SUPREME COURT OF QUEENSLAND

CITATION:	*The Proprietors Cathedral Village Building Units Plan No 106957 & Ors v Cathedral Place Community Body Corporate & Ors* [2013] QCA 264
PARTIES:	**THE PROPRIETORS CATHEDRAL VILLAGE BUILDING UNITS PLAN NO 106957** (first appellant) **PETER LA** (second appellant) **HUY SO LA & THI MY XUAN DUONG** (third appellants) **KONG-CHI YUEN & NANCY AUDUONG** (fourth appellants) **TENRON PTY LTD** ACN 010 673 748 (fifth appellant) **CHIEH-JUNG HUANG & MIAO-CHEN HSU** (sixth appellants) **CONG LE & HOA MY LE** (seventh appellants) **JUNLASI INVESTMENTS PTY LTD** ACN 084 290 255 (eighth appellant) **JAMES LIN & HUEI-JUNG CHEN** (ninth appellants) **YAMING CHEN & RUXIN DOU** (tenth appellants) **SON HONG LE** (eleventh appellant) **K PAC INTERNATIONAL PTY LTD** ACN 085 130 043 (twelfth appellant) **RICHARD LEE & BRIAN CHARLES REYNOLDS** (thirteenth appellants) **PAUL SZUMOWSKI & LANA SZUMOWSKI, LENEJAU PTY LTD** ACN 088 373 460 **TALLAWAH PTY LTD** ACN 008 314 514 (fourteenth appellants) **G & S NOMINEES (QLD) PTY LTD** ACN 077 310 797 (fifteenth appellant) **DAILY FRESH CO PTY LTD** ACN 085 008 886 (sixteenth appellant) **BYRON NOBLE RABONE & VALERIE ALISON NOBLE** (seventeenth appellants)

	SYZYGY CORPORATION PTY LTD ACN 092 898 087 (eighteenth appellant) **WAYNE ASHLEY LAMB & KATHLEEN MAJELLA LAMB, MARK CARRINGTON BAKER & JENNIFER LILLIAN BAKER** (nineteenth appellants) **ANTONIO GIOVANNI PALELLA & AMELIA SESASTIANA FERLITO** (twentieth appellants) **IAN WESTALL SMOUT & EUGENIA CECILIA SMOUT** (twenty-first appellants) **DAVID BOTT FINANCE PTY LTD** ACN 010 145 632 (twenty-second appellant) **TRACI WARREN** (twenty-third appellant) **SANG THANH VO & DUYEN THI MY DUONG** (twenty-fourth appellants) **DA SHAN WANT & JOSIE YOU CHUN WANG** (twenty-fifth appellants) **v** **CATHEDRAL PLACE COMMUNITY BODY CORPORATE** (first respondent) **THE PROPRIETORS NOTRE DAME BUILDING UNITS PLAN NO 106912** (second respondent) **THE PROPRIETORS OXFORD & CAMBRIDGE UNITS PLAN NO 106905** (third respondent)
FILE NO/S:	Appeal No 10263 of 2012 SC No 7189 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	17 September 2013
DELIVERED AT:	Brisbane
HEARING DATE:	16 April 2013
JUDGES:	Holmes and Gotterson JJA and P Lyons J Judgment of the Court
ORDERS:	**1. Appeal dismissed.** **2. Subject to any submissions on costs made in writing within seven days of today, the appellants pay the respondents' costs of and incidental to the appeal.**

CATCHWORDS: REAL PROPERTY – STRATA AND RELATED TITLES – MANAGEMENT AND CONTROL – BYLAWS – GENERALLY – where the first appellant had been operating a commercial car park in the development Cathedral Place since 2001 – where the area of the car park is principally the common property of four bodies corporate including Cathedral Village which has six car spaces as part of its common property – where a controversy arose surrounding the provision made for car parking for the owners of units in Cathedral Village through the purported adoption of by-law 28 by the first respondent on 29 November 2000 – where the trial judge made findings that the appellants had no legal or equitable interest in the area of the car park beyond its own common property and that no statutory right of user should be imposed on the car park land in favour of Cathedral Village or its members – whether the trial judge erred in making such findings

Mixed Use Development Act 1993 (Qld), s 15, s 24, s 167, s 172, s 206
Property Law Act 1974 (Qld), s 180
Sustainable Planning Act 2009 (Qld), s 245

Lang Parade Pty Ltd v Peluso [2006] 1 Qd R 42; [2005] QSC 112, cited

COUNSEL: R Perry SC for the appellants
B O'Donnell QC, with M Gynther, for the respondents

SOLICITORS: Herbet Geer for the appellants
Gadens Lawyers for the respondents

[1] **THE COURT**: The Cathedral Place development project was undertaken by Cathedral Place Developments Pty Ltd ("CPD"), a subsidiary of Devine Limited, over a number of years, beginning in 1998. The project was developed through a mixed use scheme[1] in which a prominent city site in Brisbane bounded by Wickham, Gipps, Ann and Gotha Streets was developed for commercial and residential uses.

[2] By the community plan for the site,[2] four community development lots ("CDL 1, 2, 3 and 15") and one community property lot ("CPL 4") were created. By virtue of the registration of the community plan and the operation of s 15(1) of the *Mixed Use Development Act* 1993 ("MUD Act"), a community body corporate, Cathedral Place Community Body Corporate ("Cathedral Place CBC"), was also created.

[3] CPL 4, with which this litigation is concerned, was thereupon transferred automatically to Cathedral Place CBC. Initially, the company CPD was the owner of each of the community development lots. By virtue of its ownership of them all, initially it was the sole member of Cathedral Place CBC.[3]

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1 Duly approved by the Minister for Local Government and Planning and by the Brisbane City Council.

2 AB1043 Mixed Community Plan 106902 registered on 28 October 1998.

3 MUD Act ss 24(1); 167(1).

[4] As owner of it, Cathedral Place CBC became responsible for, and was able to make by-laws in relation to, the on-going management of CPL 4.[4] The lot occupies an area within the development, approximately at street level, and is accessible from Gotha Street. At all material times, it has been used as a car park.

[5] The principal frontage of CDL 2 is along Wickham Street. It was horizontally subdivided between the ground floor and the first floor into two community strata lots ("CSL 1 and 2").[5] CSL 2 was further subdivided by Building Units Plan 106957[6] into common property and individual lots. Registration of this building units plan also created a new body corporate, The Proprietors "Cathedral Village" Building Units Plan No 106957 ("Cathedral Village BC"). The individual lots were sold. They are used for a range of retail and other commercial purposes.

[6] CSL 1 and CDL 1, 3 and 15 were also subdivided by registration of separate building units plans. Each plan was referrable to a separate residential precinct within the overall development. Each created by registration its own body corporate, common property, and lots which were sold. Through this process CPD ceased to have an interest in the real property comprised in the project.

[7] Each of the bodies corporate created by registration of a building units plan became a member of Cathedral Place CBC in place of CPD. Thus, in respect of membership of the owner of CPL 4, whereas CPD had initially been the sole member of Cathedral Place CBC, once the subdivisions had been implemented, the members of that body corporate had become the respective bodies corporate created upon registration of the building units plans; and CPD had ceased to be a member of it.[7]

[8] CPL 4 is part of a car park floor, B1. The car park on this floor is comprised of CPL 4 and other areas, each one of which is common property for a building units plan, and some of which are contiguous with CPL 4. The common property for the Cathedral Village building units plan is itself used for four car parks on this level. There is a lower level car park floor, B2, where it has common property which is used for two additional car parks.

[9] An arrangement of easements affords access for CPL 4 to and from Gotha Street via a boom gate entry. This entry point provides access to an area on the floor which is comprised of part of CPL 4 and common property for three of the building units plans, including the Cathedral Village building units plan. The other two are the Oxford and Cambridge building units plan and the Notre Dame building units plan. This area is separated from the other car parking areas on the floor partly by a fence and partly by bollards and chains. The other areas have their own boom gate entry point.

[10] Two of the easements are of some relevance to these proceedings. They are registered Easements R and S. Both are within the separate car park area and are given over part of the common property of the "Notre Dame" building units plan. The dominant tenement for each is CPL 4. The easements are granted for the purpose in clause 3 of the Schedule to the registered instrument. The purpose of each easement is stated in clause 3 to be "of a right of way".

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4 MUD Act s 15(4).

5 By MSP 106904 registered on 29 October 1998.

6 The Cathedral Village building units plan registered on 9 March 1999.

7 MUD Act ss 24(4); 167(2).

The current dispute

[11] Ownership of a lot in the Cathedral Village building units plan does not confer on the owner a right to use any of the car parks. However, as those lots were marketed by the developer, representations were made to purchasers that they would have unallocated car spaces available to them on the car parking floors in a number proportionate to the area of the commercial units purchased. Moreover, in contractual documents entered into between CPD and purchasers of the lots, the company agreed to procure the benefit of at least 55 car parks to Cathedral Village BC "by either exclusive use easement or other mechanism at the Seller's discretion".[8]

[12] The mechanism which CPD chose for its intended purpose for fulfilling its contractual obligation was to cause Cathedral Place CBC to make a by-law in November 2000. This by-law, By-Law 28, was additional to some 27 by-laws that had already been adopted by the body corporate. It conferred an entitlement on "the Proprietors 'Cathedral Village' 106959 and any person authorised by them" to use CPL 4. The text of this by-law and the circumstances in which it was made are detailed later in these reasons.

[13] At an extraordinary general meeting of Cathedral Place CBC held in June 2001, it was resolved that up to $65,000 be expended by it for the installation of a boom gate and ticket dispenser. This resolution facilitated the installation of the boom gate entry point to which reference has been made. From about July 2000, Cathedral Place CBC and Cathedral Village BC acted as if they had, about that time, agreed that the latter would reimburse to the former the cost of the installation of those facilities, manage and maintain the car park at its own cost and risk, and receive the income from parking tickets issued to users.

[14] The immediate source of the current dispute is that on 28 June 2010, a comprehensive resolution ("2010 resolution") was passed at an extraordinary general meeting of Cathedral Place CBC which purported to "delete" By-Law 28. By this date, of course, CPD had ceased to be a member of the body corporate. Each of the six body corporate members of Cathedral Place CBC was represented at the meeting. Five of them voted in favour of it. The representative for Cathedral Village BC voted against it.[9]

[15] There is no issue that this resolution was made in compliance with the provisions in the MUD Act for making community property by-laws by comprehensive resolution. Subject to compliance with other provisions relating to amendment and repeal of certain types of by-laws referred to later the resolution will have had the legal effect of rescinding the entitlement conferred by By-Law 28 on the proprietors of lots in the Cathedral Village building units plan and those authorised by them to use CPL 4. Those owners are aggrieved by the potential loss of convenient car parking facilities which they, their employees, clients and customers and suppliers, have enjoyed under the by-law since this commercial precinct in the development was ready for occupation.

The proceedings

[16] On 19 August 2010, proceedings with respect to the 2010 resolution were commenced in the Supreme Court by Cathedral Village BC in its capacity as

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8 AB 1470; Typical sale of contract clause 46.

9 AB 1753.

a member of Cathedral Place CBC. During the course of the proceedings, all owners of lots in the Cathedral Village building units plan joined as plaintiffs. The defendants were Cathedral Place CBC and the two other body corporate members of Cathedral Place CBC whose common property is within the separate area of the car park which includes CPL 4. The relief sought by the plaintiffs consisted of an injunction to restrain implementation of the resolution and a declaration against its validity. The plaintiffs, other than Cathedral Village BC, also sought grant of a statutory right of user of CPL 4 pursuant to the provisions of s 180 of the *Property Law Act* 1974 ("PL Act"), in the alternative.

[17] The plaintiffs' attack on the validity of the 2010 resolution was centred upon the operation of certain provisions in Division 1 of Part 10 of the MUD Act which are concerned with community property by-laws. Separate arguments that registration of By-Law 28 had created an indefeasible registered interest in favour of Cathedral Village BC in CPL 4 and, alternatively, that Cathedral Village BC had acquired an irrevocable proprietary interest in CPL 4 on equitable principles, were also advanced to impugn the validity or effectiveness of the resolution.

[18] The proceedings were tried during 2012. Reasons for judgment were delivered on 5 October that year. After further submissions on the form of orders and costs had been made, the learned trial judge made orders on 26 October 2012. All of the plaintiffs' claims were dismissed with costs. The court also made a series of declarations as had been sought by the defendants by way of counterclaim, the import of which is to affirm that By-Law 28 has been validly revoked.

The appeal

[19] On 14 November 2012, the plaintiffs filed a notice of appeal by which they have appealed against the orders and declarations. The respondent defendants filed a notice of contention on 3 December 2012. In summary, it advances a number of additional grounds for denying By-Law 28 the continuing efficacy that the appellant plaintiffs seek to attribute to it.

[20] Whilst the stated grounds of appeal and the written submissions canvass the range of issues considered at trial, at the hearing counsel for the appellants addressed two categories of them only, namely, those relating to the characterisation of By-Law 28 for the purposes of the common property by-laws provisions in the MUD Act of which mention has been made, and that relating to the s 180 issue.

[21] It is appropriate at this point to detail By-Law 28 itself and the circumstances in which it was made.

By-Law 28

[22] By-Law 28 was made at a meeting of Cathedral Place CBC held on 29 November 2000. The evidence tendered at trial did not establish that a notice of meeting had been given for it. The minutes of the meeting[10] record that it was held at the office of Stewart Silver King & Burns (Brisbane) Pty Ltd at 10.30 am. Mr Bill Ritchie who signed the minutes as chairman, was present. He was an employee of CPD. He was also representative of each of the body corporate members of Cathedral Place CBC, including Cathedral Village BC. It was in his representative capacity he attended the meeting. Thus he was the only individual who participated in it.

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10 AB 1233-4.

[23] The business transacted at the meeting is recorded in the minutes as follows:

> "1. **Minutes**
>
> **Resolved** that the meeting of the Extraordinary General Meeting held on 20th March 2000 be confirmed as a true and correct record of the proceedings of that meeting.
>
> 2. **Amendment to By-laws – Adopt New By-law 28**
>
> **Resolved by Comprehensive Resolution** that the Body Corporate adopt a new by-law number 28 as set out below and that the Body Corporate's Solicitors be authorized to take all steps required to bring the by-law into effect.
>
> '**28. Restricted Community By-law**
>
> (a) **Application of By-Law**
>
> This By-law applies to the Visitor Carpark designated on the plan attached to this By-law ("Visitor Carpark"). Part of the Visitor Carpark is Community Common Property and part of the Visitor Carpark is Common Property for the subsidiary body corporate known as "Notre Dame". The by-law applies to the portion on the Visitor Carpark that is on Community Common Property. The by-law is intended to apply to that portion of the Visitor Carpark that is Common Property for Notre Dame on registration of an easement from the proprietors Notre Dame BUP 106911 granting the benefit of that area to the Community Body Corporate for carparking purposes.
>
> (b) **Persons Entitled to Use**
>
> The persons entitled to use the Visitor Carpark are the Proprietors "Cathedral Village" 106957 and any person authorized by them, all of whom are individually and collectively referred to as "Authorised Persons".
>
> (c) **Conditions of Use**
>
> The Proprietors Cathedral Village BUP 106957 must ensure that the Visitor Carpark is used:-
>
> (i) only for purposes ancillary to the Mixed Use Development of Cathedral Place;
>
> (ii) in a manner that complies with the by-laws form (sic) time to time for the Cathedral Place Community Body Corporate.
>
> (c) **Maintenance**
>
> The Proprietors "Cathedral Village" BUP 106957 must maintain the Visitor Carpark in a state similar to the other carparking areas on the common property for the Cathedral Place Community Body Corporate."[11]

[11] AB 1233-4.

[24] This minute records that the resolution to adopt By-Law 28 was passed as a comprehensive resolution. In evidence, Mr Ritchie confirmed that it was passed as a comprehensive resolution.[12]

[25] On 11 December 2000, the solicitors for Cathedral Place CBC submitted the by-law for ministerial approval advising that the body corporate had "by comprehensive resolution made:

> "1. Community Property By-Laws pursuant to Section 206 of the Mixed Use Development Act 1993."[13]

[26] The ministerial approval sought was that under s 206(2) of the MUD Act which provides that a community property by-law does not have effect until the Minister approves it and notification of the approval is published in the Gazette. The Minister duly approved By-Law 28 on 17 January 2001. The approval, in the following terms, was published in the Gazette on 8 March 2001:

> "Approval of Amendments of Planning Schemes
>
> 3. The Minister approved on 17 January 2001, the Community Property by-law made by the Cathedral Place Community Body Corporate for the Cathedral Place Mixed Use Development Scheme under Section 206 of the said Act."[14]

[27] The registrar of titles was notified of the approval by the Minister.[15] It is common ground that details of By-Law 28 were recorded on the community plan and noted on the title of Cathedral Place CBC to CPL 4 in the register on 1 September 2003.[16] However, the recording on the register of the by-law, whether characterised as made under s 206 or s 206A, would not have conferred indefeasibility on the entitlement thereby granted to the grantee. As the learned trial judge observed,[17] s 184 of the *Land Title Act* 1994 confers indefeasibility on the registered proprietor of an interest in a lot. The entitlement to use ostensibly granted by the by-law was not a proprietary interest in land; nor was it registered on the title as such.

[28] By-Law 28 refers to a plan attached to it which designates a "Visitor Carpark" area. It may be assumed for present purposes, as it was for the purposes of argument of the appeal, that the plan referred to in the minute, is the plan, a copy of which appears at p 1235 of the Appeal Record. On that plan, the designated area is hatched. It is the same area as is described at paragraph 9 of these reasons, as being the separate car park on level B1 which comprises part of CPL 4 and common property of three of the other bodies corporate. It is identified as "Visitor Carpark" on the plan.

[29] From paragraph (a) thereof, it appears that By-Law 28 was intended to apply to parts only of the Visitor Car park area, namely that part of CPL 4 as was within it

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12 AB 177 Tr3-6 LL23-28.

13 AB 829.

14 AB 834.

15 See ss 206A(10), (11). Why this notification was given is not illuminated by the evidence. Quite possibly it occurred administratively because of the words, "Restricted Community By-Law" at the heading of By-Law 28, notwithstanding that it was approved as a community property by-law.

16 AB 1044.

17 Reasons [17].

and the common property for the Notre Dame building units plan. In the case of the latter, the by-law was to apply to it only upon the registration of an easement from the proprietors of the Notre Dame building units plan granting the benefit of that area to Cathedral Place CBC for car parking purposes.

[30] Had such an easement been registered, this litigation might have put in issue the lawfulness of the by-law in so far as it purported to apply to the common property of the Notre Dame building units plan. However, there is no evidentiary basis from which a finding could have been made that such an easement had ever been registered. Easements R and S, considered singularly, or together, do not answer that requirement. They apply to part only of the common property. Moreover, they are not expressed to be for "car parking purposes".

[31] Terminology used in By-Law 28 and the language in which the by-law is cast give rise to several interpretative issues. First, the expression "The Proprietors "Cathedral Village" 106957" is apt to describe collectively the lot owners in the Cathedral Village building units plan. Notwithstanding, the context in which it is used in the by-law in imposing conditions of use and a maintenance obligation suggests that the intended beneficiary of the by-law was the single corporate entity, Cathedral Village BC. Furthermore, despite that the entitlement conferred by the by-law is not expressed to be an exclusive one, it is open to inference from the conditions of use and the maintenance obligation that the by-law was intended to confer such an entitlement over the area to which it was to apply on the intended beneficiary and those authorised by it or them. However, having regard to the conclusions we have reached on the characterisation of By-Law 28, it is not necessary to resolve either of these two issues.

The characterisation of By-Law 28 grounds

[32] At all times material to these proceedings, s 206 in Division 1 of Part 10 of the MUD Act has authorised a community body corporate to make by-laws, for the "control, management, administration, use or enjoyment of the community property". It might do so by a comprehensive resolution: s 206(1). A comprehensive resolution is defined in s 3 of that Act to mean a resolution:

> "(a) that is passed at a properly convened meeting of the body corporate; and
>
> (b) for which the members that vote in favour have not less than 75% of the voting entitlements recorded in its body corporate roll."

[33] Section 206A of the MUD Act relates to a particular type of by-law that might be made by a body corporate under s 206. It is a by-law that "restrict(s) the use of any part of the community property" in any one of some eight ways which are set out in s 206A(1). This type of by-law is called a restricted community property by-law. Such a by-law may only be made by resolution without dissent: s 206A(2). A resolution without dissent is defined in s 3 to mean a resolution:

> "(a) that is passed at a properly convened meeting of the body corporate or committee; and
>
> (b) against which no vote is cast."

[34] By virtue of s 172(9) of the MUD Act, Part 2 of Schedule 2 to the *Building Units and Group Titles Act* 1980 ("BUGT Act") applies to meetings of a community body corporate (other than its first annual general meeting), and to voting at such meetings. Section 1(2A)(d) of Schedule 2 requires that notice of a general meeting be served and that it set forth the business of the meeting and, in respect of each motion to be considered, specify whether it requires "a resolution, special resolution, resolution without dissent or unanimous resolution". Significantly, s 14 thereof has at all relevant times provided:

> "A unanimous resolution, resolution without dissent or special resolution of a body corporate may not be amended or revoked except by a subsequent unanimous resolution, resolution without dissent or special resolution, as the case may be."

[35] It is quite clear that s 14 is to be read distributively. Thus, a resolution without dissent may be amended or revoked by a resolution without dissent only. The expression "resolution without dissent" is defined by s 7 of the BUGT Act in materially the same terms as the definition given for it by s 3 of the MUD Act.

[36] The issue of characterisation of By-Law 28 arises in this way. If (as the appellants contend) it was made as a restricted community property by-law under s 206A, then it need have been made by a resolution without dissent. As such, it could be revoked only by a resolution without dissent: s 14. It will be recalled that the 2010 resolution was passed as a comprehensive resolution. Although, on the evidence, it appears that the resolution to adopt By-Law 28 was neither proposed, nor passed, as a resolution without dissent, the appellants contend that it was, or was also, a resolution without dissent as defined in s 3. That follows, they submit, because no vote was cast against it. If By-Law 28 was validly made as a restricted community property by-law, then the 2010 resolution will have failed to revoke it.

[37] However, if (as the respondents contend) By-Law 28 was made under s 206 but not as a restricted community property by-law under s 206A, then the 2010 resolution will have been effective to revoke it. Part 2 of Schedule 2 does not contain any impediment to the revocation by a comprehensive resolution of a community property by-law made by comprehensive resolution.

[38] It is therefore necessary to decide how By-Law 28 is to be characterised. In that regard, particular attention needs to be paid to whether or not it was made by a resolution without dissent for the purposes of s 206A and s 14.

[39] It is critical to the appellants' contention that By-Law 28 is a restrictive community property by-law that it have been made by resolution without dissent as required by s 206A(2). We turn first to consider that matter. In our view, the conclusion reached on it is determinative of the issue whether the by-law was validly revoked or not.

[40] There is a substantial body of direct evidence that the motion to adopt By-Law 28 was passed as a comprehensive resolution. As noted, the minutes record that and Mr Ritchie's evidence corroborates it. Whether it was also passed as a resolution without dissent will depend upon the meaning that that expression has in s 206A(2).

[41] Section 3 of the MUD Act contains the definitions for "comprehensive resolution" and "resolution without dissent" to which reference has been made, and also a definition for the term "unanimous resolution". Part 2 of Schedule 2 requires any

notice of a general meeting of a body corporate to set forth whether a motion to be carried requires a resolution, special resolution, a resolution without dissent or a unanimous resolution.[18] The motion may not be submitted at the general meeting unless notice of it has been given in accordance with the section.[19] Entitlement to vote may vary according to whether a motion is one that requires a unanimous resolution or not.[20] These provisions, together with the provisions in the MUD Act which require a specific type of resolution to carry a motion on specified topics - of which ss 206(1) and 206A(2) are examples, forcefully indicate that each of the definitions of a type of resolution in s 3 is intended to be read as applying only to a resolution that is duly notified and passed as a resolution of that type by the meeting. That is to say, for example, a resolution will be a resolution without dissent only if it is notified as requiring a resolution without dissent and is passed as such.

[42] Moreover, this interpretation would preclude the circumstance that the same resolution might be classified as a unanimous resolution, a resolution without dissent and also a comprehensive resolution. Given the extent to which both Acts distinguish between different types of resolutions, it is most unlikely that the possibility of that circumstance would have been intended.

[43] These features of Part 2 of Schedule 2 also indicate that when s 14 speaks of a type of resolution being capable of amendment or revocation by a resolution of that type only, it intends to refer to a resolution which has been notified and passed as such. Thus, whilst s 14 provides that a resolution that has been notified and passed as a resolution without dissent may be amended or revoked by a resolution without dissent only, that stricture does not apply to a resolution which is notified and passed as a comprehensive resolution even though it might have been passed at a meeting with no vote against it.

[44] The appellants have not identified any evidence which proves that By-Law 28 was notified as requiring a resolution without dissent or that the resolution to adopt it was passed as a resolution without dissent. To the contrary, the evidence indicates that the resolution to adopt it was passed as a comprehensive resolution. In these circumstances, this Court cannot conclude that the resolution to adopt By-Law 28 was effective to adopt it as a restricted community property by-law under s 206A nor can it conclude that a resolution without dissent was required by s 14 to revoke it. By-Law 28 was validly made as a community property by-law by a comprehensive resolution. The 2010 resolution was therefore effective to revoke it. The learned trial judge so concluded.[21] His Honour's conclusion is correct, in our view.

[45] A number of other arguments were advanced by the parties with respect to characterisation of the by-law. They focused upon whether or not it answered the statutory description of a s 206A restricted community property by-law. Although the fate of this issue does not depend upon success on the respondents' part on any of them, it is appropriate that they be noted and addressed briefly.

[46] At the time that By-Law 28 was made, s 206A(1) provided:

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18 Section 1(4)(d).
19 Section 1(7).
20 Section 2(6).
21 Reasons [44].

> "**206A.(1)** The community body corporate may make by-laws under section 206 that restrict the use of any part of the community property (**"restricted community property"**) to—
>
> (a) a member of the community body corporate; or
>
> (b) a body corporate created by the registration of a building units or group titles plan; or
>
> (c) a proprietor of a lot created by the registration of a building units or group titles plan; or
>
> (d) a precinct body corporate; or
>
> (e) a member of a precinct body corporate; or
>
> (f) a proprietor of a lot created in a staged use precinct by the registration of a building units or group titles plan; or
>
> (g) a lessee or occupier of a lot within the site; or
>
> (h) someone else while the person is engaged in construction works in the site or in a future development area or subsequent stage."

[47] For the respondents, it was submitted that in a number of respects, By-Law 28 was not a by-law of a type that might be made under s 206A. First, it was argued that By-Law 28 was not restrictive of the use of common property to any category of persons listed in the section. The respondents relied on the absence from the by-law of any express conferment of an exclusive right of user, submitting that the heading to the by-law, "Restricted Community By-Law" did not, of itself, cloak the grant with a restriction against use by others.[22] However, as is noted at paragraph 31 of these reasons, other features of the by-law are capable of grounding an inference that the grant of an exclusive right of user was intended. This argument would avail the respondents only if that inference were not drawn.

[48] Secondly, in so far as the by-law purported to confer on persons authorised by the Proprietors "Cathedral Village" 106957 an entitlement to use the Visitor Car park, it would have conferred an entitlement on persons who did not fall within any of the eight categories listed in s 206A(1). It is accurate to say that none of those categories would accommodate as potentially broad a class of persons as those authorised by the Proprietors. There is merit in the respondents' submission that on this account, By-Law 28 could not have qualified as a restricted community property by-law.

[49] Thirdly, the respondents argued that it was improbable that the by-law was intended to give exclusive use to Cathedral Village BC since that would mean that individual

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[22] Contrast By-law 25 (AB 1194) which authorises Cathedral Place CBC to allocate the exclusive use of car parking spaces and which that body corporate exercised in respect of other areas (AB 1208-1223).

lot owners in the Cathedral Village building units plan would have to secure authorisation from their own body corporate before being able to use the car park. This argument is unpersuasive. It was open to the lot owners as members of the body corporate to ensure the adoption by it of suitable arrangements for the use by them of the car park.

[50] The learned trial judge considered each of these arguments to be valid.[23] He observed that had he held that By-Law 28 was made under s 206A, he would have held it to be invalid as a restricted community property by-law on account of these arguments.[24] For these reasons given in the preceding three paragraphs, we agree with his Honour's conclusions with respect to the second of them but have reservations with respect to the first and third of them.

Section 180 ground

[51] In their further amended statement of claim, the plaintiffs, other than Cathedral Village BC, pleaded that "it is reasonably necessary in the interests of the effective use of the carpark" that they or the registered owners of the commercial lots from time to time should have "a statutory right of user in respect of the carpark in perpetuity, subject only to termination by (Cathedral Place CBC) pursuant to a resolution without dissent."[25] On the footing of that allegation, those plaintiffs sought to invoke the jurisdiction conferred on the Supreme Court by s 180 of the PL Act to impose a statutory right of user in those terms.

[52] The plaintiffs supported their claim to the right with evidence in the form of a draft By-Law 30.[26] Additional affidavit evidence indicated that were the statutory right granted, then Cathedral Place CBC would adopt the by-law. Its purpose would be to regulate the operation, control and maintenance of the Visitors Car Park. The area designated as the Visitors Car park on the plan in Annexure A to this draft by-law equates to the whole of the hatched area on the plan attached to By-Law 28 (referred to in paragraph 28 of these reasons) reduced by some nine car parks at the western end of it which would be made available for trade vehicles and a loading zone.

[53] Section 180 provides as follows:

> "(1) Where it is reasonably necessary in the interests of effective use in any reasonable manner of any land (***the dominant land***) that such land, or the owner for the time being of such land, should in respect of any other land (***the servient land***) have a statutory right of user in respect of that other land, the court may, on the application of the owner of the dominant land but subject to this section, impose upon the servient land, or upon the owner for the time being of such land, an obligation of user or an obligation to permit such user in accordance with that order.
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> (2) A statutory right of user imposed under subsection (1) may take the form of an easement, licence or otherwise, and may be declared to be exercisable—

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23 Reasons [28]-[31], [34], [35].

24 Reasons [37].

25 AB 2584.

26 Exhibit 25 AB 2115-2128 tendered at AB 373.

(a) by such persons, their servants and agents, in such number, and in such manner and subject to such conditions; and

(b) on 1 or more occasions; or

(c) until a date certain; or

(d) in perpetuity or for some fixed period;

as may be specified in the order.

(3) An order of the kind referred to in subsection (1) shall not be made unless the court is satisfied that—

(a) it is consistent with the public interest that the dominant land should be used in the manner proposed; and

(b) the owner of the servient land can be adequately recompensed in money for any loss or disadvantage which the owner may suffer from the imposition of the obligation; and

(c) either—

(i) the owner of the servient land has refused to agree to accept the imposition of such obligation and the owner's refusal is in all the circumstances unreasonable; or

(ii) no person can be found who possesses the necessary capacity to agree to accept the imposition of such obligation."

[54] It may be seen at once that the appellants' reference in their pleading to effective use of the car park was misplaced. The appropriate reference for the application of s 180 in this context, is effective use of the appellants' respective lots in Cathedral Village. The appellants' submissions on appeal adopted that reference.

[55] It is common ground that the principles summarised in *Lang Parade Pty Ltd v Peluso*[27] and restated by the learned trial judge[28] guide the determination of whether it is reasonably necessary in the interests of the effective use in any reasonable manner of the dominant land that it, or its owner from time to time, should have a statutory right of user in respect of the servient land. It is unnecessary to restate those principles here.

[56] His Honour accepted a number of submissions made by the respondents to the effect that reasonable necessity in terms of s 180(1) had not been established and that, in any event, the discretion conferred by the section ought not be exercised. He summarised those submissions and made observations with respect to the application of the provision as follows:

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27 [2006] 1 Qd R 42 at [23].

28 Reasons [61].

"[62] It is not a remedy apt to be applied to enforce the creation of a car park for the holders of units in a particular part of a development such as this over the community property of another body corporate in the same development for what appears to be a claim to permit the unit holders to park permanently. The defendants made a number of submissions which appear to me to be insuperable, namely:

(a) the section is not designed to assist in creating a licence or lease over land for exclusive car parking rights;

(b) the evidence does not establish that it is reasonably necessary for the effective use of the units that such a right be imposed over the car park, rather only some of the unit holders gave evidence that it was highly desirable for the businesses they ran from their units to have convenient car parking;

(c) as to that factual issue the defendants argued that the evidence of the existence of delivery bays on the property and a proposal by Cathedral Place CBC to pass a new by-law permitting deliveries within the car park to the units in Cathedral Village and creating additional delivery bays as well as the evidence of the availability of other commercial car parks nearby made the issue one not of reasonable necessity but simply convenience of the unit holders;

(d) no evidence established that it was consistent with the public interest[29] to use the car park in the manner proposed, as opposed to the interests of the individual unit owners;

(e) the development approval required the area to be used for patrons of the retail/commercial area and visitors of residents only, not for use by proprietors of units exclusively;

(f) no evidence was led to show that there had been an unreasonable refusal by Cathedral Place CBC to agree to accept the imposition of such an obligation pursuant to s 180(3)(c), having regard to the wish of that body to maintain access to the car park for other unit holders in it, the other bodies corporate and visitors;

(g) the imposition of the obligation would be inconsistent with the legislation governing the community property of Cathedral Place CBC and the common property of the other defendants by which

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[29] See s 180(3)(a).

> those bodies corporate are obliged to manage their common or community property for the benefit of their members, rather than surrendering its control to the members of Cathedral Village.
>
> [63] It also seemed to me to be inappropriate to use this remedy in this situation where the legislature has already created a complex statutory scheme for the regulation of bodies corporate. Decisions dealing with car parking are are (sic) intended to be made pursuant to those relevant statutes and the bodies corporate have been empowered to deal with community property in precisely regulated circumstances. For these reasons it would be quite inappropriate to use the remedy provided by s 180 in favour of those plaintiffs."

[57] We agree that it was correct for his Honour to refuse relief under this section. Some only, and well short of a majority, of the lot owners testified. The evidence of a number of them was somewhat diminished in cross-examination. However, at the highest, there was sufficient evidence to find in respect of two lot-owners[30] that concerning the uses with which they are associated, there is need for the provision of some parking in close proximity to their respective lots. At an evidentiary level, the plaintiffs concerned did fail to prove that it was reasonably necessary in the interests of effective use of the lots in the Cathedral Village building units plan, to impose a statutory right of user over as extensive an area as the Visitors Car park area in Annexure A to the draft by-law. The evidentiary failure on this account was sufficient in itself to justify refusal of the relief sought.

[58] However, we would not accept in totality all of the submissions made on behalf of the respondents listed by his Honour in paragraphs 62 of his reasons. We make the following observations in respect of those which we would accept in part or reject.

[59] The learned trial judge accepted a submission made on behalf of the respondents to the effect that the development approval required the area over which the appellants sought the imposition of a statutory right of user, to be available for use by patrons of the retail/commercial area and visitors and residents only; and not for use exclusively by proprietors of units.[31] That finding was relied upon by the respondents in the appeal. For the appellants it was submitted that inconsistency with the planning approval was not the subject of evidence; and that the effect of the finding was questionable. It was submitted by them that the right which they sought was consistent with condition 37 of the development approval[32], with reliance being placed upon a letter from the Brisbane City Council dated 1 July 2010.[33]

[60] The draft By-Law 30 demonstrates an intention to comply with the requirements of the development approval. It also makes clear that part of the area in respect of which the relief was sought was to be made available to visitors. However, under it, another part of the same area is to be "allocated" for the benefit of the occupiers of lots, including lots in the Cathedral Village building units plan.[34] The evidence led

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30 Mr Warren and Mr Rabone.

31 Reasons [62](e).

32 Approved on or about 24 September 1998 AB 1863-1902.

33 Exhibit 1 document B54 AB 926-7; also AB 34-36, Tr1-34-1-36.

34 Exhibit 25 clause 30.6 and the definitions therein.

in support of the application under s 180 demonstrated an intent, in a number of cases, that those who conducted businesses in Cathedral Village would have exclusive use of at least some of the car parks.

[61] Condition 37 of the development approval[35] required that this area not be used as a public car park for purposes other than ancillary to the approved development and that notices be displayed stating that the public parking area "is for patrons of the retail/commercial area and visitors of residents only". It was not submitted on the appeal that condition 37 was ineffective or that the public parking area to which it refers was not the area in respect of which relief was sought under s 180.

[62] The language of condition 37 is not without its difficulties. However, it appears to be drawn on the basis that the designated area would be used as a public car park and to require that area to be used only for purposes ancillary to the development the subject of the development approval. It then specifies how the area was to be so used by requiring notices limiting the use of the car park to patrons of the retail/commercial area and visitors of residents only.

[63] Non-compliance with condition 37 would have risked contravention initially of s 3.5.28 of the *Integrated Planning Act* 1997 and later of s 245 of the *Sustainable Planning Act* 2009.[36] Thus, to the extent that the draft By-Law 30 would permit the exclusive use of some of the parking by the occupants of lots in the Cathedral Village building units plan, we would accept the submission of the respondents and uphold the finding of the learned trial judge.

[64] It need be said that the reliance by the appellants on the letter of the Brisbane City Council dated 1 July 2010 is misplaced. The effect of a condition of a development approval is a matter to be determined by a court and not by an officer of a local government. In any event, the letter indicates that the exclusive use by owners or tenants of those commercial lots is inconsistent with the condition.

[65] Next the respondents' submission that s 180 is not designed to assist in creating a licence or lease over land for exclusive car parking rights cannot be accepted. The section is a remedial statutory provision intended to confer on a court a discretion by which a right might be granted to enable the effective use of land in a reasonable manner. Conditions which must be established to enliven the discretion and the circumstances of which the court must be satisfied before exercising it are expressly identified in the section. Sub-section (2) indicates that the right which might be granted is not limited to interests in land or rights in relation to land according to the doctrines and principles of the general law. There does not appear to be anything within the section which would justify the conclusion that the imposition of an exclusive right to use land for car parking is beyond its intended scope.

[66] The respondents' additional submission that the imposition of a statutory right of user would be inconsistent with the scheme of regulation found in the BUGT Act does not withstand scrutiny. That Act is intended to enable the subdivision of land in such a way that owners of lots thereby created would have rights in common in respect of some of the land. It was necessary for that Act to include provisions about the regulation and alteration of such rights. That circumstance does not, however, lead to a conclusion that relief under s 180 is not available over land

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35 AB 1898.

36 This Act replaced the *Integrated Planning Act* 1997.

subdivided under the BUGT Act. Indeed, it is not difficult to conceive (particularly in a group title development) of a situation where the effective use of one lot in a reasonable manner would necessitate some right over another lot in the development. Moreover, since relief under s 180 is available in respect of land in which the applicant has no interest, the provision has a potential scope for operation in circumstances which might not be capable of being adequately catered for by rights created under the BUGT Act. These considerations militate against a conclusion that such relief is not available in respect of common property.

[67] It might also be observed that the conclusion of the learned trial judge about the availability of such relief in respect of land which has been subdivided under the BUGT Act would seem to be applicable only in respect of that part of the car park as is within CPL 4. Whilst they do own lots in the Cathedral Village units plan, the appellants concerned have no relationship with the Oxford and Cambridge or Notre Dame building units plans which might be capable of being regulated under the BUGT Act. It is therefore difficult to infer that the BUGT Act was intended to prevent relief being granted to them over common property of a building unit development in which they have no interest.

[68] It is also of some significance that at the time when s 180 was enacted, there were already in force in Queensland two other Acts providing for the creation, and regulation of the use, of common property.[37] Neither of those statutes was referred to in s 180 as exceptions from its purview.

Other issues

[69] Two other issues warrant brief mention. One arises in the appellant's case; the other from the notice of contention.

[70] In the alternative to a right under By-Law 28, the appellants claim to have an equitable interest in the car park relying on the doctrine of proprietary estoppel. This claim was rejected by the learned trial judge.[38] His Honour was not satisfied that expenditure of money on the car park by Cathedral Village BC was made on the understanding, express or implied, that it or the other appellants would thereby acquire a proprietary interest in the car park. He also considered it relevant that, as he found, the money which that entity had expended on the car park had been recouped by it from the parking fees. The appellants have not shown that his Honour erred in making either of these findings with respect to fact.

[71] In so far as the appellants have, in this context, sought to rely on contractual promises made by the developer, CPD, they are unavailing because:

(a) they were not made to Cathedral Village BC, the only appellant entity to have expended money on the car park;

(b) the promisor was the developer and not Cathedral Place CBC or any other respondent; and

(c) the promise was not that the buyer of a lot would acquire a proprietary interest in the car park.

The claim to an equitable interest or interests in the car park was rightly rejected.

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37 *Building Units Title Act* 1965 and *Group Titles Act* 1973.

38 Reasons [59].

[72] The respondents also sought to impugn By-Law 28 as a fraud on the power of Cathedral Pace CBC to make a by-law. It was argued that the power had been exercised for the sole purpose of fulfilling CPD's contractual obligations to purchasers of lots in Cathedral Village and that, on that account, it was exercised improperly. This argument had been advanced at trial. The learned trial judge considered it[39] but declined to determine whether the licence which, in his view, By-Law 28 had created in favour of Cathedral Village, had been created by a fraudulent exercise of power. His Honour considered that it was unnecessary for him to make the determination given that he had already determined that By-Law 28 had been validly revoked.

[73] For similar reasons, we consider it unnecessary to decide that issue in this appeal. It is unnecessary for the respondents to rely on the argument to sustain the judgment at first instance in their favour.

Disposition

[74] For these reasons, we conclude that this appeal fails and that the appropriate order is that it be dismissed.

Orders

[75] We would propose the following orders:

1. Appeal dismissed.
2. Subject to any submissions on costs made in writing within seven days of today, the appellants pay the respondents' costs of and incidental to the appeal.

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39 Reasons [45]-[55].