely to be comparable, because this is not a resort facility; it is a retirement village which, at the time of the valuation, did not have the benefit of permitted use for rental to mining operatives or the like. I simply note that I do not accept that there is a basis for criticism of the sale process or the acceptance of the sale price as being unreasonable. (Nor am I in a position to consider any unfair practices or misconduct or the like as were the subject of the submissions by the third defendant. I simply do not have evidence that would enable any findings of that kind to be made, and I do not consider that to be relevant to the way in which the application is to be dealt with, having regard to the proper construction of the legislation.)

Costs

106. As the defendants were seeking a costs order, I considered brief submissions on costs following the *ex tempore* judgment on the substantive issues. I here summarise those submissions and my reasons for the costs orders then made.

Receivers' submissions on costs

107. In resisting a costs order, the Receivers submitted: first, that it was necessary for the application to be brought in order to complete the sale and determine the distribution of the proceeds of sale; second, that as the legislation had never been the subject of judicial consideration, its application was unclear and it was appropriate to ventilate all the issues in the proceeding; third, that it was the Receivers' motion which led to the appointment of a tutor for the fourth and fifth defendants and it was on the Receivers' recommendation that there was a referral to the Pro Bono Panel so that the Court could benefit from proper contradictors; fourth, that, given the short notice of the appointment of legal representatives for the fourth and fifth defendants, the Receivers had no notice of the construction put forward (and ultimately accepted) until a day before the hearing. Additionally, the Receivers submitted that, as prayer five of the summons provided for orders "as this Court sees fit", in a technical sense, the Receivers had gained the relief sought. Ultimately, the Receiver submitted that, combined, these issues weighed against an award of costs against the Receivers (T 80-81).

First and second defendants' submissions on costs

108. Counsel for the first and second defendants submitted that it would be inappropriate for the Receivers personally to pay their costs. However, it was submitted that an order, similar to those in cases with liquidators, where the liquidator is ordered to pay costs only to the extent that they

can satisfy that liability with assets of the company, would be appropriate (T 83-84). In this regard, Counsel referred to *In the Matter of Mendarma Pty Ltd (in liq) (No 2)* (2007) 61 ACSR 601; [2007] NSWSC 99 (*Mendarma*) at [44]-[45] per White J, as his Honour then was, and *Kirman v RWE Robinson & Sons Pty Ltd (in liq), Re RWE Robinson and Sons Pty Ltd (in liq)* [2019] FCA 372 at [13] per Banks-Smith J.

109. The Receivers in reply pointed to the likely lack of utility of an order of the kind proposed by the first and second defendants, given that it is unlikely that there will be any assets left after paying Zagga (T 86-87).

Third defendant's submissions on costs

110. The third defendant embraced the submissions of the first and second defendants and, further, sought an indemnity costs order based on an offer of compromise dated 7 April 2021 (alternatively expressed as a *Calderbank* offer) (Ex 4) (T 84).

111. In terms of the third defendant's indemnity costs submission, the Receivers submitted in reply that the offer of compromise asked for $120,000 when the Receivers did not owe the third defendant that amount. Further, it was submitted that the Receivers could not accept the offer due to the nature of this litigation, as it was necessary for the Court to make orders for the sale of the property, and, consequently, there was a risk that the Court could have exercised its discretion not to do so, leaving the third defendant's charge arguably still attached to the land (T 88). It was submitted that the offer also raised difficulties with the order of priorities, as it would have effectively given priority to the third defendant over the others (T 89.5).

Fourth and fifth defendants' submissions on costs

112. The fourth and fifth defendants submitted that costs, at least of the third, fourth and fifth defendants, fell within s 182G(a) , as part of the costs of sale and the applicant's costs in seeking the order. Alternatively, it was submitted that, ultimately, the defendants had prevailed and that it was appropriate for the Receivers to pay the costs of the defendants, bearing in mind the vulnerability of the defendants who needed to pay to have their interests represented. In response to the Receivers' submissions that it was necessary for all of the defendants to appear, it was submitted that it was only necessary for the third, fourth and fifth defendants to appear and protect their interests due to how the Receivers construed s 182G and reflected it in prayer four of the summons (T 84-85).

113. The Receivers in reply submitted (and I agree) that legal costs would not be included in "costs of the sale", considering that the applicant's costs are dealt with separately by s 182E(a). I consider that the words "the applicant's costs" in seeking the order for sale to cover only the applicant's legal costs, not those of others that the approval may then have been ordered to pay (T 87).

Sixth defendant's submissions on costs

114. Counsel for the sixth defendant supported the submission put forward by Counsel for the first and second defendants (T 86.10-15).

Determination on costs

115. As to the indemnity costs order sought by the third defendant, I accept the Receiver's submissions that the offer was not capable of acceptance in circumstances where the Receivers required court approval for the sale in any event. If it is not capable of acceptance, then it does not comply with the offer of compromise regime. Even if it did, it would be appropriate in my opinion to make an order other than as provided for under the special costs order regime having regard to the matters to which Counsel for the Receivers has referred. If it were put forward as a Calderbank offer (*Calderbank v Calderbank* [1975] 3 All ER 333), then I am of the view that it was not unreasonable for the Receivers not to accept the offer having regard to considerations of the kind set out in *Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2)* (2005) 13 VR 435; [2005] VSCA 298.

116. I accept that all of the defendants were necessary parties to be joined, and that they have properly responded to the application. I accept that the costs of the application would have been necessary in any event since Court approval for sale was necessary. The appropriate costs order in my opinion was an order of the kind that was made in *Mendarma,* that the plaintiffs pay the defendants' costs of the application to the extent that there are assets of New Aged Projects No 2 Pty Ltd (in liq) which are available to the Receivers to satisfy that costs liability. For the avoidance of doubt, I note that this is not an order that the costs be paid in priority to moneys to which Zagga is entitled pursuant to its security.

Orders

117. For those reasons, I make the following orders:

1. Order pursuant to s 182F(a) of the Retirement Villages Act 1999 (NSW) (Retirement Villages Act) that the land comprising Lot 2 in Deposited Plan 1070178 situated at 59 Tindale Street, Muswellbrook NSW 2333 (Property) be sold.

2. Order pursuant to s 182F(b) of the Retirement Villages Act that Rahul Goyal and Catherine Margaret Conneely be appointed to act jointly and severally as agents on the sale.

3. Order that Rahul Goyal and Catherine Margaret Conneely be jointly and severally at liberty to execute any and all necessary conveyance or other documents and do all such things that are necessary in relation to the performance of these orders.

4. Order pursuant to s 182F(d) of the Retirement Villages Act that the proceeds of the sale of the Property be distributed on completion in accordance with the following order of priority:

1. first, in payment of the costs of the sale of the land and the plaintiff's costs relating to or connected with seeking those orders;

2. second, in payment of the $150,000 owing to the second defendant, Darrell Maxwell Cameron under his residence loan agreement dated 24 September 2018, less retention sum calculated at 4% which, for the purposes of this order, is calculated as amounting to a refund of $144,000;

3. third, in payment of the sum of $132,544 owing to the sixth defendant, Valerie Whittaker, being the outstanding balance of the accommodation fee owing to her under her resident loan agreement dated 22 November 2018;

4. fourth, in payment of the sum of $160,000 owing to the first defendant, Jean Margaret West, under her resident loan agreement dated 23 December 2018, less the retention charge calculated at $6,400, the refund to Ms West amounting to $153,600;

5. fifth, in payment of the sum of $160,000 owing to the third defendant, Shirley May Mills, under the resident loan agreement dated 29 April 2019, less retention fee calculated at $6,400, the amount payable to Ms Mills being $153,600;

6. sixth, in payment of the sum of $154,152 owing to the fourth and fifth defendants, Stan Partridge and Shirley Partridge under their Residence Loan Agreement dated 7 May 2019;

7. seventh, in payment of the amount owing to Zagga Investments Pty Ltd as trustee for the Zagga Investments Lending Trust, pursuant to the Zagga loan agreement and general security agreement dated 19 March 2019, which as at the date of hearing was in the order of $2.6 million;

8. eighth, in payment of the sum of $484,486.40 owing to the seventh defendant, Trustees of The Roman Catholic Church for the Diocese of Maitland Newcastle under the Deed of Loan under the deed of loan dated 5 April 2019 and unregistered mortgage dated 5 April 2019;

9. the balance, if any, to be paid to the plaintiffs, Rahul Goyal and Catherine Margaret Conneely in their capacity as joint and several receivers of New Aged Projects No 2 Pty Ltd (Receivers and Managers appointed) (in liquidation) to be distributed in accordance with their duties as joint and several receivers.

5. Note the undertakings of the first defendant, Jean Margaret West to withdraw Caveat AQ451430; of the second defendant, Darrell Maxwell Cameron to withdraw Caveat AQ458147; of the sixth defendant, Valerie Whitaker to withdraw Caveat AQ838248 and of the seventh defendant to withdraw Caveat AQ282022, at settlement.

6. Note that counsel for the third defendant has proffered an undertaking on behalf of her client to withdraw any caveat that may have been lodged by the third defendant.

7. Order that the plaintiffs have liberty to apply on five days' notice with respect to any other matter that may arise with respect to these orders, the sale of the property or the distribution of the sale proceeds.

8. Direct that the plaintiffs pay the defendants' costs of the application to the extent that there are assets of New Aged Projects No 2 Pty Ltd (in liq) which are available to the receivers to satisfy that costs liability

9. For avoidance of doubt, note that order 8 is not an order that costs be paid in priority to moneys to which Zagga is entitled pursuant to its security.

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Amendments

13 May 2021 - Representation of 4th and 5th defendants

Decision last updated: 13 May 2021