SUPREME COURT OF QUEENSLAND

CITATION:	*Zhang and Wu v South Sky Investments Pty Ltd and Anor* [2011] QSC 367
PARTIES:	**JOHN HAI ZHANG AND HONGYI WU** (applicant) **v** **SOUTH SKY INVESTMENTS PTY LTD** **ACN 097 092 709 (as receivers and managers appointed)** (first respondent) **"THE ORACLE" TOWER 2 BODY CORPORATE SCHEME 41740** (second respondent)
FILE NO:	BS 4215 of 2011
DIVISION:	Trial
PROCEEDING:	Civil
DELIVERED ON:	2 December 2011
DELIVERED AT:	Brisbane
HEARING DATE:	1 September 2011
JUDGE:	Fryberg J
ORDERS:	**1. Application dismissed;** **2. Applicant to pay the respondents costs on the indemnity basis; and** **3. Applicant given leave to appeal so much of the order for costs as awarded on the indemnity basis.**
CATCHWORDS:	Conveyancing – Statutory obligations or restrictions relating to contract for sale – Protection of purchasers – Prescribed statement by original proprietor of lot in strata or related plan – Alleged common mistake – Material prejudice – Typographical error on proposed community management statement – Validity of by-law – *Body Corporate and Community Management Act 1997, s 217, s 214* *Body Corporate and Community Management Act 1997,* s 10, s 24, s 52, s 53, s 59, s 60, s 66, s 212A, s 213, s 214, s 215 *Land Title Act 1994,* s 115L *Australia Estates Pty Ltd v Cairns City Council* [2005] QCA 328, cited *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2002] EWCA Civ 1407; [2003] QB 679, cited

Hong Kong Fur Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd [1961] EWCA Civ 7; [1962] 2 QB 26, cited
Mirvac Queensland Pty Ltd v Wilson [2010] QCA 322, cited
Taylor v Johnson [1983] HCA 5; (1983) 151 CLR 422, distinguished
Tillmans Butcheries Pty Ltd v Australian Meat Industry Employees' Union [1979] FCA 85; (1979) 42 FLR 331, cited

COUNSEL: P A Kronberg for the applicant
J McKenna SC and J M Horton for the first respondent
R J True (solicitor) for the second respondent

SOLICITORS: WWS Lawyers for the applicant
Allens Arthur Robinson for the first respondent
Mallesons Stephen Jaques for the second respondent

[1] **FRYBERG J:** The applicants want to get out of a contract to buy an apartment, and to get their deposit back. They seek a declaration of invalidity of the contract and an order for the payment out of court of the deposit monies. At the outset of the hearing, they abandoned an earlier claim that they had validly terminated the contract for breach. Although their written submissions raised a number of issues, they informed the court that they relied only on common mistake and s 217 of the *Body Corporate and Community Management Act 1997*.

[2] The facts are not in dispute.

The negotiations

[3] The applicants are husband and wife. Toward the end of 2007 they were interested in purchasing a two-level penthouse apartment at the Gold Coast for vacation purposes. Among a number of factors which were important to them was the existence of a private lift for access between the two levels. They inspected many apartments before deciding upon a penthouse in a development called Oracle Tower 2. It was listed for sale for $5.5 million. It had not yet been built, but the developer, South Sky, provided them with plans. These showed that the building was to contain two penthouses, each occupying half of level 40 and a substantial portion of level 41 and designated at that time as units CC and DD respectively. Living accommodation was on the lower level. Much of the upper level was occupied by building machinery, but the balance comprised a pavilion, swimming pool and spa for each unit and a raised recreation deck.

[4] Access to level 40 from the ground was achieved by a bank of four lifts which also serviced lower floors. These lifts terminated at a lift lobby at level 40. Entry to each penthouse was through a door opening on to the lobby. Also opening on to the lobby was a lift which operated between level 40 and level 41 ("the penthouse lift"). On the upper level that lift opened into another lobby from which doors lead into the recreation area of each penthouse.

[5] The applicants tentatively decided to purchase unit CC, but they wanted some substantial modifications made to it. They paid a preliminary deposit of $55,000

and entered into negotiations with the developer through their solicitors. In October 2007 the developer agreed to a number of modifications at their request and they agreed to pay the cost of these, $100,000 plus GST, at the date of settlement. One of the modifications affected the penthouse lift. By letter dated 24 October, the developer wrote:

> "Subject always to any necessary architectural, engineering or Authority approvals that may be required, we advise that we raise no objection to the request by the Buyers for the following on-site building variations (Works) to be undertaken, at the Buyer's cost, to Lot 24001:
>
> (a) Provision for exclusive internal life access between the media room adjacent to the lift on level 40 (Annexure 'A') to the pavilion for area marked Unit CC on level 41 (Annexure 'B')."

[6] Whether by accident or design, one wall of the penthouse lift well butted up against a boundary wall of unit CC on both levels of the penthouse. The applicants through their solicitor asked the respondent to modify the plans to provide for the penetration of that wall on both levels and the insertion in the penetrations of lift entrances. This would provide them with direct access from inside unit CC to the interior of the upper level pavilion. That modification was duly made. It was an important modification to the applicants, in part it seems because they believed that the lift provided the only means of access between the two penthouse levels. That belief was incorrect; there were also stairs.

The Disclosure Statement and the Community Management Statement

[7] As might be expected, South Sky intended to establish a community title scheme under the *Body Corporate and Community Management Act 1997* for the building. Such a scheme is established when a plan of subdivision for identifying the scheme land is registered under the *Land Title Act 1994* and the Registrar records a Community Management Statement (CMS) for the scheme;[1] scheme land and the statement constitute the scheme.[2] The lots come into existence on the establishment of the scheme; until then they are proposed lots. The scheme land must consist of at least two lots.[3] Once the CMS takes effect, it is binding on lot owners[4]; until it is recorded (under the *Land Title Act*) it has no effect.[5] A purchaser obviously has a considerable interest in knowing what is in it.

[8] South Sky was not prohibited from entering into contracts of sale in respect of proposed lots before the tower was built. Before it did so, however, it was obliged to give the buyer a disclosure statement.[6] That was inevitably a very substantial document; the one which South Sky prepared for Tower 2 was, including the accompanying documents, 177 pages in length. It included a considerable amount of information and was accompanied by a number of documents as required by the

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1 Section 24.

2 Section 10(1).

3 Section 10(2).

4 Section 59.

5 Section 52.

6 Section 213(1).

Act. One of the accompanying documents was the proposed CMS.[7] If the proposed CMS had not existed[8] or the disclosure statement had not been given[9], purchasers could terminate any contract which had not already settled.

[9] The proposed CMS was 24 pages long (counting the attached plan). The first page was in a bar-coded form prescribed for recording under the Act in the Queensland Land Registry. The remainder comprised five schedules listed on the first page. As required by the Act, it identified the scheme land.[10] Panel 4 on p 1 provided:

> "**4. Scheme land**
> Description of Lot
> Lots # to # on SP 194241
> Lots # on SP 194241"

and specified the county and parish for both of the last two lines. The specific lots were not identified, I infer because it was intended to include them in an enlarged panel in the final version to be lodged in the Land Registry. Schedule A listed the lot entitlements, but only for lots 20101 to 22007. The omission of the remaining lots was of little consequence; sch B of the CMS, headed "Explanation of the development of scheme land", set out how the development would proceed. That schedule made it clear that the development was to be a staged development and that sch A listed only the 131 lots in stage 1. A complete list of all residential lots with their contributions and interests formed part of sch B, but it was made clear that those comprised in stage 2 were subject to change. The lot previously described as Lot CC was now numbered 24001; all of the lots in stage 2 were on plan 194266.

[10] Because South Sky did not propose to adopt the by-laws in the schedule in the Act, sch C in the proposed CMS stated, "The by-laws in schedule 2 of the Act will not apply to the Scheme and the following by-laws will apply."[11] The proposed bylaws were then set out. Two of those bylaws are presently relevant:

> "**50. Exclusive Use Area – Lift (Penthouse Purposes)**
> (a) The Occupiers of Lots mentioned in Schedule E under the heading **By-law 50 – Lift (Penthouse Purposes)** are entitled to the exclusive use of that part of the Common Property **(Penthouse Lift)** which is identified in Schedule E.
> (b) The following conditions apply to such use:-
> (i) the Penthouse Lift must only be used for the purpose referred to in Schedule E;
> (ii) the Benefited Owners are liable to:
> (A) keep the Penthouse Lift clean and tidy, in good repair and condition and properly maintained;
> (B) ensure Penthouse Lift maintenance is regularly carried out;

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7 Section 213(2)(e)(i).

8 Section 212A(3).

9 Section 213(6).

10 Section 10.

11 Section 66(1)(e)

(C) perform all the duties of the Body Corporate in respect of the Penthouse Lift including ensure that the Penthouse Lift are maintained to a standard commensurate to the standard of other facilities on the Common Property.

(iii) the relevant Owner and Occupier allowing the Body Corporate, the Committee and its properly appointed agents, access at all reasonable times to the Penthouse Lift for any proper purpose;

(iv) the Benefited Owners must contributed to all costs and expenses associated with the Penthouse Lift within 30 days of written demand from the Body Corporate. Such costs will be apportioned between the Benefited Owners based on the contribution lot entitlement of the Benefited Lots they own as a proportion of the total contribution lot entitlement of all the Benefited Lots.

(c) If an Owner or Occupier of a Lot does not carry out its responsibilities in accordance with this By-law ***50*** then the Body Corporate, and persons authorised by it, may enter upon the Penthouse Lift for the purpose of carrying out such responsibilities and the Owner will be liable for the costs incurred by the Body Corporate in that regard. Such costs must be paid on demand.

(d) In this By Law:

(i) **Benefited Owners** means the Owners of the Lots to which this By-law ***50*** attaches;

(ii) **Benefited Lots** means the Lots to which this By-law ***50*** applies.

…

54. Special Rights – Building Levels

(a) Occupiers and Owners of Lots on each level of the Building will have the special right over that part of Common Property consisting of the foyers on their respective levels ***(Special Areas)*** so that a security and access control system can ensure that only Authorised Persons may access that level.

(b) ***Authorised Persons*** are those who are:-

(i) Occupiers of a Lot on the relevant level;

(ii) invited by an Occupier or Owner of a Lot on the relevant level to visit them;

(iii) persons maintaining Common Property;

(iv) the Caretaker; and

(v) such other persons as the Committee decides, acting reasonably.

(c) The Body Corporate must carry out its duties (including maintenance and operating duties) in respect of the Special Areas. If there is any doubt about the location or extent of the Special Areas, the determination of the Chairman of the Body Corporate (or his nominee) (acting reasonably) will be final."

[11] By-law 50(b)(i) referred to sch E. That was a schedule to the CMS, not to the by-laws. It was entitled "Description of lots allocated exclusive use areas of common property". It dealt (or envisaged future dealing) with car parks and storage and with a lift for construction and other purposes, and it also contained the following:

Lot No.	Area	Purpose
By-law 50 – Lift (Penthouse Purposes)		
Lot 24001 on SP 194266	Area L1 on plan marked 'Area A'	Lift (Penthouse Purposes)
Lot 24002 on SP 194266	Area L1 on plan marked 'Area A'	Lift (Penthouse Purposes)

On the attached plan, two levels were shown, level 40 and level 41. On each area L1 was the area of the penthouse lift. Lot 24002 was the second penthouse.

The contract and the further statement

[12] By a contract dated 14 January 2008 South Sky sold proposed lot 24001 to the applicants for $5.6 million. The contract provided for payment of a deposit of $510,000 and I assume that this was duly paid.

[13] Before it entered into the contract South Sky gave the disclosure statement to the applicants.[12] The following special conditions were included in the contract:

> "2.2 The Seller will cause, at its cost, the following alterations to be made t the layout of the Lot by settlement:
>
> (a) provide for private and exclusive entry internal lift access between the media room adjacent to the left on level 40 (refer to Annexure A) and the pavilion area marked Unit CC on level 41 (refer to Annexure B);
>
> …
>
> 3. Penthouse Lift Access
> The Buyer acknowledges that:
>
> (a) By-Law 50 of the CMS applies to the Lot ***(Lift Bylaw)***;
>
> (b) the Lift Bylaw gives the owner of the Lot and the owner of proposed Lot 24002 exclusive use of Area L1;
>
> (c) by settlement, the Seller will cause the Lift Bylaw to be amended as outlined in Annexure C; and
>
> (d) if, in accordance with Clause 25.1, the Body Corporate grants Lease to the Seller (or any person nominated by it) the Lift Bylaw will be amended to permit the lessee of the Lease to use Area L1 to gain access to and from the roof of the Scheme Buildings for the sole purpose of transporting equipment or material that is physically impossible to transport via

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[12] As the applicants acknowledged in cl 16 of the terms of contract.

the stairwell. To remove doubt, the lessee of the Lease is not permitted to use Area L1 as a general access way.

4. Rooftop Lease
The Seller agrees that any Lease granted in accordance with Clause 25.1 will include a provision prohibiting the lessee of the Lease from using the leased area as a function area."

The applicants conceded that "exclusive" in cl 2.2(a) did not mean that the owners of Lot 24002 and their invitees were to be excluded from the lift.

[14] Annexure C to the special conditions contained the following:

"**50. Exclusive Use Area – Lift (Penthouse Purposes)**

(a) The Occupiers of Lots mentioned in Schedule E under the hearing **By-law 50 – Lift (Penthouse Purposes)** are entitled to the exclusive use of that part of the Common Property **(Penthouse Lift)** which is identified in Schedule E.

(b) The following conditions apply to such use:-

(i) the Penthouse Lift must only be used for the purpose referred to in Schedule E;

(ii) the Benefited Owners are liable to:

(A) keep the Penthouse Lift clean and tidy, in good repair and condition and properly maintained;

(B) ensure Penthouse Lift maintenance is regularly carried out;

(C) perform all the duties of the Body Corporate in respect of the Penthouse Lift including ensure that the Penthouse Lift are maintained to a standard commensurate to the standard of other facilities on the Common Property.

(iii) subject to 50(b)(v), the relevant Owner and Occupier allowing the Body Corporate, the Committee and its properly appointed agents, access at all reasonable times to the Penthouse Lift for any proper purpose;

(iv) the Benefited Owners must contributed to all costs and expenses associated with the Penthouse Lift within 30 days of written demand from the Body Corporate. Such costs will be apportioned between the Benefited Owners based on the contribution lot entitlement of the Benefited Lots they own as a proportion of the total contribution lot entitlement of all the Benefited Lots;

(v) if the Body Corporate, the Committee or its properly appointed agents or lessee intend to use the Penthouse Lift to move equipment or material of a significant size and nature ***(Equipment)*** the Body Corporate, the Committee or the agent shall first ensure Equipment is adequately protected to avoid damaging the Penthouse Lift. Any damage to the Penthouse Lift caused by the Equipment must be

promptly made good by the Body Corporate at its cost.

(c) If an Owner or Occupier of a Lot does not carry out its responsibilities in accordance with this By-law ***50*** then the Body Corporate, and persons authorised by it, may enter upon the Penthouse Lift for the purpose of carrying out such responsibilities and the Owner will be liable for the costs incurred by the Body Corporate in that regard. Such costs must be paid on demand.

(d) In this By Law:

(i) **Benefited Owners** means the Owners of the Lots to which this By-law ***50*** attaches;

(ii) **Benefited Lots** means the Lots to which this By-law ***50*** applies."

[15] The Act envisages that information in the disclosure statement may contain errors or may cease to be accurate as a development proceeds. To deal with those situations it provides that if the contract has not settled, the seller must give the buyer a further statement rectifying the inaccuracies within 14 days or longer period agreed between the parties after becoming aware of an initial inaccuracy or after a supervening inaccuracy occurred.[13] By letter dated 7 June 2010 the solicitors for South Sky sent the solicitors for the applicants a further statement under the Act. It advised (among other things) that the (proposed) CMS had been amended and the exclusive use plans attached to it updated. A copy of the amended CMS with the updated plans was attached.

[16] Page 1 of the CMS was not amended and panel 4 continued to lack specification of the lots in the development, but otherwise the amendments were substantial. Schedule A, the Schedule of Lot Entitlements, was expanded by the inclusion of stage 2 of the development, to include all 243 lots. All of the lots, including lot 24001, were stated to be on plan 194241. That was because in December 2008 South Sky decided to create the proposed lots in one stage only. Doubtless for the same reason, the content of sch B (the explanation of the development) was entirely deleted and replaced with the words "Not applicable". In sch C, the by-laws, by-law 49 (which had dealt with an exclusive use area for a lift for construction and other purposes) was replaced with a by-law entitled "Exclusive use area – Wine Lockers". By-law 50 was amended as foreshadowed in the contract.[14] By-law 54 remained unaltered. Schedule E was altered to reflect the proposed wine lockers, but there was no amendment to the portion relating to the penthouse lift quoted above.[15] That was unfortunate, because the reference to SP 194266 was out of date. The two penthouses were now on plan 194241, as sch A showed.

[17] Two consequences followed from the delivery of the further disclosure statement. First, the statement and all accompanying material became part of the provisions of the contract.[16] Second, the applicants acquired a right to terminate the contract by notice in writing given within 14 days if they would have been "materially

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13 Section 214.

14 Paragraph [13].

15 Paragraph [10].

16 Section 215.

prejudiced if compelled to complete the contract, given the extent to which the disclosure statement was, or [had] become, inaccurate".[17] They made no attempt to terminate at that time.

The CMS as recorded

[18] In due course the Gold Coast City Council endorsed the CMS[18], it was signed by South Sky as original owner[19] and on 25 August 2010 it was recorded in the Queensland Land Registry.[20] In the recorded version the "Description of Lot" in panel 4 was changed by the deletion of the last two lines quoted above[21] and their replacement with the words "See enlarged panel". The first page was followed by two pages listing all of the lots in the tower under the heading "Enlarged panel". The list included "Lot 24001 on SP 194241".

[19] There were also some changes in schedule E, the description of lots allocated exclusive use areas of common property. Previously the heading relating to car parks had not included a list of lots identifying the areas allocated for car parking and storage. These areas were now listed for each lot by reference to plans. The same was true of areas under the heading "Wine Locker". Lot 24001 appeared in both cases; it was listed as being on SP 194241. Under the heading "Lift (Penthouse Purposes)", the erroneous reference to SP 194266 remained uncorrected.

[20] SP 194266 was never lodged at the Land Registry and remains in the possession of South Sky's surveyor.

The outbreak of hostilities

[21] On 1 April 2011 the solicitors for South Sky notified the applicants of the establishment of the community title scheme and nominated 6 May 2011 as the settlement date.[22] That letter disclosed to the applicants (if they did not know it already) that South Sky had passed into receivership.[23] The applicants sought counsel's advice and on that advice obtained a copy of the CMS as recorded in the Land Registry. Shortly thereafter their solicitors identified the error in schedule E. On 21 April they wrote to the solicitors for South Sky purporting to terminate the contract. The grounds upon which they did so were expressed in the letter:

> "It has now come to our client's attention, after receiving Counsel's advice that:-
>
> (a) By-law 50 in the CMS as recorded purporting to give an exclusive use by-law in favour of our clients in respect to 'the penthouse lift' is not a valid by-law for two reasons:-
>
> (i) that purporting to give an exclusive use by-law in respect to the penthouse lift is prohibited pursuant to

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17 Section 214(4).

18 Section 60.

19 Section 53.

20 *Land Title Act 1994*, s 115L.

21 Paragraph [8].

22 Under cl 5.1(a) of the contract.

23 Receivers were appointed on 16 December 2010.

s.177(1) of the *Body Corporate and Community Management Act 1997* ("the Act") in that it purports to give exclusive use to 'utility infrastructure which is common property' within the meaning of the Act; and

(ii) by-law 50 as set out in the recorded CMS purports to confer the benefit of the by-law upon the Lots 'mentioned in Schedule E' under the heading 'By-law 50-(Penthouse Purposes)' as 'Lots 24001 and 24002 on **SP 194266**'. The lots 'mentioned' do not exist at all and thus the by-law is invalid in not giving effect to 'attaching to a Lot under the Scheme' as required by s.170(1) of the Act, nor to 'a lot that is another community titles scheme', as required by s.170(2) of the Act, to be an 'exclusive use by-law';

(b) that the last disclosure statement dated 7 June, 2010, is 'inaccurate' within the meaning of s.217(b)(viii) of the Act, in that it has the same inaccurate reference to the 'Lots mentioned' as referred to in (a)(ii) above. Such inaccuracy will be materially prejudicial to our clients if compelled to settle, because that inaccuracy has carried through to the CMS as recorded and thus, as of today our client would be compelled to settle with an invalid by-law 50.

Accordingly, by virtue of (a)(i) above, the condition is impossible to be fulfilled, now or by the settlement date, entitling our clients to terminate.

Further, and in the alternative, the condition cannot be fulfilled because of (a)(ii) above, by the settlement date, in light of the statutory requirements to amend and record a new CMS, entitling our clients to terminate.

Further, and in the alternative, by reason of (b) above, our clients are entitled to terminate pursuant to s.217(d) of the Act."

[22] The solicitors for South Sky responded on 29 April by asserting that the Act did not prohibit granting exclusive use of the lift; that by-law 50 was not invalid; and that the reference to SP 194266 was a typographical error. On the same day they lodged a request for a new CMS correcting the typographical error and the new CMS was immediately recorded. Nonetheless the applicants did not settle on the due date.

[23] On 18 May the applicants applied for orders that they had validly terminated the contract and were entitled to the return of their deposit.

The applicants' submissions

[24] The applicants submitted that they were entitled to terminate the contract on two bases:

"(a) That the Contract was entered into under the common mistake of the parties that the proposed bylaw 50 would be a

valid exclusive use bylaw in respect of proposed Lot 24001 when in fact it was not, in accordance with s.177(1) of the BCCM Act;

(b) The last Disclosure Statement provided to the applicants dated 7 June 2010 was 'inaccurate' within the meaning of s.217 of the Act, in that it has the same inaccurate reference to the 'lots mentioned', being 'Lot 24001 and 24002 on SP 194266'."

The respondent's submissions

[25] South Sky submitted that by-law 50 was a valid by-law and that even if it was not, any mistake was not a material mistake capable of supporting a decision that the contract was void. As to the argument based on s 217, upon the proper interpretation of the further (disclosure) statement, the information in it was not inaccurate, and in any event the applicants would suffer no material prejudice if required to settle.

The "Trial Arrangements" document

[26] At the beginning of the trial the parties tendered a document headed "Trial Arrangements". That document provided:

"The parties approach the trial on the following agreed basis:

1. SSI does not require the Applicants to formally prove the facts contained in:
   a. paragraph 59 of the Applicant's submissions in Reply (up to and including the words *'not traverse other lots'*); and
   b. paragraph 29 of the Applicant's primary submissions. These facts, however, do not displace evidence of Mr Wilkinson of the way in which the lift the subject of this proceeding actually operates.
2. The parties are approaching the question of construction of the contract and material prejudice as objective tests and as being supported only be evidence of that kind. The Applicants' evidence of subjective matters goes only to their mistake case. The Applicants' counsel has, on this basis, withdrawn subparagraph 6(a) of his supplementary submissions.
3. On the basis outline in 2. above:
   a. SSI does not object to the evidence of subjective matters deposed to by the Applicants;
   b. the parties do not seek to cross-examine deponents;
   c. the parties do not require their opponent's case to be put to their witnesses, the witnesses having had an opportunity, in affidavits, to respond to material aspects of the opponent's case.
4. The Applicants' Counsel will tender (without objection), a copy of the Applicants' solicitors letter of 31 May 2011 for the purposes of notifying the Court of a decision to abandon

> allegations as to anticipatory breach of contract earlier advanced in correspondence.[24]"

Having regard to the balance of these reasons, it is unnecessary to quote paras 29 and 59 referred to in para 1 of that document.

Mistake

[27] In their outline of argument, the applicants submitted:

> "The Queensland Court of Appeal in *Australia Estates Pty Ltd v Cairns City Council* has authoritatively stated the principles of common mistake as set out in the English Court of Appeal decision of *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd*. Accordingly, the principles as set out in *Great Peace* or, alternatively, the rather narrow rule in *Taylor v Johnson* are applicable."

They did not expand upon the alternative submission, and did not refer to it orally. *Taylor v Johnson*[25] was a decision about unilateral mistake. It has no application to the present case. South Sky tacitly accepted the primary submission and developed its submissions accordingly.

[28] I am far from persuaded that the primary submission is correct. *Australia Estates Pty Ltd v Cairns City Council*[26] was decided on several alternative bases and different members of the court placed different levels of emphasis upon those bases. Identification of a binding *ratio decidendi* is not easy. But this is not the case for an excursion into the fine points of Australian law relating to mistake in contract.[27] As far as this case is concerned, the parties accepted the law as stated in *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd*, in particular the following passage:

> "76 If one applies the passage from the judgment of Lord Alverstone CJ in *Hobson v Pattenden,* which we quoted above to a case of common mistake, it suggests that the following elements must be present if common mistake is to avoid a contract. (i) there must be a common assumption as to the existence of a state of affairs; (ii) there must be no warranty by either party that that state of affairs exists; (iii) the non-existence of the state of affairs must not be attributable to the fault of either party; (iv) the non-existence of the state of affairs must render performance of the contract impossible; (v) the state of affairs may be the existence, or a vital attribute, of the consideration to be provided or circumstances which must subsist if performance of the contractual adventure is to be possible."[28]

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[24] The letter referred to in para 4 became ex 2.

[25] [1983] HCA 5; (1983) 151 CLR 422.

[26] [2005] QCA 328.

[27] Described in a note on *Australia Estates* as "old, arcane, uncertain in application, complex and controversial": N Seddon, "Contract: Mistake Mistake", (2006) 80 *ALJ* 95.

[28] [2002] EWCA Civ 1407; [2003] QB 679 at p 703.

They joined issue over the application of that law to the facts of this case. It is not appropriate for me to go beyond deciding that issue.

Common assumption as to the existence of a state of affairs

[29] The applicants submitted in their outlines that the parties assumed that an exclusive use licence could validly be given in respect of the penthouse lift, but it became apparent in the course of oral submissions that they were really relying upon an alleged mistake as to the validity of proposed by-law 50(a). In support of the existence of such an assumption they referred to special condition 3[29] of the contract and the letter of 24 October 2007.[30] They gave no evidence that they or their solicitor had ever turned their minds to the efficacy of the by-law, much less that they had relied upon it in any way.

[30] Special condition 3 of the contract was a term proposed by South Sky, not one sought by the applicants. Its function was to give the applicants advance notice of South Sky's intention to vary the proposed by-laws set out in the disclosure statement as it stood at the date of the contract by adding the underlined words. That was why it was phrased as an acknowledgement on the part of the applicants, not conferral of rights upon them. There was no variation proposed to by-law 50(a). The inclusion of the special condition in the contract is neutral in relation to the question whether the applicants or their solicitor relied upon a mistaken view of the validity of proposed by-law 50(a). Neither they nor their solicitor swore to any such reliance in their affidavits.

[31] Nor can any such reliance be inferred from South Sky's letter of 24 October 2007. That letter does not refer to the by-laws, but only to internal lift access between the floors. I do not doubt that that was of some importance to the applicants, but it was not the subject of the alleged mistake. There is no evidence that the applicants were even aware of the proposed by-laws at the time of that letter.

[32] However South Sky did not rely on this point. It submitted that the by-law was valid. In the alternative it submitted that notwithstanding any invalidity of by-law 50(a), the contract could still be performed in accordance with its terms; and in any event, invalidity of the by-law made no material difference to the applicants' position.

Impossibility of performance

[33] The applicants submitted that invalidity of the by-law under s 177 of the Act rendered performance of special condition 3 impossible. That submission depended upon the further submission that special condition 3 should be read as if it meant or implied:

> "The parties enter into Special Condition 3 of the Contract on the basis of the proposed bylaw 50 as set out in Special Condition 3 can be validly effected as an exclusive use bylaw within the meaning of the *Body Corporate and Community Management Act 1997*."

29 Paragraph [12].

30 Paragraph [4].

With respect to counsel, that submission misconceived the purpose and effect of special condition 3. That condition stood simply as an acknowledgement by the applicants. It is impossible to imply the term for which the applicants contend.

[34] The acknowledgement stands and has its force. South Sky did not warrant the validity of the proposed by-law. The law does not presume the validity of proposed by-laws or even their validity after the CMS containing them is recorded in the Land Titles Register[31]. Nothing prevents the due performance of the contract.

Vital attribute

[35] The applicants submitted that in analysing this element of the test it was appropriate to have regard to what was written by Diplock LJ in *Hong Kong Fur Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd*. I quote part of the relevant passage:

> "The test whether an event has this effect or not [discharging a party from further performance of his undertakings] has been stated in a number of metaphors all of which I think amount to the same thing: does the occurrence of the event deprive the party who has further undertakings still to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration or performing those undertakings?"[32]

In *Great Peace* the Court of Appeal wrote that in deciding whether an alleged mistake was fundamental in all the circumstances, that test could be of assistance.

[36] In the present case, the validity or invalidity of the by-law makes no difference to the applicants' position. They still have the exclusive use of the lift. Their position is protected by the security system on the lifts and by the provisions of by-law 54. Their private entries to the lift have been constructed. The main lifts do not go beyond level 40 and only the applicants and the owners of the other penthouse have access to that level. Only they have the electronic keys necessary to operate the penthouse lift. The existence or the validity of the by-law was not a vital attribute of the consideration to be provided or the circumstances which must subsist for performance of the contract.

[37] It is unnecessary to consider whether by-law 50 is valid. South Sky's alternative submissions are correct. The contract was not void for common mistake.

Section 217

[38] After some uncertainty, the applicants relied upon the following parts of s 217:

> "**217 Terminating contract for inaccuracy of statement**
>
> The buyer may terminate the contract if—
>
> (a) it has not already been settled; and
>
> (b) at least 1 of the following applies—
>
> …

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31 *Land Title Act 1994,* s 115L(2)(b).

32 [1961] EWCA Civ 7; [1962] 2 QB 26.

(viii) information disclosed in the disclosure statement, as rectified by any further statement, is inaccurate; and

(c) because of a difference or inaccuracy under paragraph (b), the buyer would be materially prejudiced if compelled to complete the contract; and

(d) the termination is effected by written notice given to the seller by the buyer not later than the latest of the following—

(i) 3 days before the buyer is otherwise required to complete the contract".

They abandoned their original reliance on s 217(b)(i), doubtless because the CMS recorded for the scheme on its establishment was relevantly the same as the one most recently advised to them.

[39] When the applicants purported to terminate the contract on 21 April 2011, it had not been settled. Settlement was due on 6 May 2011. Paragraphs (a) and (d) were therefore satisfied.

[40] For the purposes of this submission, the applicants relied upon the error in sch E to the CMS, where, it will be recalled, the number of the plan upon which the penthouse was identified for the purposes of by-law 50 was incorrectly stated.[33] They submitted that the error was an inaccuracy which deprived them of the benefit of the by-law, and that they would suffer material prejudice if compelled to complete the contract.

[41] That submission fails for at least two reasons: the inaccuracy was not contained in the disclosure statement; and it would cause no material prejudice to the applicants if they were compelled to settle. It is unnecessary to examine whether on the proper construction of the by-laws, there was in fact any real inaccuracy.[34]

[42] "Disclosure statement" in s 217 is relevantly defined as a statement complying with s 213(2) – (4). Those subsections, among other things, specify what must be included in the statement and require that it be *accompanied* by the proposed CMS. Section 213 makes it plain that the proposed CMS is not part of the disclosure statement. Even if the incorrect plan number amounted to the disclosure of inaccurate information (a matter which is by no means clear), it was not information disclosed in the disclosure statement.

[43] Moreover, for the reasons set out above[35], the applicants would suffer no material prejudice as a result of it if compelled to complete. The error was obvious; it was quickly and easily rectified once South Sky's attention was drawn to it; and it did not render anything in the contract void for uncertainty.

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33 Paragraph [11].

34 The inaccuracy must be real or of substance as distinct from ephemeral or nominal: *Tillmans Butcheries Pty Ltd v Australian Meat Industry Employees' Union* [1979] FCA 85; (1979) 42 FLR 331 at p 348, cited with approval in *Mirvac Queensland Pty Ltd v Wilson* [2010] QCA 322 at [24].

35 Paragraph [36].

Orders

[44] The application is dismissed. I shall hear the parties as to consequential orders and costs.