NEW SOUTH WALES SUPREME COURT

CITATION: Neighbourhood Association DP 285249 v Watson [2008] NSWSC 876

JURISDICTION:

FILE NUMBER(S): 5858/06

HEARING DATE(S): 28-30/04/08, 1-2/05/08, 5-7/05/08, 12-16/05/08, 19-23/05/08, 26-30/05/08, 2-5/06/08

JUDGMENT DATE: 27 August 2008

PARTIES:
Neighbourhood Association DP 285249 (First Plaintiff)
Neighbourhood Association DP 285433 (Second Plaintiff)
Neighbourhood Association DP 285486 (Third Plaintiff)
Terry Cunnington (Fourth Plaintiff)
Anthony Watson (First Defendant)
Hillington Valley Pty Ltd (Second Defendant)
Registrar-General, Department of Lands (Fourth Defendant)
Community Association DP 270076 (Fifth Defendant) (submitting appearance)
Statewide Secured Investments Ltd (Sixth Defendant) (submitting appearance)
Murray Shire Council (Seventh Defendant) (submitting appearance)
Neighbourhood Association DP 285882 (Eighth Defendant) (no appearance)
Perricoota Boat Club Investments Pty Ltd (Ninth Defendant)

JUDGMENT OF: Biscoe AJ

LOWER COURT JURISDICTION:
Not Applicable

LOWER COURT FILE NUMBER(S):
Not Applicable

LOWER COURT JUDICIAL OFFICER:
Not Applicable

COUNSEL:
Mr P. Tomasetti SC (until 22/05/08) and Mr N. Eastman (Plaintiffs)
Mr C. Leggat SC and Mr J. Young (1st, 2nd and 9th Defendants)

SOLICITORS:
Cosgriff Orchard Legal (Plaintiffs)

GDA Lawyers (1st, 2nd and 9th Defendants)
Department of Lands (4th Defendant)
Pogson Cronin (5th Defendant)
Commins Hendriks (6th Defendant)
Kell Moore Solicitors (7th Defendant)

CATCHWORDS: Real Property :- Community titles legislation - Whether unregistered development applications and plans are incorporated in development consents referred to in registered development contracts and statutory covenants - Whether such plans form part of the development contracts - Whether continuation or completion of community scheme has become impracticable and, if not, whether community scheme should be varied - Whether specific performance should be ordered of original proprietors' obligations under development contracts and statutory covenants - Whether original proprietors in breach of development contracts - Damages for breach of development contracts.

LEGISLATION CITED:
Access to Neighbouring Land Act 2000 (NSW), s 7
Community Land Development Act 1989 (NSW), preamble, ss 3(1), 3(2), 3(4), 4(1), 5, 13(1)(a), 25, 26, 31, 35, 36, 41(1), 70, Schedule 2, Schedule 3
Community Land Development Regulation 1990 (NSW), cl 39(2)
Community Land Development Regulation 2007 (NSW), cl 30
Community Land Management Act 1989 (NSW), preamble, ss 3(1), 3(2), 15, 16, 60(1)(b), 85, 106, Schedule 2 Part 1, Schedule 2 Part 3
Conveyancing Act 1919 (NSW), s 88K
Disability Discrimination Act 1992 (Cth)
Electricity Supply Act 1995 (NSW), s 72
Environmental Planning and Assessment Act 1979 (NSW), ss 83B, 121H
Interpretation Act 1987 (NSW), s 8(b)
Land and Environment Court Act 1979 (NSW), ss 20(2), 20(5), 71
Limitation Act 1969 (NSW), s 14
Local Government Act 1993 (NSW), s 68
Local Government Act 1919 (NSW), s 311
Real Property Act 1900 (NSW), s 36(11)

CATEGORY:
Principal judgment

CASES CITED:
Amber Holdings (Aust) Pty Ltd v Polona Pty Ltd [1982] 2 NSWLR 470
Auburn Municipal Council v Szabo (1971) 67 LGRA 427
Commonwealth of Australia v Amann Aviation Pty Limited (1991) 174 CLR 64
Community Association DP 270212 v Registrar General for the State of New South Wales (2004) 62 NSWLR 25
Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd [1998] A.C. 1
Council of the City of Sydney v Pink Star Entertainments Pty Ltd [2008] NSWLEC 176
Hadley v Baxendale (1854) 9 Exch 341
Hobbs v Petersham Transport Co Pty Limited (1971) 124 CLR 220
Hubertus Schuetzenverein Liverpool Rifle Club Ltd v Commonwealth of Australia (1994) 85 LGERA 37

Kindimindi Investments Pty Ltd v Lane Cove Council [2005] NSWLEC 398
Loreto Normanhurst Association Inc v Hornsby Shire Council (2001) 122 LGERA 347
Mackay v Dick (1881) 6 App Cas 251
Newmont Pty Ltd v Laverton Nickel NL (1982) 44 ALR 598
Over Our Dead Body Society Inc v Byron Bay Community Association Inc (2001) 116 LGERA 158
Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia (1998) 195 CLR 1
Quinn Villages Pty Ltd v Mulherin [2006] QCA 433
Sanctuary Investments Pty Ltd v St Gregory's Armenian School Inc [1999] ANZ Conv R 454
Secured Income Real Estate (Australia) Limited v St Martins Investments Proprietary Limited (1979) 144 CLR 596
Sheldon v McBeath (1993) Aust Torts Reports 81 – 209
Shell Company of Australia Ltd v Parramatta City Council [No 2] (1972) 27 LGRA 102
St George Bank Ltd v Indigenous Business Australia (2007) 215 FLR 79
Stebbins v Lismore City Council (1988) 64 LGRA 132
Tip Fast Pty Limited v South Sydney City Council (2002) 120 LGERA 292
Westfield Management Ltd v Perpetual Trustee Co Ltd (2007) 239 ALR 75
Weston Aluminium Pty Ltd v Alcoa Australia Rolled Products Pty Limited [2004] NSWLEC 551
Weston Aluminium Pty Ltd v Environment Protection Authority (2007) 156 LGERA 283
Winn v Director-General of National Parks and Wildlife (2001) 130 LGERA 508
Woolworths Ltd v Campbells Cash and Carry Pty Ltd (1996) 92 LGERA 244

TEXTS CITED:

DECISION:
Community scheme to be varied.
Specific performance of obligations under, and damages awarded for breach of, development contracts.
Parties to bring in short minutes of orders to give effect to decisions.

JUDGMENT:

IN THE SUPREME COURT
OF NEW SOUTH WALES
EQUITY DIVISION

BISCOE AJ

5858/06 NEIGHBOURHOOD ASSOCIATION DP 285249 & ORS v WATSON & ORS

IN THE LAND AND

ENVIRONMENT COURT
OF NEW SOUTH WALES

BISCOE J

41094/06 NEIGHBOURHOOD ASSOCIATION DP 285249 & ORS v WATSON & ORS

27 August 2008

JUDGMENT

INTRODUCTION

1 **HIS HONOUR**: In these two closely related proceedings there are claims for variation of a community development scheme and related development contracts and also for specific performance and damages for breach of those contracts. The scheme and contracts relate to an 85 berth houseboat marina on Deep Creek. Deep Creek is a quiet, picturesque lagoon joined to the Murray River by a narrow channel. It is situated 17 kilometres by road west of the twin towns of Moama (in New South Wales) and Echuca (in Victoria).

2 One of the proceedings is in the Supreme Court. The other is in the Land and Environment Court. They have been heard together by me as an acting judge of the former and as a judge of the latter. In this way duplication of costs and judicial resources has been minimised. An order has been made that evidence in one is evidence in the other. The two proceedings are in different courts because the legislature has given exclusive jurisdiction:

(a) to the Supreme Court to vary community development schemes and related development contracts: s 70 *Community Land Development Act 1989* (NSW) (**Development Act**); and

(b) to the Land and Environment Court to order specific performance and award damages in relation to development contracts: s 20(2) and (5), s 71 *Land and Environment Court Act 1979* (NSW); s 106 *Community Land Management Act 1989* (NSW) (**Management Act**).

OVERVIEW OF THE CASE

3 Deep Creek Marina is the subject of a community scheme and subsidiary neighbourhood schemes established under the New South Wales community titles legislation. That legislation essentially comprises two companion statutes, the *Development Act* and the *Management Act*. The legislation enables a subdivision of land which incorporates common property and offers facilities in accordance with a pre-determined theme.

The development applications and consents

4 In 1990, development application 18/90 (**DA 18/90**) was lodged with Murray Shire Council for a 100 berth marina as Stage 1 and a tourist complex as Stage 2 on land with an area of 243 hectares and frontages to the Murray River and Deep Creek. The land was

formally described as Lot 12 in deposited plan 846348 being part of Lot 1 in deposited plan 521202, Parish of Benarca, County of Cadell. The registered proprietors and original developers of the land were Anthony Watson and Sammy One Pty Ltd (**Sammy One**), a company owned and controlled by Mr Watson and his wife.

5 Accompanying DA 18/90 were four plans showing the completed development including marina berths, an access track behind the eastern berths, and a public wharf. The plaintiffs place particular reliance on one of these plans, Plan 4, entitled "*Detailed Landscape Masterplan*": a copy is **annexure A** to this judgment. The land described as a "*wildlife refuge*" on Plan 4, on the opposite side of Deep Creek from the development, was sometimes later called "*the island*" (although it is not actually an island). In 1991, the council granted consent to DA 18/90.

6 In 1992, development application 66/92 (**DA 66/92**) was lodged with the council for subdivision of the land under the community titles legislation in two stages. The plaintiffs place reliance on three accompanying Stage 1 subdivision plans: copies are **annexures B, C and D** to this judgment. These plans show that community property included, inter alia, a substantial amount of the foreshores and the whole of the waters of Deep Creek. The plaintiffs also place reliance on the accompanying Stage 2 subdivision plan: a copy is **annexure E** to this judgment. It shows subdivision of the developers' residual parcel into five lots and shows essentially the same facilities as are shown on Plan 4 accompanying DA 18/90. In 1992, the council granted consent to DA 66/92.

Registration of the community plan

7 In January 1995, the developers registered a community plan, community development contract and community management statement. The community plan effected a subdivision of the land in which most of the community property shown on the plans accompanying DA 66/92 had disappeared, including most of the foreshores and waters of Deep Creek. Instead that area was shown as part of the lot owned by the developers. This gross loss of community property has led to serious access problems for houseboat mooring lot owners at the Deep Creek Marina and, ultimately, to this litigation. One sheet of the community plan as originally registered in January 1995 is **annexure F** to this judgment. It was subsequently amended. The community plan as registered on 16 May 2006 is **annexure G** to this judgment.

8 In 1995, 1997 and 1998 the developers registered three neighbourhood plans for mooring berths together with related neighbourhood development contracts and neighbourhood management statements.

Access at the Deep Creek Marina

9 Notwithstanding the disparity between the plans accompanying DA 66/92 and the registered community plan, access difficulties did not arise until about 2005. That is because access roads to the moorings physically existed over the developers' land (now called **Lot 16** and so described in these proceedings), even though they were not shown on the registered community plan. Mooring berth owners used these access roads for vehicular access. On the western side of the marina, where the foreshore is steeper, access was facilitated by several access stairs, apparently constructed by the developers, leading from the access road to the

mooring berths. Also, until 2005, there was no impediment to access to the public wharf and boat ramp.

10 The developers represented orally in marketing material and in at least one contract for sale of mooring berths that the existing access roads were for use by mooring berth owners. The developers also represented that the berth owners' access rights would be formalised in due course.

11 All this changed following reconstitution of the ownership of Lot 16 (see [28] below). The current proprietors of Lot 16 are Mr Watson, Hillington Valley Pty Ltd (**Hillington**) and Perricoota Boat Club Investments Pty Ltd (**Perricoota Company**). In or about 2005 the developers closed the access roads to the mooring berths, fenced off the public wharf and, for a time, blocked access to the boat ramp. The consequential access difficulties are examined in detail below.

Claims in the Supreme Court proceedings

12 In the Supreme Court proceedings, the plaintiffs claim that the community scheme has become impracticable, both in its continuation and its completion. This is said to be because (a) what was proposed cannot be delivered and (b) what has been delivered is not physically functional and practical. The plaintiffs seek variation of the scheme by amending the related development contracts and the community management statement under s 70 of the *Development Act* in order to alleviate impracticability and to provide what is said to be appropriate.

13 The alleged impracticability arises largely because of access problems in three respects:

(a) the mooring owners have no legal vehicular access to their moorings and, since the developers closed the access roads in 2005 have not had any actual vehicular access;

(b) since 2006 the developers have denied access to the public wharf by fencing it off; and

(c) for a time in 2005, the developers blocked access to the boat ramp by installing a boom gate. The boom gate has since been opened, but remains in place in the open position.

14 The plaintiffs claim that the consents to DA 18/90 and DA 66/92 respectively incorporate those applications, including the plans accompanying each application, subject to the conditions of each consent.

15 The plaintiffs' proposed variations involve accretions to community property to reflect the plans which accompanied DA 66/92 (**annexures B** to **E** to this judgment). These variations would convert foreshores and the waters of Deep Creek owned by the developers into community property, or at least to the extent of providing vehicular access to the moorings. The proposed accretions are shown on the plan which is **annexure H** to this judgment.

16 The plaintiffs' proposed variations under s 70 of the *Development Act* also involve variation of the development contracts, primarily by appending a plan showing facilities, which is itself a variation of Plan 4 accompanying DA 18/90 and the Stage 2 plan accompanying DA 66/92. These proposed variations are shown on the plan which is **annexure J** to this judgment. The plaintiffs propose related amendments to the text of the development contracts and the community management statement.

17 There is an alternative claim for a right of vehicular access to the moorings under s 88K of the *Conveyancing Act 1919* (NSW).

Claims in the Land and Environment Court proceedings

18 In the Land and Environment Court proceedings the plaintiffs allege that the defendants are in breach of the development contracts in respect of: (a) developing the community scheme in accordance with what was proposed; (b) providing electricity and telephone services; and (c) doing road works and sealing.

19 The plaintiffs claim specific performance of the development contracts and damages for electricity and road works already undertaken. Alternatively, they claim damages only.

PLANS ANNEXED

20 The following plans annexed to this judgment, to which I have already referred, are essential to an understanding of the issues:

A	Plan 4 accompanying DA 18/90 to which Murray Shire Council consented.
B, C and D	Three Stage 1 subdivision plans accompanying DA 66/92 to which council consented.
E	Stage 2 subdivision plan accompanying DA 66/92 to which council consented.
F	Sheet 2 of the community plan for Community Association DP 270076 registered in January 1995.
G	Additional sheet 12 of the community plan registered on 16 May 2006.
H	Plaintiffs' plan of proposed accretions to community property, pursuant to variation under s 70 of the *Development Act*.
J	Plaintiffs' plan of proposed facilities to be provided by the original developers to be included in community and mooring neighbourhood development contracts, pursuant to variation under s 70 of the Development Act. This shows a modification of the facilities shown on annexures A and E above, and is Schedule 2 to the plaintiffs' Second Further Amended Statement of Claim as further amended.

THE PARTIES

21 In each of the proceedings, the plaintiffs are the owners of Lots 2, 3 and 6 (respectively, **the Central, Eastern and Western Neighbourhood Associations**), which are the mooring neighbourhoods, and the owner of Lots 14 and 15 (Mr Cunnington). (For ease of reference I will refer to the applicants and respondents in the Land and Environment Court proceedings as plaintiffs and defendants).

22 In the Supreme Court proceedings the defendants are the current developers and proprietors of Lot 16 (Mr Watson, Hillington and Perricoota Company), the Registrar–General, the community association, the Lot 16 mortgagee (Statewide Secured Investments Ltd), Murray Shire Council, and the owner of Lot 12 Neighbourhood Association DP 285882 which is called "*Murray River's Edge"*. In the proceedings "*Murray River's Edge*" was generally referred to as the "*Honeyman Lot*".

23 In the Land and Environment Court proceedings the defendants are the original developers and proprietors, Mr Watson and Sammy One. They caused development consents 18/90 and 66/92 to be obtained. They caused to be registered in 1995 the community plan, community management statement and community development contract for the community association. They caused to be registered the neighbourhood plan, neighbourhood management statement and neighbourhood development contract in 1995, 1997 and 1998 for, respectively, the Central, Western and Eastern Neighbourhoods. They were the parties to the community development contract and neighbourhood development contracts under which they became bound by certain covenants, including those found in Schedule 2 to the *Management Act*, on which the plaintiffs rely (see [57] below).

24 The defendants other than the developers have filed submitting appearances or have not appeared or have taken no active part in the proceedings.

THE COMMUNITY ASSOCIATION AND ITS MEMBERS

25 The community association for Deep Creek Marina is Community Association DP 270076 which, under s 25 of the *Development Act*, was incorporated in January 1995 upon registration of community plan DP 270076. The land in this community plan has been subdivided and re-subdivided over the years. The current subdivision is indicated in the registered sheet of the community plan copied at **annexure G** to this judgment.

26 Currently, the community association has seven members. Three are neighbourhood associations of mooring berths (Lots 2, 3 and 6 – Lot 6 was originally Lot 4). One is a neighbourhood association whose property is under development for holiday cabins and related facilities (Lot 12, the Honeyman Lot). One is the owner of the hotel/restaurant (Lot 14). One is the owner of the supermarket (Lot 15). Finally, one is a residual development lot (Lot 16) owned by the current developers, which includes the foreshores and waters of Deep Creek, a public wharf and much more. Further details are as follows:

Lot	Member	Unit Entitlement
2	Neighbourhood Association NP DP 285249 (***Central Neighbourhood***). Registered 19 January 1995. 45 mooring berths. Neighbourhood property: 2 metre wide walkway adjoining the berths.	3,060
6	Neighbourhood Association NP DP 285433 (***Western Neighbourhood***). Registered 30 September 1997. 11 mooring berths. Neighbourhood property: 2 metre wide walkway adjoining the berths.	1,300
3	Neighbourhood Association NP DP 285486 (***Eastern Neighbourhood***). Registered 25 March 1998. 30 mooring berths. Neighbourhood property: 2 metre wide walkway adjoining the berths.	3,300
12	Neighbourhood Association NP DP 285882 known as "*Murray River's Edge*" (***Honeyman Lot***). Registered 11 November 2004. Neighbourhood property: under development mainly for holiday cabins and related facilities. This neighbourhood scheme was developed by Construct Co Developments Pty Ltd (directors: Thomas Honeyman and Fiona Honeyman).	602
14	Terry Cunnington. Property: hotel/restaurant.	28
15	Terry Cunnington. Property: supermarket.	19
16	Anthony Watson, Hillington and Perricoota Company. This residual lot includes the foreshores and waters of Deep Creek, the public wharf and much more.	1,691
	TOTAL:	10,000

The three marina berth neighbourhoods (Lots 2, 6 and 3) have been described above as the "*Central*", "*Western*" and "*Eastern*" in order to indicate their locations relative to each other along the northern side of Deep Creek. This can be seen in the plan on **annexure G** to this judgment. The Central Neighbourhood is divided by the public wharf (part of Lot 16), the hotel/restaurant (Lot 14) and supermarket (Lot 15). At the trial it was said on behalf of the plaintiff owner of Lot 15 that he submitted to the waterfront strip on that land becoming community property.

THE DEVELOPERS

27 It is convenient hereafter to generally refer to the owners from time to time of what is now Lot 16 as "*the developers*". Lot 16 has had a number of changes in nomenclature over the years. Originally, most of it was called Lot 5.

28 In 1990 Anthony Watson and Sammy One were the registered proprietors of the subject land. Sammy One was a company owned and controlled by Mr Watson and his wife. On registration of the community plan in 1995, those original proprietors owned the largest lot in the community scheme, which was then Lot 5 (but is now mostly Lot 16). In June 2003 they transferred part of their interest in that Lot so that it was owned in equal one third shares by Mr Watson, Hillington owned by Gary and Jayne Bares, and Ozzie Erections Pty Ltd (**Ozzie**) owned by Mr Steven "*Ozzie*" Robertson. By transfer dated 9 October 2006 Ozzie sold its share to Perricoota Company owned by Mr Paul Jarman. Thus, the current developers and proprietors of Lot 16 are Mr Watson, Hillington and Perricoota Company.

29 Mr and Mrs Bares have been associated with Deep Creek Marina since 1997 when Accredited Aged Care Services Pty Ltd, the sole director of which was Mrs Bares, became the first buyer of seven mooring lots in the Western Neighbourhood. That company was the trustee for Mr Bares' superannuation fund. It was he who made the decision to purchase the moorings. The trustee leased out six of the moorings and Mr Bares used the seventh. Commencing in May 2002, it sold its moorings at a substantial gross profit. Throughout the five years of its ownership one could drive a car to the moorings and access them via stairs. It was only after they commenced to be sold that Mr Bares took the position that mooring owners were not entitled to use the access roads and, later, with the other developers, closed the access roads.

30 Mr Jarman has been associated with Deep Creek Marina since 2000-2001 when he worked for Mr and Mrs Watson as the manager of their hotel/restaurant on what is now Lot 14. After a break he then worked for Mr and Mrs O'Brien, the new owners of the restaurant/bar and supermarket on, respectively, Lots 14 and 15, from October 2004 to January 2005. From 2005 he has been employed by the developers as their site manager and to represent them at community association meetings.

31 In 2002 the developers began to use a company which has had several names. At one time it was called DC Marina Pty Ltd. In 2004 its name was changed to Deep Creek Marina Pty Ltd. From December 2002 its directors and secretaries were Messrs Watson, Robertson and Bares and its shareholders were Hillington, Ozzie and Perricoota Investments Pty Ltd. Currently, it appears, its directors are Mr Watson and Mr Bares and its shareholders are Mr Watson and Hillington. The name of this company was sometimes erroneously used in communications as if it were the owner of Lot 16. In fact it was a service company for the developers.

32 By a transfer stamped in April 2002, Mr and Mrs Watson transferred to Hillington a one half share in land known as Lot 23 immediately to the east on Deep Creek. It has been developed as a houseboat marina development called Perricoota Boat Club: see [129] – [130] below. The moorings at Lot 23 have good pedestrian and vehicle access. There is a one metre wide concrete path adjacent to them. Then there is approximately two metres of grass.

Then there is a sealed vehicular access road approximately 2.4 metres wide. Houseboats moored at the Lot 23 marina have to cross the waters at the Deep Creek Marina in order to reach the Murray River. Lot 23 enjoys the benefit of easements of access of variable width over those waters as well as over Lot 16 land just to the north of the upper access track to the eastern moorings.

33 The developers wish to develop Lots 16 and 23 into a very large residential and tourist development and are seeking to have the land rezoned for residential purposes.

THE COMMUNITY TITLES LEGISLATION

34 The Deep Creek Marina may have been the first houseboat marina in New South Wales to come under the community titles legislation, which essentially comprises the *Development Act* and the *Management Act*. This legislation commenced on 1 August 1990, a little over two months after DA 18/90 for development of Deep Creek Marina was lodged with the local council. Following council consent to that application in 1991, in 1992 DA 66/92 was made to the council for subdivision to bring the land under the community titles legislation. The council approved this application in 1992: see [79] – [93] below.

35 The concept of community title, its historical context and potential use, as well as the general scheme of the community titles legislation, were described in the Second Reading Speech by the Minister for Natural Resources, as follows:

> …Generally known as the community titles legislation, the bills will introduce a new form of land subdivision in New South Wales and will permit greater innovation in subdivision design and greater flexibility in residential, commercial and industrial development. So that honourable members will appreciate the significance of the legislation I should remind them of some of the milestones preceding the bills. In 1961 the Parliament of New South Wales approved legislation permitting titles to be issued evidencing ownership of flats by enabling land to be subdivided into strata lots.
>
> Prior to 1961 the only way of subdividing land was the conventional method, creating blocks used mainly for freestanding cottages for separate occupation. The concept of strata title gained widespread acceptance and encouraged the development of less traditional options for residential accommodation. The 1961 legislation had a number of deficiencies and in 1973 it was replaced by the Strata Titles Act, which continues to function as the operative legislation for all strata-based developments. The original intention of the strata legislation was to permit the strata subdivision of completed buildings of at least two storeys. Despite this intention, since the introduction of the legislation developers have been looking for ways to use it to accommodate types of development it was never designed to permit.
>
> An ever-growing shortage of land available for residential occupation has discouraged developers from employing the traditional method of subdividing land into a grid pattern of rectangular blocks fronting a public road. There has been also a demonstrated demand for developments designed around a theme, such as retirement villages, tourist resorts, industrial parks and sporting complexes. As a consequence there was a clear need to devise an additional means of subdividing land which would combine elements of both

conventional and strata subdivision and introduce the context of shared communal property into a land subdivision. The aim of the four bills to be considered today is, therefore, to introduce that much needed alternative system of land subdivision, which will be as innovative today as the strata title legislation was in 1961. **The system proposed will enable a subdivision of land incorporating common property which may be developed in stages in accordance with a pre-determined theme.**

…[T]he model proposed by this legislation offers sufficient flexibility to allow it to be used for low or medium density residential projects; large, mixed-use developments; small urban schemes; rural communes; and theme development specially designed to accommodate the specific needs of special interest groups. The legislation has been divided into two principal bills – the Community Land Development Bill, covering the procedure for establishing a scheme, and the Community Land Management Bill, governing the day-to-day management of schemes and the resolution of disputes. The remaining two bills make associated amendments to the Strata Titles Act and a number of other Acts.

The Community Land Development Bill will permit the creation in subdivisions of shared land known as association property. Individuals purchasing into a scheme will receive a separate title to their lots, which may or may not contain improvements, and will acquire an interest in the association property. Because amenities can be shared, residents will be able to acquire the use of facilities such as sporting and recreational complexes which would have been prohibitively expensive for an individual homeowner. The common elements and communal facilities within a scheme will be shared and managed by the participants themselves. Management will be controlled by a body corporate, referred to in the legislation as an association, which will be constituted on registration of a plan and will be made up of the individual lot owners. The legislation has been designed to enable a development to be completed as a staged or non-staged scheme. Allowing developments to proceed in stages will make it possible for savings in initial development costs, as one stage can be used to finance the construction of later stages. With a reduction in initial development costs, purchase prices should be correspondingly reduced.

The Community Land Management Bill will complement this development flexibility by providing a range of options for the management structure which may operate within the scheme. When a staged scheme is embarked upon, the community will have two tiers of management. However, where the community is sufficiently large or complex, the developer may elect to interpose a further tier and thereby create three levels of management. Where it is not proposed to develop the land in stages, only one level of management—known as a neighbourhood association—will be created. An important feature of the legislation is the opportunity it will provide for a development or organizational theme to be introduced throughout a scheme. For example, a theme may simply be used to establish a uniform architectural or landscaped design or a development may be designed around a sporting theme, offering facilities such as a golf course or equestrian activities.

Safeguards have been built into the legislation to ensure that a theme does not impose restrictions based on race or creed or on ethnic or socioeconomic groupings.

To ensure that purchasers are made aware of any matters that will affect the day-to-day maintenance of a community, a developer will be required to prepare a management statement to accompany each stage of the scheme. This statement will bind the developer and the individual owners buying into a scheme and will be available for public inspection. The statement will set out the rules governing the use of association property including any access ways, and the use of any facilities which may be erected on the communal land. It will provide details of how services such as water and electricity are to be maintained and the insurance cover taken out by the association.

It is envisaged that large developments may be constructed over many years, and with changes in economic and social conditions likely during the period, it would not be appropriate to compel detailed disclosures to be made at the time the community plan initiating the project is registered. However, to balance the need to safeguard the interests of people buying into such a scheme against the danger of shackling developers to a static project indefinitely, **at each stage of a community scheme the developer will be obliged to make binding promises about the facilities to be provided within that stage. This document will be known as a development contract** and will be lodged with each neighbourhood plan to place on public record a description of the development, any theme proposed and details of amenities to be provided. The role of local councils in approving and overseeing development will be preserved by this legislation. Both the management statement and development contract will be submitted to the local council for approval with the relevant plans. Where people are living closely in a community, conflicts will inevitably arise.

The Community Land Management Bill will establish procedures designed to simplify the running of an association and to avoid disputes by regulating the calling and holding of meetings and the keeping of records and accounts. A community schemes board is to be constituted to hear disputes and a community schemes commissioner will be established. The role and powers of the commissioner and board will be similar to those of the Strata Titles Commissioner and Strata Titles Board. Some amendment to the Strata Titles Act is required to ensure that strata schemes forming part of a community scheme are subject to the by-laws of the community association and the provisions of the community titles legislation. This is done in the Strata Titles (Community Land) Amendment Bill. In addition, the Miscellaneous Acts (Community Land) Amendment Bill will amend various Acts to ensure that, where appropriate, reference is made to the proposed community titles legislation.

The legislation proposed marks a significant advance in land development. By offering a further means of subdivision, traditional concepts of land development can give way to more imaginative and sympathetic

> approaches to land use. The legislation will promote higher-density housing without loss of amenity and will encourage cheaper accommodation by reducing initial development costs. Commercial development will also be advantaged by providing an appropriate legislative base for projects such as tourist complexes and industrial parks.
>
> (emphasis added)

36 One of the passages emphasised above refers to the developer, at each stage of a community scheme, being "*obliged to make binding promises about the facilities to be provided within that stage*" in a neighbourhood development contract. There is also provision in the legislation for the developer, if it wishes to do so, to register at the outset a community development contract to which statutory covenants will attach about developing the land in accordance with the development contract and development consent: *Development Act* s 26 and Schedule 2 to the *Management Act*: see [47] and [57] below. Such a community development contract was registered in the present case. It and the development consents are at the heart of these proceedings.

Community Land Development Act 1989 **(NSW)**

37 The preamble to the *Development Act* states that it is an Act "*to facilitate the subdivision and development of land with shared property; and for other purposes*". The object of the *Development Act* is stated in s 4(1) as follows:

> Subject to subsection (2), the object of this Act is to facilitate the subdivision of land into parcels for separate development or disposition:
>
> (a) with an interest in associated land in the nature of common or shared property, and
>
> (b) with or without further subdivision (including a subdivision under the *Strata Schemes (Freehold Development) Act 1973*) in conjunction with the development of another such parcel or other such parcels.

38 Section 3(2) provides:

> This Act is to be interpreted as part of the *Real Property Act 1900* but, if there is an inconsistency between them, this Act prevails.

39 "*Community scheme*" is defined in s 3(1) of the *Development Act* as follows:

> (a) the manner of subdivision of land by a community plan, and
>
> (b) if land in the community plan is subdivided by a precinct plan—the manner of subdivision of the land by the precinct plan, and
>
> (c) the manner of subdivision of land in the community plan, or of land in such a precinct plan, by a neighbourhood plan or a strata plan, and
>
> (d) the proposals in any related development contract, and
>
> (e) the rights conferred, and the obligations imposed, by or under this Act, the *Community Land Management Act 1989* and the *Strata Schemes (Freehold Development) Act 1973* in relation to the community association, its community property, the subsidiary schemes and persons having interests in, or occupying, development lots and lots in the subsidiary schemes.

40 In the present case, there was a registered community plan and three registered subsidiary neighbourhood plans, but no precinct plan.

41 "*Community plan*", "*neighbourhood plan*" and "*development contract*" are key concepts and are defined in s 3(1) of the *Development Act* as follows:

> ***community plan*** means a plan for the subdivision of land into 2 or more community development lots and 1 other lot that is community property, whether or not the plan includes land that, on registration of the plan, would be dedicated as a public road, a public reserve or a drainage reserve.
>
> ***neighbourhood plan*** means a plan (other than a community plan, a precinct plan or a strata plan) for the subdivision of land into 2 or more lots for separate occupation or disposition and 1 other lot that is neighbourhood property, whether or not the plan includes land that, on registration of the plan, would be dedicated as a public road, a public reserve or a drainage reserve.
>
> ***development contract*** means instruments, plans and drawings that are registered with a community plan, precinct plan or neighbourhood plan and describe the manner in which it is proposed to develop the land in the community plan, precinct plan or neighbourhood plan to which they relate.

42 Other relevant definitions in s 3(1) of the *Development Act* include the following:

> ***community association*** means the corporation that:
>
> (a) is constituted by section 25 on the registration of a community plan, and
> (b) is established as a community association by section 5 of the *Community Land Management Act 1989*.
>
> ***community development lot*** means a lot in a community plan that is not community property, a public reserve or a drainage reserve and is not land that has become subject to a subsidiary scheme or a lot that has been severed from the community scheme.
>
> ***community management statement*** means a statement that is registered with a community plan as a statement of the by-laws and other particulars governing participation in the community scheme.
>
> ***community parcel*** means land the subject of a community scheme.
>
> ***community property*** means the lot shown in a community plan as community property.
>
> ***developer*** means:
>
> (a) in relation to a community scheme—the person who, for the time being, is the registered proprietor of a community development lot in the community plan, or
> (b) in relation to a precinct scheme—the person who, for the time being, is the registered proprietor of a precinct development lot in the precinct plan, or

(c) in relation to a neighbourhood scheme—the original proprietor of the neighbourhood parcel.

development, in relation to land, means:

(a) the erection of a building on the land, or
(b) the carrying out of a work in, on, under or over the land, or
(c) the use of the land or of a building or work on the land, or
(d) the subdivision of the land, not excluded by regulations under the *Environmental Planning and Assessment Act 1979* from the definition of ***development*** in that Act.

development application means an application under Division 1 of Part 4 of the *Environmental Planning and Assessment Act 1979* for consent to carry out development.

development consent means consent under Division 1 of Part 4 of the *Environmental Planning and Assessment Act 1979* to carry out development.

development lot means a community development lot or a precinct development lot that has not been severed under section 15 from the applicable scheme.

neighbourhood association means the corporation that:

(a) is constituted by section 25 on the registration of a neighbourhood plan, and
(b) is established as a neighbourhood association by section 7 of the *Community Land Management Act 1989*.

neighbourhood lot means land that is a lot in a neighbourhood plan but is not neighbourhood property, a public reserve or a drainage reserve.

neighbourhood property means the lot shown in a neighbourhood plan as neighbourhood property.

neighbourhood scheme means:

(a) the manner of subdivision of land by a neighbourhood plan, and
(b) the proposals in any related development contract, and
(c) the rights conferred, and the obligations imposed, by or under this Act and the *Community Land Management Act 1989* in relation to the neighbourhood association, its neighbourhood property and the proprietors and other persons having interests in, or occupying, the neighbourhood lots.

original proprietor, in relation to land, means the registered proprietor in fee simple of the land at the time of registration of a community plan, precinct plan or neighbourhood plan subdividing the land.

scheme means a community scheme, a precinct scheme, a neighbourhood scheme or a strata scheme.

staged scheme means a community scheme or precinct scheme developed in stages.

subsidiary scheme means

(a) in relation to a community scheme—a precinct scheme, neighbourhood scheme or strata scheme that is part of the community scheme, or
(b) in relation to a precinct scheme—a neighbourhood scheme or strata scheme that is part of the precinct scheme.

43 Section 3(4) of the *Development Act* provides:

A reference in this Act to a development consent, development contract, community management statement, precinct management statement or neighbourhood management statement includes a reference to the consent, contract or statement as from time to time modified or amended in accordance with this Act.

44 Section 5 of the *Development Act* provides for subdivision of land by the registration of a community plan as a deposited plan and permits registration of a development contract for the community scheme, as follows:

5 Community plan

(1) Land that is not part of a community parcel, precinct parcel, neighbourhood parcel or strata parcel may be subdivided by the registration of a community plan as a deposited plan.

…

(5) There may be lodged for registration with a community plan a development contract for the community scheme that complies with Schedule 2 and that, on registration, will become binding in accordance with section 15 of the *Community Land Management Act 1989*.

45 In the present case, development lots were subdivided by neighbourhood plans. This is provided for in s 13(1)(a) of the *Development Act*:

13 Subdivision of a development lot by a neighbourhood plan or strata plan

(1) A development lot may be subdivided:
(a) by a neighbourhood plan registered as a deposited plan…

46 Section 25 provides for incorporation of a community or neighbourhood association upon registration of a related community or neighbourhood plan:

25 Incorporation of associations

(1) The registration of a community plan operates to constitute a corporation with the corporate name *Community Association D.P. No* , the

number to be inserted being that of the deposited plan registered as the community plan.

…

(3) The registration of a neighbourhood plan operates to constitute a corporation with the corporate name *Neighbourhood Association D.P. No* , the number to be inserted being that of the deposited plan registered as the neighbourhood plan.

(4) The membership and functions of the corporations are as stated in the *Community Land Management Act 1989*.

47 A community development contract is optional but a neighbourhood development contract is mandatory. In that regard, section 26 provides as follows:

26 Development contract

(1) If an application for development consent to development in accordance with a proposed community scheme or precinct scheme is accompanied by a proposed development contract, the consent authority may not grant the development consent unless the proposed development contract complies with Schedule 2 and is approved by the consent authority in the approved form.

(2) The consent authority may not grant consent to the subdivision to be effected by a neighbourhood plan unless it also gives approval in the approved form to a proposed development contract for the neighbourhood scheme that complies with Schedule 2 and is lodged with the application for consent.

…

(5) If development consent approving a development contract is required and is granted, the consent authority must certify on the development contract:

(a) that consent has been granted to the development proposed by the instruments, plans and drawings that comprise the development contract, and

(b) that the instruments, plans and drawings are not inconsistent with the development consent,

and must provide the applicant for consent with a copy of the development contract bearing the certificate.

48 Schedule 2 to the *Development Act*, prescribes matters to be included in a development contract. It relevantly provides:

Schedule 2 Development contracts

(Sections 5, 9, 13, 18, 26)

1 Matters to be included

Unless clause 3 applies, a development contract that relates to a neighbourhood scheme (whether or not it is part of a community scheme) must consist of instruments, plans and drawings that are prepared in the approved form and include, but need not be limited to:

(a) a description of the land to be developed under the scheme, and
(b) a description of the amenities proposed to be provided, and
(c) a description of the basic architectural design and landscaping under the scheme and any theme on which the scheme is based, and
(d) a simple pictorial representation of the anticipated appearance of the completed development, and
(e) any other matter prescribed by the regulations.

2 Inconvenience and damage

Unless clause 3 applies, a development contract for any scheme (whether or not it is a neighbourhood scheme) must include:
(a) details of access and construction zones, working hours and any related rights over association property, and
(b) an undertaking by the developer not to cause unreasonable inconvenience to proprietors of lots in the scheme and to repair without delay any damage caused to association property or common property by development activities, and
(c) such other matters as may be prescribed.

…

4 Warning to be displayed

A development contract (whether or not it relates to a neighbourhood scheme) must prominently display a warning in the prescribed form that draws attention to:
(a) the possibility that the scheme to which it relates may be varied or may not be completed, and
(b) the necessity for prospective purchasers to examine the applicable management statement for details of their rights and obligations under the scheme….

49 It can be seen that cl 1(d) of Schedule 2 requires a "*simple pictorial representation of the anticipated appearance of the completed development*" to be included in a neighbourhood development contract. Plan 4 in DA 18/90 or the Stage 2 plan in DA 66/92 (**annexures A** and **E** to this judgment) would satisfy that requirement. However, in the present case no pictorial representation was included in the neighbourhood development contracts. There is no statutory requirement for a pictorial representation to be included in a community development contract.

50 Clause 39(2) of the *Community Land Development Regulation 1990* (NSW) (now repealed and replaced by cl 30 of the *Community Land Development Regulation 2007* (NSW)) prescribed that, in addition to containing the matters referred to in Schedule 2 to the *Development Act*, all development contracts must prominently display on the first page a warning in a prescribed form as follows:

WARNING

(1) This contract contains details of a *neighbourhood/**precinct/*community scheme which is proposed to

be developed on the land described in it. Interested persons are advised that the proposed scheme may be varied, but only in accordance with section 16 of the Community Land Management Act 1989.
*If the scheme forms part of a staged development, interested persons are advised of the possibility that the scheme may not be completed and may be terminated by Order of the Supreme Court.

NOTE: *Delete if not applicable.*

(2) This contract should not be considered alone, but in conjunction with the results of the searches and inquiries normally made in respect of a lot in the scheme concerned. Attention is drawn in particular to the management statement registered at the Land Titles Office with this contract, which statement sets out the management rules governing the scheme and provides details of the rights and obligations of lot owners under the scheme.

(3) Further particulars about the details of the scheme are available in:
* …… local environmental plan No. ……
* development control plan … of ……. Council
*development consent dated ……. granted by ……..

(4) The terms of this contract are binding on the original proprietor and any purchaser, lessee or occupier of a lot in the scheme. In addition, the original proprietor covenants with the association concerned and with the subsequent proprietors jointly and with each of them severally to develop the land the subject of the scheme in accordance with the development consent as modified or amended with the consent authority's approval from time to time.

51 Section 31 of the *Development Act* provides for vesting of association property in an association upon registration of a relevant association plan:

31 Vesting of association property

(1) On registration of the plan or dealing by which it is created, association property vests in the relevant association.
(2) Land vests under this section for the estate or interest evidenced by the folio for the land.
(3) On vesting, the land is freed from any mortgage, charge, covenant charge, writ or caveat that affected it immediately before it became association property.
(4) The estate or interest of an association in its association property is held by it:
  (a) if it has only 1 member—as agent for the member, or
  (b) if it has more than 1 member—as agent for all the members as tenants in common in the shares prescribed by section 32.

52 Section 35 provides for easements:

35 Creation, release and variation of easements or restrictions

(1) If authorised by a unanimous resolution, a community association may:
(a) execute a dealing creating an easement which burdens its community property or a restriction on the use of land or a positive covenant which burdens its community property or the whole of the community parcel…

53 Section 70 of the *Development Act* empowers the Supreme Court to vary a development contract or terminate a staged scheme where completion of a staged scheme has become impracticable, and to vary (or terminate) a scheme where its continuation has become impracticable:

70 Variation or termination of scheme by Supreme Court

(1) If the Supreme Court is satisfied:
(a) that completion of a staged scheme has become impracticable—the Court may vary any applicable development contract or terminate the scheme, or
(b) that continuation of a scheme (whether or not a staged scheme) has become impracticable—the Court may vary or terminate the scheme, or
(c) that the association of a community scheme, each proprietor of a lot within the community scheme and each registered mortgagee, chargee and covenant chargee of a lot within the community scheme have made an application to the Court to terminate the scheme—the Court may vary or terminate the community scheme and any scheme within the community scheme.

(2) An order of the Supreme Court varying a development contract may provide for:
(a) the conversion of a development lot or former development lot to community property or precinct property, or
(b) the conversion of a neighbourhood lot to neighbourhood property, or
(c) the severance from the scheme of a development lot or a neighbourhood lot, or
(d) any other matter the Court considers to be appropriate, just and equitable in the circumstances.

(3) An order of the Supreme Court varying or terminating a scheme may provide for all or any of the following:
(a) the adjustment, exercise and discharge of rights and liabilities under the scheme of an association and its members,
(b) disposal of the assets of an association or of a strata corporation that is a member of an association,
(c) the vesting of estates or interests in land within the staged scheme,
(d) the winding up of an association or of a strata corporation that is a member of an association,
(e) a variation of unit entitlements in accordance with a new valuation,

(f) the registration of a new plan or reversion to a former plan,
(g) any other matter that the Court considers to be appropriate, just and equitable in the circumstances.

(4) If the Supreme Court orders termination of a scheme, the parcel that was subdivided to constitute the scheme is, for the purposes of section 23F of the *Conveyancing Act 1919*, reinstated as a lot in a current plan.

(5) Subsection (4) does not apply if the Supreme Court orders the lodgment for registration of a current plan for the parcel.

54 It can be seen the Court's discretionary power under s 70 is enlivened if the Court is satisfied that completion of a staged scheme or continuation of a scheme has become impracticable. Continuation of a scheme may have become impracticable because a problem, inherent in the terms of the scheme itself, is eventually seen as inevitably producing impracticability during the life of the scheme. In ***Community Association DP 270212 v Registrar General for the State of New South Wales*** (2004) 62 NSWLR 25 at [19] – [22] and [28] Palmer J held:

> In my opinion, s 70(1) does not require the applicant for termination of a scheme to prove that continuation of the scheme is impracticable in the sense of being totally impossible; rather, the applicant must show that in the particular circumstances of the case the scheme cannot continue as a matter of practicality. There is well established authority for construing *impracticable* in this way.
>
> In *Re El Sombrero Ltd* [1958] 1 Ch 900, the applicant sought an order convening a meeting of a company under a provision of the *Companies Act* 1948 (UK) which enabled the court to make such an order *if for any reason it is impracticable to call a meeting of the company in any manner in which meetings of that company may be called.*
>
> Wynn-Parry J said (at 904):
>
> > ... The question then arises, what is the scope of the word *impracticable*? It is conceded that the word *impracticable* is not synonymous with the word *impossible*; and it appears to me that the question necessarily raised by the introduction of that word *impracticable* is merely this: examine the circumstances of the particular case and answer the question whether, as a practical matter, the desired meeting of the company can be conducted... .
>
> In *Thornley v Heffernan* (McLelland J, 12 September 1995, unreported) McLelland J had to consider the meaning of a clause in the constitution of the Liberal Party of Australia which provided for what could be done *if ... time or circumstance ... make it impracticable to hold a meeting*. His Honour, referring to *Re El Sombrero Ltd*, said (at 8): *The expression* impracticable *in [the relevant clause] does not mean* impossible. *It directs attention to considerations of a practical rather than a theoretical nature arising out of the particular circumstances ...* . See also *Re South British Insurance Co Ltd* (1980) CLC (34,419) 940-664.
>
> …

> I do not think that s 70(1) of the Act always requires the court to find that the continuation of a community scheme *has become impracticable* because a particular unexpected problem has arisen and has proved to be insoluble. No doubt that situation would be the most common one in which the section would be applied. But in some cases, the court may find that continuation of a scheme *has become impracticable* because a problem, inherent in the terms of the scheme itself and previously unrecognised, is now seen as inevitably producing impracticability at some time in the future during the life of the scheme. In my opinion, that is the case with the present Community Scheme.

Community Land Management Act 1989 **(NSW)**

55 The preamble to the *Management Act* states that it is an Act "*to provide for the management of community schemes, precinct schemes and neighbourhood schemes established by the subdivision of land under the Community Land Development Act 1989; and for other purposes*". The relevant definitions in s 3(1) are to the same effect as those in the *Development Act*, and s 3(2) likewise provides:

> This Act is to be interpreted as part of the *Real Property Act 1900*, but, if there is an inconsistency between them, this Act prevails.

56 Sections 15 and 16 of the *Management Act* relevantly provide:

> **15 Binding effect of development contract**
>
> (1) If a development contract is registered with a community plan, it has effect as if it included an agreement under seal with covenants to the effect of those set out in Part 1 of Schedule 2.
>
> …
>
> (3) The development contract registered with a neighbourhood plan has effect as if it included an agreement under seal with covenants to the effect of those set out in Part 3 of Schedule 2.
>
> (4) Any attempt to exclude, modify or restrict the operation of the covenants is void.
>
> …
>
> **16 Amendment of development contract with approval of association**
>
> …
>
> (2) A proposed amendment that involves a change in the basic architectural or landscaping design of the development, or in its essence or theme, may not be made unless it is approved:
>
> (a) by the consent authority, and
>
> (b) unless the developer is the only member of the association—by unanimous resolution of each association and strata corporation that is a party to the development contract…

57 The plaintiffs rely on Part 1 of Schedule 2 to the *Management Act* which prescribes the following important covenants in a community development contract lodged with a community plan:

> **Part 1 Community schemes**
>
> **1 Covenant by original proprietor—community scheme**

> Under the agreement included by section 15 in a development contract lodged with a community plan, the original proprietor of the land the subject of the community scheme **covenants**:
> (a) with the subsidiary bodies jointly and with each of them severally, and
> (b) with the subsequent proprietors jointly and with each of them severally,
> **that the land will be developed in accordance with the development contract and the development consent.**
>
> **2 Covenants by subsidiary bodies and subsequent proprietors—community scheme**
>
> The:
> (a) subsidiary bodies, and
> (b) subsequent proprietors,
> under a community scheme covenant jointly, and each of them covenants severally, with the original proprietor of the land the subject of the community scheme that the original proprietor will be **permitted** to develop the land in accordance with the development contract and the development consent.
>
> (emphasis added)

58 Mr Jarman in cross-examination indicated that his solicitor who acted on the conveyance of the interest in Lot 16 to Perricoota Company "*sort of*" made him aware, during the conveyance, of the covenant in cl 2 of Part 1.

59 Although it is not mandatory to lodge a community development contract, in the present case one was lodged with the community plan. It was executed by the original proprietors, Mr Watson and Sammy One. Under s 15 that contract contains the covenants in Part 1 of Schedule 2 to the *Management Act*. Therefore, the original proprietors, Mr Watson and Sammy One, covenanted that the land would be developed in accordance with the development contract and "*the development consent*", and the subsequent proprietors – relevantly, Hillington and Perricoota Company – covenanted that they will permit the original proprietors to do so.

60 In the present case, there is a question as to what is the "*development consent*" referred to in cl 1 of Schedule 2 Part 1 to the *Management Act*. Generally, it may be anticipated that there will only be one development consent which brings land under the community titles legislation, providing both for subdivision and proposed facilities for the community scheme. In the present case, the community titles legislation commenced about two months after the original DA 18/90 was lodged. Plan 4 accompanying that DA showed proposed facilities. In 1992, DA 66/92 was lodged to effect a subdivision which would bring the land under the community titles legislation. The Stage 2 subdivision plan showed essentially the same facilities as had been shown on Plan 4 accompanying DA 18/90. Hence, in the present case there are two relevant development consents.

61 The plaintiffs submit that under their statutory covenant the original proprietors covenanted to develop the land in accordance with both consents — or at least consent 66/92

— including the plans in the development applications to which the consents related (**annexures A** to **E** to this judgment).

62 The mandatory neighbourhood development contract was registered with each of the mooring berth neighbourhood plans. Under s 15(3), each of those contracts contain the covenants found in Part 3 of Schedule 2 to the *Management Act*. These statutory covenants in a neighbourhood development contract are as follows:

> **Part 3 Neighbourhood schemes**
>
> **4 Covenant by original proprietor—neighbourhood scheme**
>
> Under the agreement included by section 15 in the development contract lodged with a neighbourhood plan, the original proprietor of the land the subject of the neighbourhood scheme covenants:
> (a) with the neighbourhood association, and
> (b) with the subsequent proprietors jointly and with each of them severally,
> that the land will be developed in accordance with the development contract and the development consent.
>
> **5 Covenants by neighbourhood associations and subsequent proprietors**
>
> The:
> (a) neighbourhood association, and
> (b) subsequent proprietors,
> under a neighbourhood scheme covenant jointly, and each of them covenants severally, with the original proprietor of the land the subject of the neighbourhood scheme that the original proprietor will be permitted to develop the land in accordance with the development contract and the development consent.

DEVELOPMENT CONSENT 18/90

The development application

63 On 23 May 1990, upon the instructions of Mr Watson and Sammy One, Mr B Mitsch of Veitch and Mitsch, consulting town planners, lodged DA 18/90 with Murray Shire Council. The application was for a 100 berth marina as Stage 1 and a tourist complex as Stage 2. It described the development for which development consent was sought as follows:

> Marina – initially for 30 river craft with extension to 100 craft Tourist development complex as stage 2.

64 The application stated that the development involved the erection of buildings and that, when erected, their proposed use would be "*managers residence – boat storage – tourist accommodation*".

65 An environmental impact statement (**EIS**) accompanied the development application. The EIS included a concept drawing, which showed the proposed development, including houseboat moorings along the northern side of Deep Creek, a speed boat ramp, houseboat ramp, supply jetty, motel, restaurant, units, tennis court, swimming pool, houseboat service centre, manager's residence, office and other facilities. The significance of the manager's residence was emphasised in paragraph 2.5.2 of the EIS, which stated:

A manager's residence will be incorporated into the project to ensure that day to day activities on the site are carried out in an orderly and environmentally safe manner.

66 In June 1991 a supplementary environmental impact statement (**SEIS**) was lodged with the council. It included a location map and four plans:

(a) Plan 1 entitled "*Existing Conditions Plan*";

(b) Plan 2 entitled "*Landscape Masterplan*". It included the notation "*Refer to Detailed Landscape Masterplan for enlargement of the central area*". This was a reference to Plan 4;

(c) Plan 3 entitled "*Stage One Development Plan*"; and

(d) Plan 4 entitled "*Detailed Landscape Masterplan*".

67 Plan 4 (**annexure A** to this judgment) shows, among other things, mooring berths, a public wharf, a boat ramp, a manager's residence and a central carpark with (it seems) some 60 car parking spaces. It shows an "*access track*" roughly parallel with, and some distance to the north of, the eastern moorings with three paths leading from it to those moorings. The position of this "*access track*" appears to be slightly different from the existing upper vehicular access track to the eastern moorings. There also exists a lower vehicular access track to the eastern moorings, close to and roughly parallel with them, but this lower access track is not shown on Plan 4.

68 The SEIS indicated as follows that Plans 2 and 3 were the "*masterplan*" for the marina development and that Plan 4 showed Stage 1 of the development:

> …[The developers] propose a carefully staged development, to include a 100 houseboat marina with full service facilities, cabin style family accommodation, motel and restaurant facilities.
>
> The existing conditions of the proposed development site are illustrated on Plan 1.
>
> The Masterplan for the marina development is shown on Plans 2 and 3. Plan 2 shows the whole development site including the marina's relationship to the lagoon and Murray River, the proposed road access, fencing of the island and recycled-water woodlot. Plan 3 illustrates the detailed masterplan for the development, showing mooring sites, boat ramp and jetty, kiosk, cabin and motel accommodation, sewage pump out treatment facilities, fuel supply location, restaurant, carparks, tracks and roads.
>
> Stage One of the development will see the construction of the marina facilities. This includes 100 houseboat moorings, kiosk, sewage pump out and fuel supply facilities, manager's residence, carpark, dry storage area and associated storage and maintenance structures. Stage One of the marina development is shown on Plan 4. Stage One will be implemented over a 12 month period to be completed by December 1992 and can be divided into 4 phases. The first phase will commence in September and will include excavation of the creek, entrance, construction of 30 moorings and associated

earthworks, establishing gravel entrance roads and sewage system, power and water supply, fencing, stormwater retention wetland and site planting.

During Phase 2, all of the buildings associated with Stage One, a further 30 moorings and houseboat hardstand area will be constructed and the fuel supply installed.

During Phase 3, the winter months, there will be no construction.

In the final phase of Stage One, the remaining 40 moorings will be constructed, all roads will be surfaced and further site planting will occur.

69 Paragraph 4.2 of the SEIS stated that the Landscape Masterplan (Plan 2) showed the main features of the proposed marina and associated facilities:

> **4.2 THE MARINA DEVELOPMENT**
> The Landscape Masterplan which is reproduced in the Introduction to this Supplementary EIS shows the main features of the proposed marina and associated facilities. The Masterplan shows sufficient detail for the purposes of EIS assessment. Further details of site development and construction will be provided once approval for the project had been obtained

70 Also enclosed with the SEIS was a large scale map entitled "*Map 1: Location Map*". It showed a large area on both sides of the Murray River with a relatively small shaded part marked "*Deep Creek Proposed Marina*".

71 The SEIS addressed the public components of the proposal, including the public wharf, in paragraph 4.1.6:

> **4.1.6 The Department of Conservation and Environment raises the issue of the provision of a public component in the development of such facilities as the proposed marina.**
>
> While the main objective of the marina proposal (as encapsulated in the Stage 1 Development Plan) is the provision of mooring and associated facilities for houseboats, there is also provision for public components in the proposal. It is envisaged that the general public will have access to the restaurant, motel and cabin components of the development, the kiosk, wharf area, picnic facilities and public conveniences and to the area to the east of the creek which is to be established as a native flora and fauna area with access provided by canoes or rowing boats.
>
> The pump out and re-fuelling facilities would also be available to other river users.

72 Paragraph 4.2.20 addressed the sealing of the main access road and the surfaces of other roads and carparks as follows:

> The main access road into the site will be sealed with asphalt and 6.2 metres in width. Access roads to the restaurant and public wharf will also be asphalt sealed. It is proposed that all other roads, and the carparks and houseboat storage area be surfaced with gravel. It is envisaged that these gravel surfaces

will fit more comfortably into the rural landscape character of the development while proving satisfactory for access and storage purposes.

73 Paragraph 4.4 noted that the NSW State Pollution Control Commission's main area of concern related to the "*marina's likely impact on water quality of the Murray River and a proper effluent management plan for the treatment and disposal of all … effluent from the complex*".

74 On 10 September 1991, the council's Health and Building Surveyor submitted a Special Report to the ordinary meeting of Murray Shire Council. It described the application as being for the following development:

> **Stage 1** is proposed to include excavation of the creek entrance, construction of 30 moorings and associated earthworks, gravel entrance road, sewerage system, power and water supply, fencing, stormwater retention wetland and site planting.
>
> **Stage 2** a further 30 mooring sites and houseboat hardstand area and fuel supply installed.
>
> **Stage 3** the remaining 40 mooring sites will be constructed, roads will be surfaced and site planting.
>
> To support the Marina development also proposed is a boat ramp and jetty, kiosk, cabin and motel accommodation, sewage pump out facility, fuel supply, restaurant, carpark, managers residence, storage sheds, workshop and houseboat storage area.

Development consent

75 At a meeting on 10 September 2001, Murray Shire Council conditionally approved DA 18/90. The notice of determination was signed by the Shire Clerk on 12 September 1991. The notice stated that the conditions of consent were "*as per attached letter*". The attached letter was dated 12 September 1991. In the letter the council notified Mr Mitsch that it had granted development consent and set out the conditions of approval.

76 It is necessary to pay close attention to the terms of the notice and the letter because there is an issue of construction about whether the consent incorporated the terms of the development application, particularly the enclosed plans, as the plaintiffs contend. The notice, after identifying Mr Mitsch as the applicant in respect of DA 18/90, stated:

> PURSUANT TO SECTION 92 OF THE ACT NOTICE IS HEREBY GIVEN OF THE DETERMINATION BY CONSENT AUTHORITY OF THE DEVELOPMENT APPLICATION
>
> NO: 18/90 RELATING TO THE LAND DESCRIBED AS FOLLOWS:
> PART PORTION 19, PARISH OF BENARCA
>
> THE DEVELOPMENT APPLICATION HAS BEEN DETERMINED BY:
>
> * ~~(a) GRANTING OF CONSENT UNCONDITIONALLY;~~

* (b) GRANTING OF CONSENT SUBJECT TO THE CONDITIONS SPECIFIED IN THIS NOTICE;
* ~~(c) REFUSING OF CONSENT.~~

THE CONDITIONS OF THE CONSENT ARE SET OUT AS FOLLOWS:

AS PER ATTACHED LETTER

THE REASONS FOR THE * IMPOSITION OF THE CONDITIONS/THE REFUSAL ARE SET OUT AS FOLLOWS:

AS PER ATTACHED LETTER.

77 The terms of the attached letter dated 12 September 1991 from the council to Mr Mitsch bear on the issue of whether the development application, particularly the enclosed plans, forms part of the development consent. The letter stated:

Development Consent 18/90
Deep Creek Marina and Tourist Development
Part Portion 19, Parish of Benarca

Council resolved at the meeting of 10th September, 1991 to grant development consent for the abovementioned Marina and tourist development subject to the following conditions:-

Stage 1

1. That a concrete regulator be constructed across the entrance of Deep Creek to the River. This regulator shall be constructed so that at low river an acceptable level of water is retained in Deep Creek.

   The regulator shall be constructed to a design and finished to a level approved by the Shire Engineer.

2. The sewerage system shall be installed to the requirements of the State Pollution Control Commission.

3. Gravel roads shall be constructed to a design and standard approved by the Shire Engineer.

Stage 2

4. The houseboat storage area shall be surfaced with crushed rock and be screened from the main road by the planting of suitable screens of advanced trees.

5. The fuel supplies shall be installed to the requirements of the Dangerous Goods Branch of the Department of Labour and Industry. Bund walls shall be provided around fuel storage areas.

6. The access road shall be surfaced with bitumen and the intersection with the main road shall be constructed to a standard required by the Traffic Committee.

General

7. Water testing as specified by Council's Health Surveyor shall be carried out in Deep creek on a monthly basis and on the sewage treatment plant on a half yearly basis. The results of these tests shall be forwarded to Council.

8. Water quality within the Marina shall be maintained to a base standard which will be a standard set by water sampling before work on the Marina commences.

9. Approval under Section 21D of the Soil Conservation Act shall be obtained for removal or pruning of any tree within 20 metres of the bank of the river.

10. Approval shall be obtained from the Department of Water Resources for any excavation works proposed to the River bank and the boat ramp.

11. A potable water supply shall be provided for the motel, cabins, restaurant and kiosk.

12. Buildings shall not be constructed nearer than 60 metres from the bank of the River or Deep Creek.

13. Internal roads and parking areas shall be sealed with bitumen when restaurant, motel and cabins are developed.

14. Houseboats shall not be occupied for more than three consecutive days while moored within the Marina.

15. The destruction of any tree not being permitted in the proposed wild life refuge area.

16. All buildings to be finished in a colour that blends into the surrounding landscape.

17. One sign only of an approved size being permitted on the entrance to the development.

18. Moorings within the Marina shall be restricted to the area shown on the map in the supplementary Environmental Impact Statement.

19. Access to the sewage treatment works shall be from within the property and a separate entrance to this facility shall not be permitted from the main road.

20. Stock shall be fenced off from Deep Creek.

The reasons for the imposition of the conditions are sit [sic] out as follows:-

1. To retain an acceptable level of water within Deep Creek at all times.
2. To prevent pollution.
3. To provide safe access.
4. To provide all weather access to vessels and for aesthetic reasons.
5. To comply with legislation and prevent pollution.
6. To provide all weather access and for traffic safety reasons.
7. To check on possible pollution.
8. To provide a base sample for comparison.
9. As required by legislation.
10. As required by legislation.
11. For health reasons.
12. To comply with legislation and Councils code.
13. To provide all weather access.
14. To comply with legislation.
15. For conservation reasons.
16. For aesthetic reasons.
17. For aesthetic reasons.
18. To comply with the Environmental Impact Statement.
19. For traffic safety.
20. To reduce pollution.

78 In cross-examination Mr Watson agreed that this development consent included consent to Plan 4. I do not consider that his view is relevant to the construction issue although it may be relevant to discretionary relief if the case reaches that stage.

DEVELOPMENT CONSENT 66/92

Development application

79 On 7 October 1992, Mr Mitsch lodged DA 66/92 which described the development for which consent was sought as: "*Community title subdivision to create 1 community scheme and 2 two neighbourhood schemes*". The consent of the owners, Mr Watson and Sammy One, appeared on the application.

80 Accompanying DA 66/92 was a letter from Mr Mitsch dated 7 October 1992. The letter explained that consent was sought to a subdivision in two stages, to be effected under the terms of the new community title legislation, involving a community association and neighbourhood associations.

81 The first stage was described in Mr Mitsch's letter as follows:

Lot 1 – Association Property

This association property includes:

1. access way
2. central carpark
3. foreshore area
4. sewerage pump station
5. effluent disposal site
6. that part of the lagoon area not included in the individual berths

Lot 2 – 11 – Development Lots.

These future development Lots are designed to be further subdivided in a neighbourhood lots and each of the development lots will provide for approximately 10 individual lots of one berth each.

Neighbourhood Development Contracts and Neighbourhood Management Statements will be prepared for each of these subdivisions and will be approved by Council prior to lodgement at the Titles Office.

82 The second stage was described in Mr Mitsch's letter as follows:

Development of Lot 12 –

This is the residue parcel and is designed to be further subdivided into neighbourhood lots to comprise the following:

Neighbourhood Lot 1 will comprised [sic] the open space consisting of the wildlife refuge on the island and the Murray River Foreshore setback Area.

Neighbourhood Lot 2 will incorporate the Motel Unit and the Restaurant area.

Neighbourhood Lot 3 will incorporate:

1. Managers Residence
2. Houseboat Storage Area
3. Houseboat Maintenance Area
4. Wharf and Fuel Supply Area
5. General Store
6. Small Storage Shed

Neighbourhood Lot 4 will incorporate the holiday cabins, tennis court and swimming pools.

Neighbourhood Lot 5 will comprise the residue farming land area and will be utilised for small scale farming activities which will be compatible with the overall development. These will form part of an agriculture based tourist park.

83 Mr Mitsch's letter explained that:

Each stage of the development involves the incorporation of a association, i.e community association for the overall development and neighbourhood associations for the further subdivisions. These associations are controlled by the appropriate Development Contract and a Management Statement. The Development Contracts and Management Statements form part of the title to the individual Lots and are lodged at the Land Titles Office with the subdivision plan. They are binding on not only the proprietors of the land but also successors in title. Both Development Contract and Management Statement are approved by Council. The Development Contract cannot be varied except with Councils consent.

84 His letter referred to access as follows:

> The access way to the site will be part of the community association property and will be established as a private access way. This remains vested in the community association which is responsible for the maintenance and upkeep of that facility. A private access way allows the community association to control and limit its use to those members of the association and their guests.

85 The letter enclosed drafts of a community management statement, community development contract, neighbourhood management statement and neighbourhood development contract.

86 A "*Subdivision Outline*", which formed part of DA 66/92, included the following description:

> **1. COMMUNITY SUBDIVISION**
>
> 3 LOTS;
>
> **LOT 1:** **Association Property**
> Managed by Community Association in accordance with the Development Contract and the Management statement.
>
> **LOTS 2-11** **Development lots;**
> To be subdivided into individual berths by neighbourhood plans.
>
> **LOT 12:** **Development lot;**
> Further development for Marina Complex in accordance with Development Contract.
>
> **2. NEIGHBOURHOOD SUBDIVISIONS**
>
> LOT 1: Association Property
> Managed by Precinct Association in accordance with Development Contract and Management Statement.
>
> LOT 2-12 inclusive:
>
> LOT 2 Motel Units and Restaurant
>
> LOT 3 Managers Residence
> Houseboat Storage
> Houseboat Maintenance
> Wharf
> Fuel Supplies
> General Store
> Storage Shed

LOT 4	Holiday Cabins Tennis Court Swimming Pool
LOT 5	Residue Farm Agriculture

Subdivision plans accompanying DA 66/92

87 Among the documents accompanying DA 66/92 were three Stage 1 subdivision plans described as "*Community Plan of Subdivision 3 Sheets*" (copies are **annexures B, C and D** to this judgment). These plans indicated in green that the community property would include a substantial part of the foreshores and the whole of the waters of Deep Creek, a carpark, a boat ramp, and an access road from the Moama-Barham Road (called Perricoota Road). On the third of those plans (**annexure D** to this judgment) under "*carpark*" appear the words "*see EIS for details*". On the second of those plans (**annexure C** to this judgment) in relation to the general store and storage shed shown on Lot 12 also appear the words "*see EIS for details*". A "*public wharf*" is shown as part of Lot 12 on those two plans.

88 The "*Lots 2 – 11 Development Lots*" in Stage 1 referred to in Mr Mitsch's letter were the proposed neighbourhood development lots for marina berths on the northern bank of the lagoon. Because of the demand for marina berths they were truncated to three neighbourhood mooring lots – Lots 2, 3 and 4 – by the time the community plan came to be registered (one sheet is **annexure F** to this judgment). I have called them the Central, Western and Eastern Neighbourhoods (see [26] above). Later, Lot 4 came to be re-numbered as Lot 6.

89 Also accompanying DA 66/92 was a Stage 2 subdivision plan (**annexure E** to this judgment). As noted above, Mr Mitsch's letter designated Stage 2 as the development of residual Lot 12 by subdivision into five neighbourhood lots. The Stage 2 subdivision plan is described on its face "*Stage 2 Subdivision Lot 12 Proposed Community Title Subdivision*". It shows essentially the same facilities and the same upper eastern "*access track*" as is shown on Plan 4 in DA 18/90 (**annexure A** to this judgment). The Stage 2 plan shows the Stage 1 subdivision area in white and the Stage 2 subdivision of Lot 12 in various colours. Within the Stage 2 subdivision of Lot 12 it shows the Stage 2 neighbourhood subdivision Lots 1 to 5 described in the Subdivision Outline (accompanying DA 66/92) and in Mr Mitsch's letter. (The Stage 2 Lots 1 to 5 should not be confused with the Stage 1 Lots 1 to 11). Lot 3 within Stage 2 is shown as including a general store and a storage shed in areas which are respectively now Lots 14 and 15; the public wharf; and part of what is now Lot 16 on which appear a manager's residence and houseboat storage area. The Stage 2 plan also shows a 100 metre setback from the Murray River adjoining the mooring neighbourhood Lots 2 and 4. Lot 5 within Stage 2 (most of which is now Lot 16) in fact extends all the way up to Perricoota Road. Ultimately,

(a) Stage 2 Lot 4, most of Lot 2 and part of Lot 1 comprising part of the setback area to the Murray River north of Deep Creek shown on the Stage 2 subdivision plan became the Honeyman Lot (also known as "*Murray Rivers Edge*"), which has been approved by the council for development as holiday accommodation, part of which has been completed;

(b) part of Stage 2 Lot 3, where the general store and storage shed are shown, was first developed and used by the original developers as a restaurant/bar and store. It was later sold and eventually became Lots 14 and 15 on which there now are, respectively, a hotel/restaurant and supermarket;

(c) the remainder of Stage 2 Lot 3 stayed in the ownership of the developers and is now part of Lot 16, which includes the original Lot 5.

Mr Watson's evidence

90 In cross-examination Mr Watson agreed that:

(a) the reference to "*central carpark*" in Mr Mitsch's letter was a reference to the central carpark shown on Plan 3 accompanying DA 18/90;

(b) the reference to "*foreshore area*" in Mr Mitsch's letter could have been a reference to the land on the northern side of Deep Creek between Murray River and the 100 metre setback from the River shown on Plan 4;

(c) the "*effluent disposal site*" referred to in Mr Mitsch's letter was a parcel of land adjoining the Moama-Barham Road (i.e. Perricoota Road), which Mr Mitsch later deleted from the community plan before it was registered;

(d) at that time "*that part of the lagoon area not included in the individual berths*" was owned by the Lands Department. Mr Watson had told the Lands Department he wanted to acquire it to incorporate it into a community title development. The community title development which he then proposed was to transfer it into community association property; and

(e) when DA 66/92 was made he intended the public wharf to be freely available to the general public.

Council report

91 The council's Health and Building Surveyor's Report dated 14 October 1992 commented on DA 66/92 that:

> The proposal appears to be in accordance with Council Consent 18/90 with the exception that individual phases of the development will be subdivided into neighbourhood lots.

Development consent

92 The notice of determination of conditional consent to DA 66/92 signed by the shire clerk was dated 26 October 1992. It is necessary to set out its contents because (as with the notice of determination of DA 18/90) the plaintiffs submit that on its proper construction it incorporated the development application and, in particular, the accompanying plans (**annexures B-E** to this judgment). The notice is in the same standard form as was used for development consent 18/90. It was addressed to Veitch and Mitsch and described them as "*the applicant in respect of development application 66/92"*. The notice then stated:

> PURSUANT TO SECTION 92 OF THE ACT NOTICE IS HEREBY GIVEN OF THE DETERMINATION BY CONSENT AUTHORITY OF THE

DEVELOPMENT APPLICATION NO: 66/92 RELATING TO THE LAND DESCRIBED AS FOLLOWS:

Lot 1, DP 16892 Parish of Benarca

THE DEVELOPMENT APPLICATION HAS BEEN DETERMINED BY:

* ~~(a) GRANTING OF CONSENT UNCONDITIONALLY;~~
* (b) GRANTING OF CONSENT SUBJECT TO THE CONDITIONS SPECIFIED IN THIS NOTICE;
* ~~(c) REFUSING OF CONSENT.~~

THE CONDITIONS OF THE CONSENT ARE SET OUT AS FOLLOWS:

As per attached letter.

THE REASONS FOR THE * IMPOSITION OF THE CONDITIONS/THE REFUSAL ARE SET OUT AS FOLLOWS:

As per attached letter.

93 The "*attached letter*" referred to in the notice was a letter dated 26 October 1992 from the council to Veitch and Mitsch. The letter was entitled: "*Community Titles Subdivision – Consent 66/92 Lot 1, DP 16892, Parish of Benarca Owner: Anthony Rupert Watson and Sammy One Pty Ltd Your reference : 6616/89*-90". That reference appeared on Mr Mitsch's subdivision plans (**annexures B** to **E** to this judgment) and on Mr Mitsch's letter of 7 October 1992 which accompanied the development application, referred to at [80] above. The council's letter of 26 October 1992 then stated:

> Council resolved at the meeting on 20th October, 1992 to grant consent for the proposed subdivision subject to:-
>
> a) The submission of formal subdivision plans, community development contracts, community management statements, neighbourhood development contracts and neighbourhood management statements.
> b) Conditions 1, 2, 6, 7, 8, 9, 10, 14, 15, 16, 17, 18, 19 and 20 of consent 18/90 being complied with.
> c) That no buildings being permit [sic] on Neighbourhood Development Lots 2 – 11 (moorings or berths).
> d) That the neighbourhood management statement require all vessels moored at the Development lots to be able to move under their own power and be a vessel registered with the Maritime Services Board.
>
> The reasons for the imposition of the conditions are as follows.
>
> a) To comply with legislation
> b) To comply with conditions of a previous consent.
> c) For aesthetic reasons.
> d) For aesthetic reasons.

SUBMISSION OF FORMAL SUBDIVISION DOCUMENTATION TO COUNCIL: OCTOBER 1994

94 The council granted subdivision development consent 66/92 subject to submission of formal subdivision plans and other documents. On 12 October 1994 Mr Mitsch, on Mr Watson's instructions, wrote to the council "*Re: Community Title Subdivision – Consent 66/92…*". The letter concluded by requesting the council to certify and return for lodgement at the Land Titles Office the original and two copies of the following documents, which were enclosed:

(1) a community plan in six sheets;
(2) a neighbourhood plan in five sheets;
(3) a community development contract;
(4) a community management statement;
(5) a neighbourhood development contract;
(6) a neighbourhood management statement.

95 The letter also stated:

> We refer to your letter of the 26th October 1992 in which you advised that a community title subdivision of the above described land had been approved by your Council subject to the conditions imposed therein.
>
> We have now been instructed to proceed with the subdivision survey and enclose herewith the formal plans together with Community Development Contract, Community Management Statement, Neighbourhood Development Contract and Neighbourhood Management Statement.
>
> The original proposal as approved was to create the neighbourhood or marina berth lots in ten separate stages i.e. as shown as lots 2 to 11 inclusive on the plans which accompanied the original application. Enquiry for these lots has been such that it is now intended to create these neighbourhood lots in three stages only.
>
> Stage 1 of the development will now comprise the creation of 45 separate marina berth lots together with two future development lots for marina berths with the balance of the land being held in one lot. This balance of the land will be developed for future use as per the approval to the marina proper and associated works. These are shown more specifically on the Environmental Impact Statements and supplementary Environmental Impact Statement which accompanied that application.
>
> It should be noted that the island, which is to form a wildlife sanctuary, is now to be created as community property at Stage 1 of the development. It was originally proposed that this would be part of the community development lot and created as common property at a future stage. Again because of the demand for marina berth lots it is felt expedient to create this as community property at day 1.
>
> **Apart from minor variations in the position of the boundaries due to physical features found on survey the layout generally conforms with that approved in Council's approval referred to above.**

(emphasis added)

96 The last sentence of this letter was, in my opinion, deceptive. The layout "*approved in Council's approval*" was the layout in Mr Mitsch's subdivision plans enclosed with DA 66/92 (**annexures B to E** to this judgment). As discussed above, those plans showed the waters and much of the foreshores of Deep Creek as community property. In the community plan enclosed with the letter, the waters and foreshores were no longer shown as community property but as part of a development lot owned by the developers (now Lot 16). The community plan was later registered in that form, except for an amendment deleting the effluent disposal block on Perricoota Road (**annexure F** to this judgment). Mr Watson in cross-examination agreed that there were no "*physical features*" found on survey which might have justified the land behind the Eastern Neighbourhood berths up to and including the access road shown on Plan 4 becoming the developers' land.

97 This gross disappearance of community property may be viewed as the seminal cause of many of the plaintiffs' grievances as they emerged more than a decade later when the developers closed vehicular access to the mooring berths and closed the public wharf.

98 There was limited reference, in the cross-examination or re-examination of Mr Watson and Mr Bird, to the reason for the disappearance of the lagoon as community property in the registered community plan. In cross-examination Mr Watson said he thought it was a result of discussions between Mr Mitsch and council planning people. In re-examination he said that Mr Mitsch had regular discussions with council officers to check how they wanted certain matters treated. He said Mr Mitsch told him that they wanted Mr Watson to be responsible for the water quality because this was the first inland marina in New South Wales, no-one knew what sort of effect it would have on water quality, and they wanted Mr Watson to keep a very close eye on it. Because of that, he understood the council wanted him to retain ownership of the lagoon and the registered plans were altered to reflect that.

99 Mr Bird, a planning consultant to the current developers, said in re-examination that Mr Mitsch had explained to him that the developer was responsible for water quality, sediment and soil erosion control during the development and that that was not practical if the developer did not control the land. He said Mr Mitsch indicated there was significant snagging in the narrower part of the most eastern part of the creek and the sediment control required the land to the north to be the developers' land, as well as the water. This evidence was given unclearly and I am left in doubt as to whether this was said to be a requirement of the council or a requirement of the developers.

100 This evidence from Mr Watson and Mr Bird was an unsatisfactory form of proof of something which goes to a central issue in the case. It is double hearsay. Mr Mitsch appears to have been available to be called as a witness but was not called. No explanation for his non-appearance has been provided. I draw the inference that he could have said nothing which would have assisted the developers' case.

101 Even if I were not to draw that inference, I would regard this evidence of council officers' wishes as unreliable. If the explanation for the transfer of so much community property, shown in the DA 66/92 plans, to the developers lay in a wish of some council

officers that the developers should control water quality, one would expect that to have been stated as a condition of development consent or in the council report in evidence or at least in a written communication from the council, and to have been referred to in Mr Mitsch's letter. I am unable to see why the expression of a wish by some council officers that the developers be responsible for water quality should have been interpreted by the developers as a council requirement that the developers had to own the lagoon and foreshores which had been designated as community property in development consent 66/92. It could have been achieved in some other way, such as by a provision in the community management statement. A wish of these unidentified council officers at some unidentified time could not negate council's development consent 66/92 for a subdivision in which the lagoon and foreshores were in the ownership of the community association.

102 In any event, even if this evidence were to be accepted, I see no reason why the lagoon and foreshores should not now become an accretion to the community property as claimed by the plaintiffs and provided for in the subdivision plans accompanying DA 66/92, if the plaintiffs' claim is otherwise made out.

THE COMMUNITY PLAN

103 On 5 December 1994 the six sheets of the community plan submitted by Mr Mitsch to the council on 12 October 1994 were endorsed with the council clerk's signature, indicating council's approval.

104 On 3 January 1995, Mr Mitsch made amendments to the community plan, by deleting part of Lot 5 on Perricoota Road (a detached block) and an easement for effluent disposal connecting the subject land to that lot.

105 On 17 January 1995 the community plan was registered as DP 270076. One of the sheets is **annexure F** to this judgment. Registered with the community plan were a community management statement and community development contract executed by the original developers, Mr Watson and Sammy One.

106 The registered community plan showed Lot 1 as community property, including the access road from Perricoota Road with a "*claw*" at the end of it around most of what is now Lot 14 (the hotel/restaurant) and Lot 15 (the supermarket), which were then part of the developers' Lot 5 (now Lot 16). As noted above at [96], Lot 5 (now Lot 16) was shown as including most of the subject land including the waterway and foreshores. Lots 2, 3 and 4 (Lot 4 is now Lot 6) were the mooring berth areas and later came to be the Central, Western and Eastern Neighbourhood Association lots.

107 The registered community plan burdened Lot 5 (now Lot 16) with an easement for access of variable width over the lagoon and benefited Lot 1 (the community association lot) and Lots 2, 3 and 4 (the three mooring neighbourhood association lots). The terms of this easement were as follows:

> Full and free right for every person who is at any time entitled to an estate or interest in possession in the land herein indicated as the dominant tenement or any part thereof with which the right shall be capable of enjoyment, and every person authorised by him, to go, pass and repass at all times and for all

purposes with or without boats to and from the said dominant tenement or any such part thereof.

108 The registered community plan also showed that an easement was granted to the council for effluent disposal adjoining the Murray River (on the northern side of Deep Creek) five metres wide together with an associated right-of-carriageway over land designated as part of Lot 5 but which the DA 66/92 plans had proposed would be community property.

THE COMMUNITY DEVELOPMENT CONTRACT

109 The community development contract registered with the community plan on 17 January 1995 was executed by Mr Watson and Sammy One. Under s 15(1) of the *Management Act*, it had effect as if it included an agreement under seal with covenants to the effect of those set out in Part 1 of Schedule 2 to that Act: see [56] – [57] above. It contained the council's certificate which certified:

(a) that the consent authority has approved of the development described in the Development Application No. 18/90; and

(b) that the terms and conditions of this development contract are not inconsistent with the Development as approved.

110 The "*proposals*" in the registered community development contract form part of the "*community scheme*" as defined in s 3 of the *Development Act*: see [39] above. The plaintiffs rely on proposals in that contract.

111 The preliminary part of the contract is entitled "*Warning*". Paragraphs 1 to 4 of the "*Warning*" are in the form prescribed by the cl 4 of Schedule 2 to the *Development Act* and cl 39 of the *Community Land Development Regulation 1990*, referred to at [48] and [50] above (now cl 30 of the *Community Land Development Regulation 2007*). The provisions of Parts 1 and 2 of the contract were prescribed in Schedule 2 to the *Development Act*.

112 The community development contract includes the following provisions:

WARNING

1. This contract contains details of a community scheme which is proposed to be developed on the land described in it. Interested persons are advised that the proposed scheme may be varied, but only in accordance with Section 16 of the Community Land Management Act 1989.

   The scheme forms part of a staged development, interested persons are advised of the possibility that the scheme may not be completed and may be terminated by order of the Supreme Court.

2. The development contract should not be considered alone, but in conjunction with the results of the searches and enquiries normally made in respect of a lot in a scheme. Attention is drawn in particular to the management statement registered at the Land Titles Office with this contract, which statement sets out the management rules governing the scheme and provides details of the rights and obligations of lot owners under the scheme.

3. Further particulars about the scheme are available in the:

Development Consent No. 18/90
granted by the Council of the Shire of Murray
dated the 12th September, 1991

4. The terms of this contract are binding on the original proprietor and any purchaser, lessee or occupier of a lot in the scheme. In addition, the original proprietor covenants with the association concerned and with the subsequent proprietors jointly and with each of them severally to develop the land subject of the scheme in accordance with the development consent as modified or amended with the consent authority's approval from time to time.

5. Any reference to *Development Consent* is a reference to that part of the Development consent that relates to the neighbourhood scheme only.

6. For the purposes of this Contract the particulars in the Development Consent referred to above relate to the Neighbourhood Scheme.

PART 1

DESCRIPTION OF DEVELOPMENT

1.1. DESCRIPTION OF LAND

The land to be developed is Lot 12 in Deposited Plan No. 846348 in the Local Government Area of Murray, Parish of Benarca, County of Cadell and State of New South Wales.

The land is to be developed for the purposes of a marina (known as the Deep Creek Marina) and associated works as detailed in Development Application to the Council of the Shire of Murray dated 23rd May 1990.

1.2. AMENITIES

1.2.1. All electricity services are to be provided by the developer.

1.2.2. The developer is to provide a sealed access way in accordance with the Development Consent.

1.3. FURTHER DEVELOPMENT

1.3.1. All driveways are to be sealed in accordance with the Development Consent No 18/90 issued by the Council of the Shire of Murray on the 12th September 1991.

1.3.2. Community Development Lots 2, 3 and 4 are to be further subdivided into neighbourhood lots for the purpose of houseboat berths.

1.3.3. Community Development Lot 5 is to be developed in a further subdivision to provide facilities incorporated in the Development Consent in accordance with plans approved by the Council of the Shire of Murray. (Refer Development Consent No 18/90 dated 12th September 1991.)

PART 2
ORIGINAL PROPRIETOR'S RIGHTS AND UNDERTAKING

2.1. ACCESS AND CONSTRUCTION AREAS

Working hours 7.00 a.m. to 5.30 p.m. Monday to Friday inclusive.

Access will be via Public Roads adjoining the Parcel.

During the construction period access is limited to community property only and roads within the Community Parcel.

2.2. UNDERTAKING BY THE ORIGINAL PROPRIETOR TO REPAIR

The developer undertakes not to cause unreasonable inconvenience to proprietors of lots in the scheme during the course of construction and should any damage occur, to repair without delay, damage caused to community property by development activities.

113 There were some differences between the provisions of the registered community development contract and the provisions of the draft community development contract which had been enclosed with DA 66/92. Among the differences were that paragraphs 5 and 6 of the former were not in the latter. Mr Watson agreed in cross-examination that at the time of the draft community development contract in October 1992, his intention was: (a) to develop the land as shown in the Stage 2 plan accompanying DA 66/92 (**annexure E** to this judgment); (b) to provide motor vehicle access along the access track shown on that plan so that people could get near their berths when they wanted to use their boats; (c) for the boat ramp shown thereon to be open for people to launch and retrieve boats; (d) for there to be motor vehicle access to and from the public wharf as shown on that plan; and (e) to provide all sewerage, water and electricity services.

114 In relation to cl 3 of the "*Warning*" section of the community development contract, Mr Watson agreed that his understanding was that the proposal in the development contract was to develop the land in accordance with Plan 4 (**annexure A** to this judgment).

115 I do not think that Mr Watson's subjective intention or understanding is relevant to the interpretation of the contract. It may be relevant to the exercise of the statutory discretion to vary the community scheme or contract if that point in the case is reached.

THE COMMUNITY MANAGEMENT STATEMENT

116 The community management statement registered with the community plan on 17 January 1995 contained the following reference to Plan 4 enclosed with DA 18/90:

> Landscaping to individual parcels and association property is to be carried out in accordance with Plan No. 4 submitted with the supplementary Environment Impact Statement lodged with the Council (Development Consent No 18/90).

117 The community management statement contained the following by-law 4.21 concerning boat traffic and usage:

> BOAT TRAFFIC AND USAGE
>
> 4.21.1 The Community Association shall have control of all aspects of boat traffic and boat usage within the Community Parcel
>
> 4.21.2 The Community Association may empower any person or persons to control all aspects of boat traffic and usage with the Community Parcel in accordance with its powers under By-law 4.21.1 hereof.
>
> 4.21.3 Any person in charge of a boat within the Community Parcel shall comply with all directions given pursuant to By-laws 4.21.1 and 4.21.2.

118 This by-law, in my view, naturally belongs with ownership of the waters of Deep Creek by the community association, which was what had been indicated in the plans accompanying DA 66/92 (**annexures B-E** to this judgment). It sits most uncomfortably with the developers' ownership of the waters of Deep Creek under the registered community plan, the developers' exercise of control when granting an easement of access over the waters in favour of the adjacent marina to the east on Lot 23, and the developers' closure for a time in 2005 of the boat ramp to all boat traffic and boat usage. Given that ownership of the lagoon and foreshores is vested in the developers, I am unable to agree with the developers' submission that it is unsurprising that the community association should be the boat traffic policeman under the by-law.

THE MOORING NEIGHBOURHOOD PLANS

119 In 1995, 1997 and 1998, the developers registered three neighbourhood plans for mooring berths, which had been approved by the council, together with neighbourhood development contracts and management statements. Under each registered neighbourhood plan, neighbourhood property was limited to a two metre wide strip adjacent to the mooring berths. Another two metre wide strip of community land was adjacent to the Central Neighbourhood Association's two metre wide strip and extended for a metre or two further, so as to just overlap with the beginning of the Western and Eastern Neighbourhoods. These strips provide the only registered legal land access to the marina berths. Much of this access is uneven and in places impeded, including by large trees.

Central Neighbourhood

120 On 19 January 1995 the neighbourhood plan (in five sheets), neighbourhood development contract and neighbourhood management statement for DP 285249 (**Central Neighbourhood**) were registered. This first neighbourhood plan created 45 mooring berths. These mooring berths are rectangular parcels of land lying below Deep Creek and including up to a few inches of dry land abutting the edge of Deep Creek, and so, in most cases, including some or all of the red-gum retaining wall installed by the developers. The plan shows a two metre wide strip of neighbourhood property running along the foreshore next to

the houseboat mooring berths. Another two metre wide strip of community land was adjacent to the neighbourhood strip and extended for a metre or two further so as to just overlap with the beginning of the Western and Eastern Neighbourhoods. The plaintiffs claim specific performance and/or damages for breach of clause 1.2.1 of the neighbourhood development contract which provides: "*All telecom and electricity services are to be provided to each lot by the developer*".

Western Neighbourhood

121 On 30 September 1997 the neighbourhood plan (in four sheets), neighbourhood development contract and neighbourhood management statement for DP 285433 were registered (**Western Neighbourhood**). This second neighbourhood plan created 11 mooring berth lots. The plan shows a two metre wide strip of neighbourhood property adjoining the mooring berths. The plaintiffs claim specific performance and/or damages for breach of cl 1.2.1 of the neighbourhood development contract which provides: "*All telephone and electricity services are to be provided to each lot by the developer*".

Eastern Neighbourhood

122 On 25 March 1998 the neighbourhood plan (in four sheets with two additional sheets), neighbourhood development contract and neighbourhood management statement for DP 285486 were registered (**Eastern Neighbourhood**). This third neighbourhood plan created 30 mooring berth lots. The plan shows a two metre wide strip of neighbourhood property adjoining the mooring berths. The plaintiffs claim specific performance and/or damages for breach of cl 1.2.1 of the neighbourhood development contract which provides: "*All telephone and electricity services are to be provided to each lot by the developer*".

AMENDMENT OF DEVELOPMENT CONSENT 18/90 BY DEVELOPMENT CONSENT 176/00

123 In 2000 the council received DA 176/00 to amend development consent 18/90. Subsequently, the council considered a report by its Director of Environmental Services which noted that the application was to "*amend the original consent for a 100 berth marina at Deep Creek. The applicant advises that the average size of houseboats within the Marina is somewhat larger than originally anticipated and as a result the number of houseboats able to be moored in the Marina has been reduced to 85. It is now proposed that the Marina be expanded to the eastern end of the lagoon to make provision for a further 21 berths (total 106)*"

124 At the time the council had a moratorium on increasing the number of moorings pending a study on the effects of boating in this area of the river. Consequently, on 20 August 2002 development consent 176/00 was issued granting conditional consent for "*adding additional area to the marina approved under Consent 18/90 without increasing mooring numbers*". This approved eastward extension of the marina was onto the adjoining Lot 23.

THE HONEYMAN LOT

125 On 1 July 2003 the council granted development consent 169/03 for a 53 unit holiday resort on the Honeyman Lot. A council report of 12 December 2002 in relation to this development application stated:

> In the original development application for Deep Creek Marina a proposed holiday resort was included as a later stage of the overall development in this area.
>
> The concept plans before Council are more intensive with approximately double the number of units proposed on this plan.
>
> There are a number of advantages of locating such accommodation in this location…

126 On 11 November 2004 a neighbourhood plan in 10 sheets was registered for DP 285882 (the **Honeyman Lot**). The land is known as "*Murray River's Edge*". The neighbourhood lots within the Honeyman Lot are owned by a company of which Mr and Mrs Honeyman are the directors. The registered neighbourhood plan shows some of the development lots close to the northern side of the western access road, which was used until 2006 by mooring berth owners in the Western Neighbourhood to gain vehicular access to their mooring berths. Development consent has been granted for many holiday cabins and related facilities, some of which have now been constructed.

CONSTRUCTION AND CONSTRUCTION CONSENT FOR RESTAURANT

127 On 8 January 1996 the council granted consent under s 68 of the *Local Government Act 1993* (NSW) to building application 138/95 on behalf of Mr Watson to construct a restaurant and shop in the location shown for a general store in Plan 4 accompanying DA 18/90 and the Stage 2 subdivision plan accompanying DA 66/92 (respectively, **annexures A** and **E** to this judgment). They were then constructed.

128 The developers constructed the junction with Perricoota Road and the access road in 1994, a sewerage pump out station and treatment plant in 1996, a hardstand area by 1996 and the marina berths from 1994 to 1996. They constructed the restaurant/bar in 1996, the carpark in 1996 and landscaping was completed by 1998. They provided electrical services in relation to facilities. The developers landscaped the carpark and planted trees and shrubs in the carpark and along the access road. They maintained the carpark until 2002. Thereafter the trees and shrubs were not watered and died.

LOT 23

129 In June 2002 Mr and Mrs Watson transferred to Hillington a half share in some 77 hectares of land immediately adjoining and to the east of the Deep Creek Marina known as Lot 23 DP 1019398. It extends from Perricoota Road to Deep Creek. In May 2003 the registered proprietors of Lot 23 were Mr Watson and Hillington as tenants in common in equal shares. As at September 2006 the registered proprietors were Mr Watson, Hillington and Ozzie as tenants in common in equal shares. The evidence does not appear to disclose whether or not that position has changed.

130 In May 2003 the council granted development consent 311/02 for construction of an additional 15 houseboat berths on Lot 23 on conditions. In November 2003 the council granted a further development consent to add a further 20 houseboat berths on Lot 23. One of the conditions was that "*Internal Roads are to be sealed with bitumen as per Development consent 18/90*". By July 2004 the 35 marinas on Lot 23 were under construction. This development is known as the Perricoota Boat Club.

131 Lot 16 is burdened by easements in favour of Lot 23. They include an easement for access of variable width over the waters of Deep Creek and an easement for access of variable width a little to the north of the existing upper eastern access track.

132 In 2003 Mr and Mrs Watson transferred to Hillington an interest in land comprising 143 hectares immediately to the east of Lot 23 known as Lot 222 DP 1022480, which extends from Perricoota Road to Deep Creek. The evidence does not appear to disclose whether or not that ownership position has changed.

133 At trial, Lots 23 and 222 were generally referred to compendiously as Lot 23. I shall also do so in this judgment unless it is necessary to distinguish between them.

134 It is proposed to develop Lot 23 as a 1600 lot residential subdivision and housing estate to be called Perricoota Marina Village.

PROPOSED DEVELOPMENT OF LOT 16

135 The Deep Creek area is zoned 1(a) – General Rural. Residential development is not permitted in that zone. In 2005 the developers made a submission to the council that the land be rezoned to permit the proposed extensive residential development of Lot 16. The proposal was described as including "*water based residential development through the extension of the existing marina waterway. The residential component of the development will aim to provide a range of lot sizes and has the potential to create up to 500 – 600 allotments in total. The development will also cater for additional water based facilities, recreational areas, community facilities and similar*".

136 One the plans which came to be included in the rezoning submission shows over 20 lots apparently for residences or tourist accommodation on the land between the eastern upper and lower access roads as well as above the eastern upper access road. The plan shows green areas between some of the lots, apparently permitting pedestrian access.

137 There was hazy oral evidence from Mr Watson and Mr Jarman that in 2006 Hillington and either Perricoota Company or Mr Jarman entered into an agreement of some sort with Mr Watson either to purchase (or to acquire an option to purchase) Mr Watson's interest in part of the land referred to in the preceding paragraph and proximate land. Mr Watson indicated that the agreement could not be finalised until the area was subdivided and titles issued. The evidence does not disclose whether or not any such agreement was written. It appears also that Mr Jarman mentioned at the general meeting of the community association on 16 April 2005 that there are "*about 20 apartments being built along here, and at the moment what they're going to be overlooking is just not acceptable*".

138 In August 2006 the council granted development consent 019/07 for a five lot subdivision of Lot 16. One of the conditions was that a three metre right of vehicular access carriageway be granted in favour of mooring lots. The developers obtained a letter of legal advice that the condition was unlawful.

139 On 19 November 2007 the developers wrote to the council enclosing that letter; asserting that the condition was invalid; enclosing a new development application for the subdivision of Lot 16 into six community title subdivision lots; and stating that if development consent was granted to the new application on terms satisfactory to the owners, they were willing to surrender development consent 019/07 as a condition of approval of the new development consent. This new application stated that it was intended to make further development applications seeking consent to use those lots (insofar in that they had not already been developed) for tourist accommodation, dwellings and associated works. The land proposed to be developed in that way included the extensive foreshore area behind the eastern mooring berths which the subdivision plans accompanying DA 66/92 had proposed should be community property (**annexures B** to **D** to this judgment).

140 In cross-examination, Mr Watson agreed that:

(a) he has no intention of building the cabins in the configuration shown on Plan 4, although he said that the cabins are going ahead;

(b) he has no intention of building a motel complex comprising three buildings each containing six accommodations as shown on Plan 4, although a motel might be built in a slightly different form on Lot 16 at some unknown time in the future;

(c) he has no present intention of sealing the carpark and internal roads in any fixed time frame; and

(d) his current intention is to pursue the rezoning and development proposal for the adjoining land to the east involving parts of Deep Creek Marina.

141 Thus, it appears that the developers have no intention of the Deep Creek Marina being developed and subdivided in the way specifically contemplated by the plans in DA 18/90 and 66/92 (**annexures A** and **E** to this judgment).

ACCESS ISSUES

Introduction

142 As discussed in more detail below, since 2005 the developers have closed the access roads to the mooring berths, closed the public wharf and, for a time, closed the boat ramp. Indeed, in July 2006 they applied to the council for consent to demolish the boat ramp. The plaintiffs point to serious consequential access difficulties as one of the reasons why continuation or completion of the scheme is impracticable.

143 For the better part of a decade prior to those events, the developers repeatedly made oral and written representations that the mooring owners were entitled to use the access roads for vehicular access to their moorings and that there was no issue about access to the public wharf and boat ramp. When people came to inquire about purchase into the Deep Creek Marina, the marina presented as if it had a vehicular access road to the western moorings, and two roughly parallel vehicular access roads to the eastern moorings.

144 Mr Watson agreed in cross-examination that he permitted vehicular access along tracks to the moorings. He agreed that he told people that there would be car access to the berths. For example, he told people who had their houseboats at another marina at Eildon Dam that, unlike that marina, they would have car access to their berths if they purchased into the Deep Creek Marina.

145 Mr Watson later began objecting to parking other than for drop off and pick up. He attributed this to concerns about damage to landscaping, including sprinklers being run over and vehicles being bogged in landscaped areas requiring removal and causing damage. His reference to landscaping and sprinklers appears to be a reference to landscaping and installation of sprinklers on the eastern side of the marina carried out by the Neighbourhoods on that side with the consent of the developers.

Sales off the plan in 1994

146 In September 1994, prior to registration of the community plan in January 1995, the developers entered into two contracts for sale of 12 mooring berth lots "*off the plan*" to two companies owned by Mr Graham Smith. The 12 lots were within the first proposed mooring neighbourhood development (the Central Neighbourhood, to be known as DP 285249)

147 The first contract was for the sale of six moorings to Downer Investments Pty Ltd. This contract annexed a plan which showed extensive community property, including the lagoon and the foreshore areas behind the proposed moorings. The community property shown on this plan appears to correspond with that shown in the subdivision plans enclosed with DA 66/92 (**annexures B, C and D** to this judgment). Condition A9.2 of the contract provided that completion was not required until the vendor had "*provided a sealed access road from Perricoota Road and wharf roadway, providing contiguous sealed access from the land to Perricoota Road*". In evidence, Mr Smith said he construed "*contiguous*" as "*continuous*" – rightly, I think, having regard to the context.

148 The second contract was for the sale of a further six moorings to Bilyan Pty Ltd. It annexed a sketch of a "*Sale Plan*" which showed the "*public wharf*" and boat ramp. Special condition A9 provided that the purchaser was not required to complete until the vendor had (inter alia) provided a sealed or formed gravel all-weather access road from Perricoota Road to the wharf area, and a completed boat ramp and houseboat removal service.

Marketing representations

149 Having registered the community plan in January 1995, Mr Watson started a campaign of advertising the attributes of the new development. The advertising material contained a number of representations about access.

150 An information brochure produced in 1995 included a copy of a plan showing the proposed completed development. This plan appears to be a copy of Plan 4 which accompanied DA 18/90 (**annexure A** hereto). The brochure said that Stage 1 of the development had been completed and Stage 2 had commenced. Stage 1 was described as including "*Construction of: opening to river, public wharf, marina wharfing (first 45 berths), slipway and boat ramp, access road (sealed), internal roads, sewage treatment system, main building foundations*". Stage 2 was described as including "*Construction of manager's residence plus balance of internal roads, marina access pathways, landscaping, lawn planting and tree planting. Installation of fuel station, sprinkler reticulation system, houseboat sewage pumping station,…sewerage network, water supply (including state of the art purification system), power and other services to the commercial sites*". The brochure included the following access representation:

> Each berth has vehicle access and mains power available with adjacent car parking and easy access to all facilities.

151 Other facilities described in the brochure included a general store "*scheduled for completion in time for the coming summer*", a restaurant adjoining the general store, a motel and holiday cottages. Mr Watson agreed in cross-examination that the references to these facilities were references to the particulars shown in Plan 4 accompanying DA 18/90.

152 Under the heading "*Stage two – (commenced)*" the brochure contained the statement: "*The detailed landscape master plan shown in the middle pages details the finished project. Some minor variations have been introduced to enhance function of the complex*". As noted above, that plan was a copy of Plan 4 which accompanied DA 18/90 (**annexure A** to this judgment).

153 In cross-examination, Mr Watson agreed that (a) he published the brochure to encourage people to invest in the development for his financial profit, and (b) the landscape plan that he had on display in his office for some or all of the time between 1997 and 2002 (see below at [156]) was consistent with the statement in the brochure that each berth has vehicle access with adjacent carparking.

154 Another marketing brochure for Deep Creek Marina, which directed all enquiries to Mr Watson, was received by (inter alia), Mr Muschinski in 1995 and Mr and Mrs Hannay in 1996. They later purchased moorings. This brochure included the following access representations:

> [C]ar access right to the boat…Berth owners have guaranteed access by road and by water to their moorings…[I]nternal roads topped with crushed rock to provide all weather access.

155 In August 2001, solicitors acting for the developers offered for sale the freehold going concern of the Deep Creek Marina and associated businesses. A marketing brochure described the businesses as including a restaurant/bar, a general store and fuel depot (on what later became Lots 14 and 15), marina berths and two houseboats. It showed the carpark landscaped in two sections, the existing eastern upper and lower access tracks connected at several points along their length, and the western access track. This would reasonably be understood, in my opinion, as a representation that the houseboat berth owners were entitled to use those access tracks.

156 For some or all of the time between 1997 and 2002, Mr Watson had on public display at his office a coloured site plan entitled "*Landscape Concept*." It showed the Central Neighbourhood with access tracks to the moorings and on the western side an access track including a layback for kerbside parking. The eastern and western access tracks were shown as connected by a road running behind the public wharf.

157 An article in the Sunday Herald Sun of 2 January 2000 featured an interview with Mr Watson and noted that the marina included (inter alia) "*riverside parking*" and a boat ramp.

Works on Lot 16

158 In 2001, after discussion between members of the Eastern Neighbourhood Association, an irrigation system was installed on land owned by Lot 16 proximate to the eastern mooring berths. It was hoped that the irrigation system would allow for grass cover to be maintained and might provide for other landscaping in the future. As members of the Eastern Neighbourhood, Mr and Mrs Watson contributed to the cost of the irrigation installation. Two working bees were conducted to carry out the necessary work. The Watsons' participation in the installation of the irrigation system would, I think, have been reasonably understood as indicating that mooring owners were entitled to use this part of Lot 16's land in this way.

Developers close the boat ramp, access roads and public wharf and threaten legal action for trespass: 2005 - 2006

159 In 2005 the developers closed the access roads (and access to adjoining parts of Lot 16) and, for a time, the boat ramp. In 2006 the developers closed the public wharf. In 2005 the developers' lawyers wrote to mooring owners alleging trespass in relation to the boat ramp, parking and mooring and threatening legal action.

Boat ramp closed

160 In April 2005, the developers installed a boom gate across the boat ramp to prevent access to it. The evidence is unclear as to how long the boom gate remained shut, but it appears to have been until about the middle of that year when it was opened after protest and confrontation. The boom gate remains as a reminder of this episode, the boom pointed skyward for the time being. The developers also used large men to police access to the boat ramp and demand money for its use from anyone who did not rent a storage shed from Deep Creek Marina Pty Ltd. At Christmas 2006, a concrete bollard was placed across the boat ramp but lot owners removed it with a crane soon afterwards.

161 Mr Bares acknowledged in evidence that lot owners, their invitees and guests were entitled to use the boat ramp. When the developers closed the boat ramp, they offered the mooring berth owners use of the boat ramp next door on Lot 23 instead.

162 Mr Bares' evidence was that the developers closed the boat ramp because members of the public who were not invited guests were using it, and this had created insurance issues for, and insurance claims on, the developers. The only specific example he gave of the insurance problem concerned a jet boat that sucked up geo-mesh into its motor while fuelling at Mr O'Brien's facility. However, he said that the boat had come off the Murray River. That example therefore hardly seems relevant to the boat ramp since, as the developers acknowledged at the hearing, the wharf was a public wharf and necessarily carried with it the prospect, indeed the invitation, that members of the public from the Murray River would use it if using the marina facilities.

163 According to Mr Bares, the insurance problem seems to have been resolved because his insurance broker told him that, provided they made an effort to stop the public using the boat ramp, if it was reopened by the community association then the developers would have insured cover because they had done what they could to prevent public use.

Access roads closed

164 In about April 2005, the developers blocked the access roads to the moorings by constructing pine log fencing and gates. Just before Christmas 2006, they arranged, and Mr Watson and Mr Jarman personally undertook, the installation of concrete bollards across the access ways and along the fence lines. Later, the concrete bollard across the western access road was replaced by a locked gate.

165 Mr Bares suggested in evidence that insurance problems contributed to the closure of the access roads, although he did not give specific details except to mention "*illegal*" works being carried out from Lot 16 to adjoining areas which, he said, could cause insurance problems. By "*adjoining*" areas, he appears to have been speaking of foreshore land in the ownership of Lot 16 between the access roads and the mooring berths.

Public wharf closed

166 In about September 2006, the developers fenced off the public wharf so that it could no longer be used by boats or passed over on foot. The fencing remains. The boating public and the mooring owners can no longer use the wharf to access the hotel on Lot 14 (behind the wharf) and the supermarket on the adjoining Lot 15. At the trial, the developers acknowledged that it is a "*public*" wharf – notwithstanding that the word "*public*" does not appear on the registered community plan – and claimed that they intend to re-open it in due course but that their intentions have been stayed pending the outcome of these proceedings.

167 Mr Watson agreed in evidence that he specifically designed the DA 18/90 proposal for a public wharf facility to enable the boating public from the Murray River to pull up there to partake of the proposed services and amenities. He later put a ski-park facility at the public wharf so that speedboats could be moored while their occupants used the facilities.

Developers allege trespass in using the boat ramp, parking and mooring: May 2005

168 In May 2005 the developers instructed Mr Jarman to send letters to mooring owners concerning breaches of by-laws by alleged trespassing by cars, trailers and houseboats on Lot 16 land.

169 On 26 May 2005 Andreones Lawyers on behalf of Ozzie wrote a letter to houseboat owners, including Mr Taylor and Mr Fry, alleging that members of the community association had no legal right to use the lower part of the boat ramp because it was in Lot 16 (in the water) which they had no right to enter. The letter threatened legal action if they did not stop trespassing by using the boat ramp. The letter also said that Ozzie would consider providing its consent for the recipient to use the boat ramp on certain terms (which were not spelt out).

170 At about the time that he received this letter, Mr Taylor tried to use the boat ramp one day but was stopped by Mr Jarman who demanded that he pay him for permission to use the boat ramp. He paid Mr Jarman $20 or $25 cash for a single day's permission.

171 On 26 May 2005 Andreones Lawyers on behalf of Ozzie wrote a letter to houseboat owners, including Mr Taylor, Mr Fry and Mrs Clinch, alleging trespass on what is now Lot 16. The letter alleged that the recipient was trespassing on Ozzie's land by regularly parking a motor vehicle and/or trailer there opposite or near the recipient's houseboat berth. This letter threatened legal action if the recipient did not stop trespassing.

172 Mr Fry received a letter from Andreones in May 2005, acting on behalf of the developers. The letter said that Mr Fry's boat was too long for his mooring and simply by having his boat on the mooring he was trespassing onto Lot 16 (meaning the water in the marina behind his boat).

Developers' access representations to mooring owners and difficulties when developers blocked access

173 For about a decade the developers repeatedly made representations to mooring owners that they were entitled to use the access roads and that access would be formalised. Serious problems arose when the developers blocked off the access roads, public wharf and, for a time, the boat ramp. The mooring owners' evidence, which I accept, is summarised below.

Mr Collins

174 Mr John Collins was a mooring berth owner in the Eastern Neighbourhood between June 1998 and March 2004. From early 1998, he leased a mooring berth from Mr Watson, whom he knew to be the developer of the Deep Creek Marina. He then became interested in purchasing a mooring berth.

175 In March 1998, before purchasing the mooring, Mr Collins reviewed the plans attached to the contract of sale. He was surprised to see that the access roads appeared to be on private property as he had formed the impression that the access ways were common property because:

(a) there were well-made gravel roads wide enough for vehicles adjacent to the mooring berths;

(b) there was no fencing or signage to indicate these roads were for any type of private use;

(c) he had observed many mooring berth owners using these roads to access mooring berths and parking their cars next to these roads while using their houseboats;

(d) he had used these roads on many occasions and had parked next to these roads on many occasions;

(e) he had seen staircases from the western access road to the moorings for the purpose of accessing the western mooring berths from the road;

(f) he had never heard any objection raised by any person in relation to the use of these roads; and

(g) he personally knew Mr Watson and had never had any discussion with him prior to this time in which he mentioned there being any problem with the use of these roads.

176 That impression was, in my view, well founded.

177 Mr Collins received advice from his solicitors that the roads were not included in community property and were still part of the development lots. In June 1998, Mr Collins informed Mr Watson of that advice and said "*before I sign a contract I need to know what the deal* is". Mr Watson replied:

> Those roads are not community property but I've always intended that everyone will have road access to the boats. I intend to formalise this down the track.

178 Mr Watson did not go into further detail, and Mr Collins took it on face value that it was a matter that was going to be rectified and that mooring owners would have road access to their boats. His assumption at the time was that the land would be included later in community property.

179 If Mr Watson had said that the roads were going to remain his property, Mr Collins would not have purchased a mooring berth. In entering the contract, Mr Collins relied on what Mr Watson said about intending to formalise vehicle access.

180 Between 1998 and 2004, Mr Collins drove over the access roads unimpeded hundreds of times.

181 Mr Collins raised the question of formalising access with Mr Watson on a number of occasions. On each occasion he was assured that the access situation would be formalised. In February 2002 Mr Watson said to him words to the effect:

> I have always intended that mooring owners would have road access, and it is still my intention to have it formalised.

182 Mr Collins was aware from discussions with mooring owners in the Central Neighbourhood that their neighbourhood had also taken up the issue of access with Mr Watson.

183 Through these conversations, Mr Collins understood that Mr Watson had agreed to formalise access rights but was concerned that some means of controlling the vehicle parking adjacent to boat moorings needed to be introduced. To achieve this, it was agreed that a low level treated pine post and rail fence would be constructed bordering the lower eastern access track at the expense of boat owners.

184 In 2001 Mr and Mrs Watson attended general meetings of the Central, Western and Eastern Neighbourhood Associations and Mr Bares attended general meetings of the Central and Western Neighbourhoods. In my view, by their conduct at these meetings, as detailed below, the Watsons and Mr Bares represented that mooring owners were entitled to use the access roads.

185 Mr and Mrs Watson and Mr Bares attended the annual general meeting of the Western Neighbourhood Association held on 26 January 2001. At that time the members of the Western Neighbourhood Association were Mr Watson and Sammy One (they were the proprietors of mooring Lots 2 to 6 in that neighbourhood) and Accredited Aged Care Services Pty Ltd (the proprietor of mooring Lots 7 to 12), the sole director of which was Jayne Bares, the wife of Mr Bares. The latter company had acquired its seven mooring lots from the original developers in 1997. It leased out six of them and Mr Bares used the seventh. The resolutions at that annual general meeting included the following:
(1) it was agreed that a one-off contribution of $1,000 per berth be made to the Neighbourhood Association to pay for landscaping and an automatic watering system and pump;
(2) it was agreed that the Neighbourhood Association would pay a maintenance contractor eight dollars per berth per week to cover the cost of mowing lawns, checking boat ropes and power leads, and ensuring Neighbourhood Association rules such as parking were being adhered to; and
(3) it was agreed that no speedboat parking be allowed on Neighbourhood Association access roads and no unauthorised signage be allowed.

186 In my view, the third resolution, at least, indicated that Mr and Mrs Watson considered and represented that the Western Neighbourhood was entitled to use and control their access road for vehicular access.

187 Mr and Mrs Watson and Mr Bares, among others, attended the annual general meeting of the Central Neighbourhood Association on 17 February 2001. The meeting agreed to adopt the resolutions passed by the Western Neighbourhood at their meeting on 26 January 2001 (set out above). Again this indicated, in my view, that Mr and Mrs Watson and Mr Bares considered and represented that the Central Neighbourhood was entitled to use and control their access roads for vehicular access.

188 Mr and Mrs Watson, Mr Collins and Mrs Hannay (among others) attended the annual general meeting of the Eastern Neighbourhood Association held on 17 February 2001. The meeting agreed to adopt (inter alia) the third resolution made by the Western Neighbourhood

Association at its annual general meeting on 26 January 2001 viz "*that no speedboat parking be allowed on Neighbourhood Association access roads and no unauthorised signage be allowed*". Again this indicated, in my view, that Mr and Mrs Watson considered and represented that the Eastern Neighbourhood was entitled to use and control their access roads.

189 On 26 February 2002, in anticipation of the Eastern Neighbourhood's annual general meeting to be held on 11 March 2002, Mr Collins wrote to all mooring berth owners in his neighbourhood recounting access discussions and proposals. I accept that the letter is accurate. It stated inter alia:

> I raised the issue with the Developer at the time [of purchase of Mr Collins' berth] and have done so several times since. On each occasion I have been advised that it was always intended that we would have access rights in terms of the existing roads and that the situation would be examined to determine the best way of formalising these rights.
>
> Some berth owners in Neighbourhood 2 who are in a similar situation also recently took up the issue. The Developer again agreed to formalise the access rights in question but was concerned that it should be done in conjunction with suitable landscaping by the berth owners to ensure the appropriate use and maintenance of the area. Particular concern was apparently expressed at the failure of many boat owners to adhere to reasonable vehicle access and parking arrangements to the detriment of the landscaping within the area. It was proposed that the berth owners be given control of the whole area between the northern boundary of our Neighbourhood and the northern side of the bottom access road and including those sections of the existing roadway extending from the bottom access road to the top access road. In conjunction with this formalisation of access arrangements, we would construct a low level treated pine post and rail fence on either side of the roadways with 1.2m gaps between each 2.4m section of fence to allow easy to pedestrian access but eliminate vehicle access. The fenced roadway would be of such width as to allow adequate vehicle access but not parking…
>
> The Developer would provide us with access rights over the top road and provide parking areas on the north side of the top road.
>
> I strongly support the proposal for the following reasons…
>
> While the details of how the control of the area can be handed over to us are still being considered, it is important that we consider our views on the proposal before the Annual General Meeting on 11 March 2002, for which I have asked it be placed on the agenda.
>
> Attached is a list of berth owners who have already indicated their support and would be happy to discuss the proposal with any interested party.

190 Mr Collins sent a copy of his letter to Mr Watson because, at the time, Mr and Mrs Watson were owners of a number of individual mooring berths at the far eastern end of the Eastern Neighbourhood. Before sending the letters out, Mr Collins he had shown a copy to Mr Watson and told him that he intended to move a motion at their forthcoming

neighbourhood association annual general meeting expressing the support of all members for whatever action was necessary to finalise the formalisation. He told Mr Watson that before sending it out he would like to get Mr Watson's agreement to what he had written insofar as it involved Mr Watson. Mr Watson replied:

> The letter is right. I don't have any problem with it.

191 After sending the letter and before the Eastern Neighbourhood Association annual general meeting on 11 March 2002, Mr Collins attended a meeting on the boat of Mr John Hodson, who was on the executive committee of the Western Neighbourhood. Mr Mitsch and Mr and Mrs Watson were also in attendance. The purpose of the meeting was to discuss specific details as to how access would be formalised so that the access routes would become common property, and the terms upon which this would occur. Mr Mitsch proposed as follows that it be done by a series of easements:

> What you want to avoid having is a designated road that the council will make you seal. I think a series of easements will be the most effective and efficient way to deal with this. You're still going to have to deal with the problems of whether you get it sealed or not and the costs associated with that, but I think that doing it by easements is the best way forward.

192 Everyone agreed and Mr Watson told Mr Mitsch to sort out the details.

193 On 5 March 2002 Mr Collins wrote a letter to mooring owners in his neighbourhood which recorded his discussions with the developers and Mr Mitsch in relation to the eastern access roads, as follows:

> Further discussions have been held with the Developers and with Mr. Brian Mitsch…It is agreed that the most effective and efficient means of formalising the access situation and management of the area immediately adjoining our Neighbourhood is by means of easements. It is proposed therefore that the following easements be created –
>
> A. An easement in favour of our Neighbourhood between our neighbourhood property and the southern boundary of the bottom access road. Such easement would allow us unrestricted access over the area as well as the right to perform such landscaping including the installation of sprinklers as we consider necessary to protect and beautify the area. A similar easement would be created in favour of Neighbourhood 2 in respect of the corresponding area adjoining the eastern section of their neighbourhood.
>
> B. An easement in favour of the Community Association over the top and bottom access roads as well as the joining roads at the eastern end of our Neighbourhood and in between our Neighbourhood and Neighbourhood 2. It is proposed the other two roads joining the top and bottom access roads be eliminated. These are the two joining roads located approximately in the middle of each neighbourhood…
>
> C. An easement in favour of the Community Association for vehicle parking purposes over an area roughly between the northern side of the top access road and the existing dry dock area.

> It would not be necessary for the Neighbourhoods to formally agree to the easements but as mentioned in my previous letter they will only be granted if we are prepared to fence the road areas below the top access road. In addition the creation of the easements would involve considerable survey and legal costs to which we would be required to contribute…
>
> I will accordingly be moving a motion at the Annual General Meeting on 11 March 2002 that we endorse the proposed creation of easements and agree that we will in exchange contribute to the fencing of the bottom access road and connecting roads at the maximum cost of $190 per berth and to contribute to survey and legal costs at the rate of $50 per berth.

194 I accept the accuracy of the contents of this letter, notwithstanding the testimony of Mr Bares, who participated in those discussions, that the discussions proposed vehicle access for loading and unloading but not parking. It appears that Mr Collins in fact may not have sent this letter to mooring owners because later Mr Mitsch or Mr Watson told him that there might be a legal problem with easements being imposed.

195 On 11 March 2002, the annual general meeting of the Central Neighbourhood Association resolved to endorse action to formalise road access rights to berths, to provide unrestricted access and landscaping rights over the area between their neighbourhood/community land and the bottom access road, and to provide vehicle parking rights over areas north of the top access road. Mr and Mrs Watson were present at the meeting and supported the resolution.

196 On 11 March 2002 about 20 people, including Mr and Mrs Watson and Mr Collins, attended the Eastern Neighbourhood Association's annual general meeting. Mr Collins was elected the representative of that neighbourhood association on the community association. The following resolution proposed by Mr Collins, in virtually the same terms as that carried by the Central Neighbourhood Association, was carried unanimously:

> Moved J. Collins that we endorse action to –
>
> 1. Formalise road access rights to berths.
> 2. Provide unrestricted access and landscaping rights over the area between our Neighbourhood property and the bottom access road.
> 3. Provide vehicle parking rights over areas north of the top access road.
>
> And we authorise the Executive Committee to finalise the necessary arrangements on the understanding that in exchange we agree to –
>
> a. Contribute to the cost of fencing the access road below the top access road at a maximum rate of $190.00 per berth and
> b. Contribute to survey and legal costs at the rate of $50.00 per berth.

197 During discussion of the motion Mr Watson was asked by one of those present at the meeting whether he was happy with the proposal. He answered in the affirmative.

198 Mr Collins anticipated that the annual general meeting of the community association to be held on 29 March 2002 would endorse the action resolved at the Eastern Neighbourhood Association's meeting earlier that month. He was mistaken.

199 Present at this meeting of the community association were Mr and Mrs Watson, Mr Gary Bares, Mr Hodson and Mr Collins. Mr Collins initially thought Mr Bares was there as a representative of the Western Neighbourhood. He was unaware that Mr Bares had agreed to purchase from the developers an interest in Lot 23 adjoining the Deep Creek Marina.

200 At the meeting, Mr Watson said that he and his mortgagor were concerned that the council would impose additional requirements on him if the Neighbourhoods' rights were formalised. He said he didn't want to be responsible for sealing the roads or doing any other major works.

201 Mr Bares informed the meeting that he had bought into the development site next door (Lot 23), that the top eastern access road provided access to this site and that he had an easement for access over that road. Mr Bares said words to the following effect:

> You'll need my consent for any of these proposals you're discussing…
>
> I haven't decided whether or not to seal the top road, but if anything like you propose is going to go ahead, then the [community] association will have to contribute to the costs of the improvement and upkeep of the road, and I will decide on the standard and design of it and the same with the parking areas between the top [eastern] access road and the storage sheds. I don't want mud and dirt from the bottom [eastern] road to get all over the top [eastern] road when you bring your cars and trailers up to the top…
>
> But I'm not going to agree to anything until there's a masterplan prepared for the total future development of the marina.

202 Mr Collins replied that he didn't have a problem with preparation of a masterplan but he didn't want this to interfere with getting the access problems sorted out straight away. He said that he and Mr Hodson would get their neighbourhood associations to prepare a written request for formalisation of the access and landscaping rights, providing that the neighbourhoods would meet any additional associated costs if the council imposed any additional requirement to carry out works on these roads.

203 Mr Collins wrote a letter on 4 April 2002 to each of the lot owners in his neighbourhood association reporting on the community association annual general meeting in relation to the formalisation of road access.

204 On 8 April 2002 Mr Collins met with Mr and Mrs Watson. He was informed that Mr Bares "*would come around*" and that the two obstacles to formalisation of the access routes were the requirements from the Watsons' mortgagor to have an indemnity against any future costs associated with the formalisation; and that there was shortage of cash on the Watsons' part to meet any commitments imposed on them by the proposed formalisation.

205 In April 2002 Mr Collins drafted a formal written proposal concerning formalisation of access and management rights over the access roads by a series of easements. It appears that it was delivered to Mr Watson and Sammy One Pty Ltd.

206 Mr Hodson continued to negotiate with Mr Watson and Mr Bares about formalisation of the access routes. Mr Collins saw a letter from Mr Bares to Mr Hodson of 5 September 2002 which set out a proposal for discussion "*Re: Extension of community association land to include access roads to moorings*". Part of the proposal was that the developers extend the land owned by the community association to include the lower roads adjacent to the Central, Western and Eastern Neighbourhoods (at their cost) and that the community association be given a right of carriageway to the upper eastern access road with linked access to the lower eastern access road in two locations (again at the cost of those Neighbourhood Associations).

207 That letter was tabled at a meeting of the executive committee of the Eastern Neighbourhood Association on 7 September 2002 attended by (inter alia) Mr Collins. The executive agreed to the proposals contained in the letter in principle subject to some clarifications and further provisions.

208 On 8 September 2002 Mr Collins attended a general meeting of the community association. Also in attendance were Mr Watson, Mr Hodson and a Mr Borg. The issue of the formalisation of road access was mentioned. It was noted that Mr Hodson was to continue negotiations.

209 Thereafter further works proceeded on and around the lower eastern access road. Treated pine posts were erected bordering the bottom eastern access road in September 2002.

210 Negotiations for formalisation continued sporadically thereafter. By early 2003, Mr Collins was concerned that there appeared to be no further movement on the negotiations with Mr Bares. On 22 February 2003, the annual general meeting of the Eastern Neighbourhood adopted a resolution that the executive urgently pursue formalisation of access.

211 On 5 April 2003, a general meeting of the community association resolved that Mr Mitsch be authorised to draw up a plan to re-align the boundaries, that a suitable landscaper prepare an overall landscaping plan, and that a management plan should be prepared. Mr Collins does not recall ever seeing a plan of the type described in the resolution.

212 Mr Collins compiled notes in September 2003 on the history of the marina. He noted that there was a meeting on 20 August 2003 between Mr Bares, Mr Hodson and Mr Honeywell, among others. The proposal from this meeting was that the access ways were going to be given to the community association, on condition that the community association pay the cost of sealing the roads and the landscaping.

213 On 29 August 2003, a meeting of Mr Bares and Mr Robertson and their consultants was held. They set about undoing the work that the neighbourhoods had done in anticipation of Mr Watson transferring ownership of the vehicle access ways, particularly the removal of pine barriers running alongside the access roads in the neighbourhood areas, which the neighbourhoods had installed.

214 On 4 October 2003 Mr Collins attended a meeting with Mr Bares and some members of the executive committee of the Eastern Neighbourhood. The principal topic of discussion was the proposal for formalisation of access. Mr Bares proposed that the community

association would purchase from the developers for the sum of $1 certain land which included the lower eastern access road, the western access road, the lagoon from the river mouth to Lot 23 and an area for additional parking; and that the community association would agree to certain works valued between $500,000 to $1,000,000. Mr Bares agreed to put forward a firm proposal before Christmas that year. Mr Collins recorded Mr Bares' proposal as follows:

> 1. The Developer would hand over to the Community for $1 the following areas –
>
> a) On the eastern side of the central Marina building, the area commonly known as the bottom access road being the road extending from the boat ramp along the front of our Neighbourhood. The area would include some 3-4 metres on the north side of the existing road and provide for turning circles in approx the middle and at the eastern end of the road. It would also include the area between the road and our Neighbourhood property.
> b) On the western side of the central Marina building, the formed roadway including the total area between the residential unit development and existing Community/Neighbourhood property as well as the vacant area at western end of the Marina adjacent to the Marina river entrance.
> c) The lagoon extending from the river entrance to eastern end of our Neighbourhood and including any currently non-Community land between the lagoon and the *island* Community property.
> d) An area for additional car parking of approximately 1.2 hectares (3 acres) across the road on the eastern side from the existing car park area.
>
> 2. In exchange the Community would be required to undertake and meet the cost of the following –
>
> a) The sealing of all roads and parking areas not currently sealed. This would include that part of the existing Community road not already sealed and the existing car park behind the central Marina building as well as the newly created Community roads entering east and west from the central Marina building. It is uncertain if the new 1.2 hectare carpark is to require sealing but regardless the Community would be responsible for the cost of whatever treatment was required.
> b) The installation of security boom gates on both sides of the central Marina building.
> c) Landscaping of the Community property to a standard to be determined.
> d) Dredging and widening the Marina river entrance.
> …
> Gary Bares estimates the cost of works at between $500k and $1m.

215 On 31 March 2005 Mr Briffa, then manager of the Eastern Neighbourhood Association, wrote to its members concerning parking of vehicles and trailers "*on the grassed areas and access roadway*" for prolonged periods. The letter stated that "*these areas are designated for drop off and pick up only, vehicles should only gain access to these areas for approximately 15 minutes at any given point in time. The above rules are designed to provide easy uninterrupted access to boats 24 hours a day*".

Mr Doyle

216 Mr Rodney Doyle leased moorings from Mr Watson for four years from 1996 after arranging to have his boat transported from Lake Eildon for that purpose. Before leasing, Mr Doyle told Mr Watson that one of the problems at Lake Eildon was that you could not get your car to the houseboat. Mr Watson said words to the effect:

> Here you can drive your car to your houseboat. That's the good thing about the mooring. You've got access to it at all times.

217 That response was an important factor in Mr Doyle's decision to move his houseboat from Lake Eildon. During the time of his lease Mr Doyle was always able to drive to his mooring.

218 Recently Mr Doyle sold his houseboat (but kept his mooring) with a view to building a new houseboat. However, he has delayed the production of this houseboat because, without vehicle access to the mooring, he sees little point in having a boat there. He regards that as a shame as his children and grandchildren love the houseboat.

219 On a normal trip on the houseboat, Mr Doyle takes, among other things, food, slabs of beer and soft drink, clothes, 3 x 20 litre containers of water and ski gear. The ski gear includes three slalom skis, two wakeboards, two kneeboards, inflatable tubes, life-vests and wetsuits.

220 Until the access tracks to the moorings were blocked, Mr Doyle transported these things to his houseboat by driving his car down to the moorings. After access to the moorings was blocked, Mr Doyle used the boat ramp to put his ski boat in the water, and then tethered up his ski boat. He then unloaded gear from his car into the ski boat, drove the ski boat to the houseboat, unloaded the gear, drove the ski boat back the boat ramp and repeated the process. He then drove his car to the carpark and parked it, walked back to the ski boat, drove to his houseboat, tethered his ski boat to the back of the houseboat, and sailed the houseboat onto the river. The process was difficult and dangerous, because there were other people using the boat ramp. Mr Doyle considers himself lucky to have the ski boat to cart his gear, which most people do not have. Most people have to carry all their gear from the carpark to the boat.

221 Mr Doyle's wife has ongoing knee problems and has had four operations on her knee. Whenever his wife has to walk the 400 metres from the boat ramp to the houseboat, she has struggled. At night, it is almost impossible for her to do this walk. The Doyles have relatives in the area and often have night-time functions to attend. On occasions, after attending functions at their relatives' houses, they have paid for accommodation in the area, rather than staying on the houseboat, because it was impossible for Mrs Doyle to access the houseboat at night.

Mr and Mrs Hannay

222 Mr and Mrs Hannay first became aware of Deep Creek Marina in 1996 when they were handed a marketing brochure by the vendors of a houseboat they were purchasing, referred to at [154] above. This brochure stated "*Berth owners have guaranteed access by*

road and by water to their mooring", and directed all enquiries to Mr Watson. In 1997 the Hannays moved their houseboat to Deep Creek. At first they rented a mooring in the Eastern Neighbourhood, which at that time comprised only 11 moorings. Before this move, Mrs Hannay sought and received confirmation from Mr and Mrs Watson that there would be accessible road access to the Hannays' mooring. Mrs Hannay also asked whether they would be able to park right next to their boat and Mr Watson replied:

> The access is available at any time but I don't like cars parking right next to the boats. I want that area to be a picnic area; so, after you've unloaded, you can park on the gravel road up the top near the sheds.

223 The Hannays enjoyed vehicle access to this mooring for the years that they held the lease. There was never an issue about their right to vehicle access during that time.

224 In 2000, the Hannays purchased a berth in the Eastern Neighbourhood from the developers. Prior to contract the vendors' solicitors wrote to the purchasers' solicitors, stating:

> We advise that in relation to your request for the sealing of the road to the site to be completed prior to settlement, we advise the Development Consent 18/90 from the Shire of Murray General Condition 13 sets out that the internal roads and parking areas are to be sealed with bitumen when the restaurant, motel and cabins are developed. We confirm that our client is prepared to place crushed rock on this road prior to the construction of the bitumen road.

225 Special condition 13 of the executed contract provided that, prior to settlement, the vendors would at their own expense and in a proper and workmanlike manner place crushed rock on the access road to the mooring berth. In my opinion, this conduct by the developers would be reasonably interpreted as a representation that the Hannays were entitled to use that access road. That is how Mrs Hannay understood it.

226 Prior to settlement of the contract, Mr Watson extended the lower eastern access road adjacent to the eastern end and there turned it up to join the upper eastern access road. There was also a road connecting the lower and upper access roads about half way along.

227 On an average trip to their houseboat, Mr and Mrs Hannay take 40 litres of water in 2 x 20 litre containers, two bags of wood for their heater, three bags of groceries, a slab of beer, clothes and other things. Since the developers blocked the access roads with concrete bollards in 2006, they have had to be selective and not take things they otherwise would have taken. On a recent trip they had to make six trips between their car and boat, in the rain, to transfer the things they needed. On that trip they ran out of gas, so Mr Hannay had to walk to the supermarket, pick up a gas bottle weighing about 18 kilograms and bring it back on a trolley over muddy, uneven and sloping grounds. Prior to the barricades going up, the supermarket owner would drive down, pick up gas bottles and replace them. Mrs Hannay considers this to be much safer.

228 To access their mooring, the Hannays still walk on the road they previously drove over, even though vehicle access has been blocked. This is because the community and neighbourhood access strips are partly blocked by several trees, become very boggy in the rain, are unlit, and there are holes in the ground.

229 When the Hannays required a mechanic to repair their houseboat motor, the mechanic had to walk in from the carpark three times, carrying his tools. This time was factored into his invoice.

230 Mrs Hannay's parents are in their early 70s. When they come to the houseboat, there is now a considerable amount of stress involved for them in getting to it. On one occasion, Mrs Hannay's father insisted on helping her bring gear from the car to the boat, causing him to take an angina pill at the outset to help deal with the stress.

Mr Fry

231 Mr David Fry became aware of Deep Creek in about 1995 when he had a houseboat moored at the nearby Merool Caravan Park on the Murray River. He and other houseboat owners at Merool received a letter from Mr Watson inviting them to shift their houseboats to Deep Creek for six months.

232 On his first inspection of the Deep Creek Marina Mr Fry observed, and liked, the vehicle access to the boats. He rented a mooring from Mr Watson for six months and, before the end of that period, purchased a mooring from Mr Watson in the Central Neighbourhood. He subsequently bought two more moorings and leased them out. He has since sold those two moorings but has retained his first mooring which is only four moorings from the boat ramp. His mooring is located just prior to the concrete barricade. Mr Doyle's mooring, together with moorings 27, 28 and 29 in his neighbourhood, are the only moorings that have vehicle access now that the access road has been barricaded.

233 On a houseboat trip, Mr Fry would normally take two car fridges, a 20 litre container of fresh water and one bag of clothes per person. He has observed the inconvenience caused by the loss of vehicle access for mooring berth owners on his side of the marina. They now drive their cars to the front of his mooring, park there temporarily while they make trips back and forth from their car to their boat, carrying everything they need for their weekend or holiday. He has also watched people loading things into their speedboats and using their speedboats to cart things backwards and forwards – including gas bottles – which he does not think is safe. He has observed people with elderly parents who have difficulty getting down to the moorings.

234 As noted above, in May 2005 Mr Fry received a letter from Andreones Lawyers in Sydney acting on behalf of Mr Bares, Mr Robertson and Mr Watson, stating that his boat was too long for his mooring and was trespassing into Lot 16. This upset him because Mr Watson had originally invited him to bring his boat to Deep Creek, he had rented from Mr Watson for six months before buying three moorings from him, and now Mr Watson was a party to an allegation that he was trespassing. At about the same time he received another letter from Andreones, alleging that he was trespassing by parking his car near the mooring. He had his solicitors respond to these allegations of trespass.

Mr Sidebottom

235 In 1999 Kelvin Sidebottom acquired an option to purchase a mooring from the developers in the Eastern Neighbourhood when the mooring was complete. It was about 12

months before that mooring was complete. In the interim the developers allowed him to keep a houseboat that he had acquired at their mooring in the Western Neighbourhood. Throughout this 12 month waiting period, Mr Sidebottom had road access to the mooring in the Western Neighbourhood.

236 In March 2000, when construction of the mooring in the Eastern Neighbourhood was complete, Mr Sidebottom's wife signed a contract to purchase that mooring from the developers on trust for herself and Mr Sidebottom. Mr Sidebottom had no doubt that vehicle access would always be allowed to the new mooring.

237 Since buying the mooring in the Eastern Neighbourhood Mr Sidebottom has driven his car to it at least 200 times. He considers that it is just too far to carry everything needed for a houseboat holiday without vehicle access. His wife and he would not have bought the mooring without vehicle access.

238 When Mr Sidebottom required a plumber on his boat, he and the plumber had to carry the plumber's equipment to the boat. As the width of the strip on which they were legally allowed to walk was only two metres wide, and had obstacles along it, it was nearly impossible to walk along it, let alone carry tools. For this reason, they were forced to walk on land outside the two metre strip (on Lot 16) in order to get to the boat.

239 Mr Sidebottom has a friend who has multiple sclerosis. The friend rarely gets to go on holiday so Mr Sidebottom had his boat professionally renovated to make it wheelchair friendly. However, since the developers put up concrete bollards preventing road access, Mr Sidebottom has not been able to get his friend to the boat.

240 Mr Sidebottom also used to invite guests from Rotary (of which he is a member) to his houseboat. He is 72 years old and most of his Rotary friends are of a similar age. When access was blocked, it became embarrassing to tell his friends that they had to park behind the restaurant and carry their things all the way to his boat. For this reason he has not had Rotary friends to the boat since access was blocked.

241 On a regular trip to his boat Mr Sidebottom takes 4 x 20 litre drums of fuel, food, bedding and gas, among other things. He used to buy gas from the restaurant, load it into his utility and drive it down to his boat. Since access was blocked, he has not been able to get gas to his boat.

242 Mr Sidebottom's mooring has electricity running to it. More than once, in heavy rain, the switch box at the top of his pole has had water in it – blowing the overload switch. When an electrician came to fix the problem, the electrician first turned the power off at the main switch box, which is located on the high ground owned by Lot 16 behind Mr Sidebottom's mooring. This means that to work on the electricity supply, the electrician first had to trespass on Lot 16 to turn off the power.

Mr Armstrong

243 Peter and Christine Armstrong leased a mooring in the Eastern Neighbourhood for about 12 months until February 2003. During this time, they were always able to drive their

car to their mooring: they would drive to the boat, unload and park on the left hand side of the road next to the mooring.

244 The Armstrongs enjoyed their leasing experience. So, in 2003, they decided to purchase a mooring in the Eastern Neighbourhood from Anthony Watson and Sammy One Pty Ltd. Their mooring is one of the furthest from the carpark.

245 On an average short trip to their boat, the Armstrongs take 40 litres of fuel in jerry cans, 2 x 20 litre containers of water, three grocery bags of food, a dog bed and a bag of clothes. On longer trips these amounts increase. Since the access tracks to the moorings have been blocked, Mrs Armstrong normally needs to make one trip from the carpark to the boat carrying provisions, and Mr Armstrong two or three. The Armstrongs usually walk on the track on which they had previously driven, because it is flat and away from the water. As there is no lighting in the area, these trips are particularly difficult at night.

246 From the commencement of their lease in 2002, Mr Armstrong went to his neighbourhood association meetings. In mid 2002 his neighbourhood association agreed with Mr Watson to install an irrigation system on Lot 16 behind the eastern moorings on either side of the access track. The neighbourhood association put poles along the access track to stop cars parking on the new irrigation system and damaging it, although they allowed an area to park on the left hand side of the lower track. This work was done by the mooring owners at working bees and some thousands of dollars from neighbourhood association funds was spent on the fence and irrigation system. In late 2003 the developers removed the poles.

247 In 2004 the developers, who were developing their adjoining land (Lot 23) as an "*extension*" of Deep Creek Marina, built a temporary dam across the end of the Deep Creek Marina. This dam ran across to the "*island*", allowing the developers to drive machinery down from the upper access road behind the eastern moorings, across the dam and onto the island. The developers did not seek and were not granted permission from the neighbourhood association to build the dam. In building the dam, the developers shifted boats from the moorings that they built across, including the Armstrongs' boat without their permission, several times during the construction of the dam and once or twice after construction of the dam was complete. The dam was removed many months later.

248 If the Armstrongs had known that they would not have vehicle access to their mooring, they would not have bought it.

Mr and Mrs Hickman

249 From early 2004 to November 2005 Mr and Mrs Hickman leased a mooring in the Central Neighbourhood on its eastern limb. In 2005 Mrs Hickman purchased the mooring. Their mooring is eight moorings east of the hotel and supermarket, about four moorings along from where the developers blocked the lower eastern access road with a concrete bollard in 2006.

250 Between 1998 and 2003, before leasing their mooring, they visited the marina a couple of times and saw the houseboats moorings there with convenient vehicle access. During the period of their lease they always had vehicle access to their mooring.

251 Even though their houseboat is closer to the concrete bollard than most, the Hickmans have been badly affected by the closing of the access way. Vehicle access is necessary in order to get many large things on the houseboat from time to time: for example, televisions, barbecues, lounge suites, fridges, beds and mechanical gear.

252 The Hickmans also have three young children. When they go on the houseboat, they need to take food, drink, clothes, ski gear and fuel. Mrs Hickman has recently had a knee reconstruction and has therefore found it more difficult to walk to the mooring than otherwise.

253 Since the developers fenced off the wharf in 2006, to get to the hotel for dinner the Hickmans now need to climb the many timber stairs at the front of the supermarket. This is particularly hard at night and quite slippery when wet. They used to walk across the wharf and up the few steps at the rear of the wharf to the hotel, which was of a much gentler gradient. The new route has been particularly difficult for Mrs Hickman because of her knee problem.

254 Mr Hickman is very concerned about the difficulty any emergency service would have in getting to the mooring if needed. His greatest concern is his 77 year old father-in-law, who visits their mooring regularly, and who has a plastic knee and recently had heart by-pass surgery. He cannot walk very far without becoming short of breath. Mr Hickman is also concerned that if there was a fire at the marina, it would spread quickly because of the gas and fuel stored on houseboats. It would be critical to get fire services to the marina quickly.

255 Just as Mr Hickman would not buy a house without vehicle access, he would not have bought their houseboat mooring if it did not have vehicle access.

256 In 2007, Mr Hickman was kicking a football with his children next to his mooring when a man well known in the area as a former boxer told him to get off the property as it was private property. It appeared to Mr Hickman that this man was being paid by the developers to patrol its boundaries. The Hickmans would not have purchased their mooring if they thought they would not be able to play with their children on the bank.

Mr Leorke

257 In 2005 Mr Andrew Leorke bought a mooring in the Western Neighbourhood. It is five moorings away from where the marina meets the river. Before buying the mooring, Mr Leorke saw that there was a road to his mooring, and that mooring owners in the area would drive to their moorings and either park at the side of the road or drive back to the carpark. He also saw that there was a timber staircase coming down from the access road to his mooring.

258 In making his decision to purchase a mooring, Mr Leorke assumed that he would have legal access to his mooring along the roadway. He would not have purchased his mooring if he had thought otherwise. After he bought his mooring, and until the road was blocked, he used the road to access his mooring by car.

259 On an average trip to his houseboat his partner and he take food and five or six bags of clothes for themselves and their three children. Recently, he has had to carry all this in relays from the carpark. Mr Leorke walks along the access road, because the neighbourhood property along the waterfront does not have good accessibility. Mr Leorke now finds it particularly difficult to get rubbish off his houseboat. The easiest way to get a gas bottle to the houseboat is to transfer it on a small boat – which he thinks is dangerous.

260 Before the developers fenced off the wharf in front of the hotel, Mr Leorke used to walk through that area to get to the supermarket. It was pleasant to walk around the marina along the waterfront.

261 Mr Leorke's building company has been asked by the manager of the Central and Western Neighbourhood Associations to repair sections of the boardwalk on their neighbourhood property. However, now that the developers will not allow access along the road, there is no way of getting the necessary equipment along the strips of neighbourhood and community property.

Mr Muschinski

262 In mid 1995 Mr Thomas Muschinski received advertising from Mr Watson encouraging him to move his houseboat to Deep Creek. That material, (discussed above at [154]) included the statement:

> Berth owners have guaranteed access by road and by water to their mooring.

263 He then received more advertising material in relation to Deep Creek which included the prominent statement:

> All facilities can be accessed by road or from the river by houseboat or speed boat with public docking facilities available to visitors.

264 Mr Muschinski relied on that advertising material when, in September 1995, he decided to buy a mooring in the Central Neighbourhood. He would not have bought a mooring if he had thought he would not have access to it by road, and the advertising material reinforced his belief that he would have such access.

265 Mr Muschinski's father is 84 years old and requires a wheelchair or walker to move around. Prior to Christmas 2006, when the access ways were blocked, he was able to take his father to the houseboat by driving him right to the houseboat. He would very much like to be able to take his father on his houseboat again but, with the access roads blocked, he cannot. His father would not be able to walk the 200 or so metres to Mr Muschinski's mooring over the rough ground.

Mr Taylor

266 Mr Michael Taylor's company purchased a mooring in the Central Neighbourhood in October 2000. After receiving the trespass allegation letter from Andreones Lawyers in May 2005 (discussed above at [171]), Mr Taylor felt intimidated into accessing his mooring by driving along the access track to the stairs, unloading people, food, bags and other provisions down the stairs, then driving back to the carpark and walking back to the mooring. He

considered this situation inconvenient and aggravating, because he felt robbed of what he felt was his right to park next to his mooring.

267 Since late 2006 when the developers blocked the access track altogether, his family and he have been put to great trouble and inconvenience. Among the guests they regularly have on their houseboat is his father, who turned 87 in September 2007, their five adult children and three grandchildren. This means that a lot of people, food and clothes need to be taken from the carpark to the houseboat mooring for each trip.

Mr Paine

268 In about March 2003 Mr Leon Paine rented a mooring in the Western Neighbourhood from Mr Watson for five months. During that period he was always able to drive his vehicle to the mooring, unload supplies and park at the mooring. In 2003 he purchased the easternmost mooring in the Eastern Neighbourhood. Until the developers denied access in 2006, he would drive his car right down to his mooring. Mr Paine's mooring is over 300 metres from the concrete bollard placed on the lower eastern access road in 2006. The carpark behind the hotel is a further 180 metres away.

Mr Smith

269 As discussed above at [146] – [148], in 1994 the original developers sold 12 mooring berths to companies owned by Mr Smith. Mr Smith has since sold six of these moorings. From the day his companies purchased the moorings until the time when the developers blocked access, there was vehicular access to the moorings.

270 Mr Smith also said that it used to be possible for visitors to the moorings to arrive from the Murray River in speedboats and moor at the public wharf. In his view, having the wharf closed to the public is unworkable. He testified and I accept that: "*the big thing that was talked about from early on in the piece was the idea of putting up a hotel and a shop there and attracting people in from the river*". He always saw the scheme as a tourist development.

271 Mr Smith is of the opinion that the barricading of the vehicle access tracks and the fencing off of the wharf have significantly devalued his companies' moorings. Had the scheme been presented at the outset on the basis that there was no vehicular access to the moorings, he would "*not have touched the moorings with a bargepole*".

Mr Williams

272 In October 2005 Mr Norm Williams bought a mooring in the Eastern Neighbourhood. Before doing so, he made four trips to the Deep Creek Marina. On each trip he had been able to access all areas of the marina in his car. Prior to purchase Mr Williams had seen the vendor parked next to the mooring and he simply assumed that access to his mooring would not be restricted.

273 Since vehicle access has been cut off, access is a big problem. All his family's clothes, food and water, among other things, have to be carried from the carpark to the mooring. Mr Williams says that if he were to try to do that and stay within the two metre community and neighbourhood property strips, which he understands he is legally restricted

to in accessing his mooring, he would probably fall in the water. The two metre strip is too narrow and impractical, and there are big trees in the way. This means that he still gets to his mooring by walking on the access roads.

274 In April 2007 Mr Williams was at his houseboat with his two sons aged 7 and 8 when the younger son had an accident, resulting in his clothes catching fire. In order to take his injured son to hospital, he first had to walk to his car carrying his injured son while his other son used a bottle to pour water over his younger son's back. His mooring is one of the furthest from the carpark. He drove his younger son to Echuca Hospital from where he was airlifted to Melbourne with full thickness burns to 10 percent of his body. Mr Williams feels that the extent of his son's injury may have been reduced if he had been able to get him into a vehicle and therefore to medical assistance more quickly. With the access roads blocked, Mr Williams can see no way that emergency vehicles can now access the moorings.

Mr Buchanan

275 In June 2004 Mr Gary Buchanan's company purchased a mooring in the Central Neighbourhood. The mooring is five west of the hotel. In addition to a houseboat that Mr Buchanan and his family keep on the mooring, they have a speedboat that they often take on houseboat trips. They launch this speedboat at the boat ramp.

276 When they originally bought the mooring, the Buchanans would walk directly along the waterfront between their mooring and the boat ramp. That is, they walked along their neighbourhood property, through an area of community property, across what they thought was the public wharf, across the walkway to the front of the supermarket and down onto the boat ramp.

277 Since the developers fenced off the wharf, it is more difficult to get between their mooring and the boat ramp. This is because they now need to go around the wharf by climbing up the retaining wall onto Lots 14 and 15 (the hotel and supermarket), up and across past the fuel bowsers next to the supermarket, down a wooden staircase to the walkway at the front of the supermarket, along the walkway and down onto the boat ramp.

Mr and Mrs Clinch

278 Lindsay and Rita Clinch own a mooring berth in the Eastern Neighbourhood. When they initially purchased into the scheme, Mr Clinch assumed that the gravel access roads and the concrete boat ramp provided free and unfettered access to the water and houseboat moorings. Thereafter Mr and Mrs Clinch used the road on the eastern side of the marina to access their houseboat mooring and to park their car during the time they spent on the houseboat. Mr Clinch observed other houseboat mooring owners doing the same thing.

279 As noted above, Mrs Clinch received a letter on 26 May 2005 from the solicitors for the developers to the effect that parking adjacent to the mooring constituted a trespass. In late April 2005 the developers installed a boom gate to deny access to the boat ramp unless a fee was paid. Mr Clinch corresponded with the community association manager, Mr Haydon, regarding access rights in a letter of 13 June 2005.

Disability access

280 Mr Martin, an architect specialising in disability access, expressed the following conclusions which I accept:

(a) it is not practical to provide disability access that complies with the Building Code of Australia 2007 and the *Disability Discrimination Act 1992* (Cth) along the neighbourhood property edge to service the Central and Western Neighbourhoods;

(b) it is not practical to provide complying disability access from the carpark to the eastern side of the Central Neighbourhood or along the neighbourhood property to service the Central and Eastern Neighbourhood;

(c) the only way to provide complying disability access to the three mooring neighbourhoods is to obtain Lot 16 land behind the community property and the neighbourhood property. This should include sufficient space for vehicle access and parking, which is best created where vehicle access currently exists. On the western side this would need to be not less than the available land of Lot 16. On the eastern side this would need to be at least about 20 metres expanding to the existing carpark.

Access for repairs and maintenance

281 Mr Neil Giffin, the managing agent of the three mooring neighbourhood associations, gave evidence which I accept. Since early October 2006 he has endeavoured to facilitate necessary repairs to mooring walls and timber decking in the Central Neighbourhood on the western side. It has been extremely difficult to do so. Mr Jarman objected to "*dead man's anchor*" holes (supporting the mooring walls) being dug on Lot 16 and to a development application for the works. Mr Giffin described the physical and logistical difficulties in doing the work without being able to utilise Lot 16 land:

> 37. It is physically and logistically very difficult to have the work conducted without being able to utilise or pass over the land in Lot 16. I have attached a coloured plan of the community scheme with hand marking to indicate the difficulty to which I refer. The plan is annexed and marked ***NG-J***. To access the area requiring repair, the tradesman is required to:
> (a) Park his vehicle in the area behind the pub which I have marked *A* on the plan;
> (b) Walk down the grass embankment adjacent to the pub, with his equipment and any plant and machinery, along the line marked *B*;
> (c) Walk along the neighbourhood property 2 metre strip coloured blue and marked *C* (the additional 2 metre-wide lime coloured community property in this area is impassable); and
> (d) Conduct the work within the area where the works are required marked *D.*
>
> 38. This is not only a real problem in this instance, but will be more of a problem for the other two neighbourhood associations I manage when repair works are required there. The other two neighbourhoods I manage are even more difficult to get to. This is because their strips of common property are only 2 metres wide and there are obstacles such as large red gums and steep grassy terrain that are also problematic to having tradesman access.

39. In fact it is not possible to access property in Neighbourhood Association DP 285433 without *trespassing* onto the neighbourhood property of Neighbourhood Association DP 285249 or Lot 16, with or without tools and equipment. This is because the connecting 2-metre wide strip of community property adjacent to the western half of Neighbourhood Association DP 285249 is too steep and is obstructed by trees.
40. I note further that these other two neighbourhoods will have another serious problem in that the dead man's anchors are longer than 2 metres and without the benefit of the adjacent community property in those neighbourhoods the anchors would need to be buried back into Lot 16.
41. There is in effect no vehicle access for tradespeople to conduct repairs despite the traditional gravel access roads still being in existence (although weeds are starting to grow on them). These access roads have been blocked off by very large concrete bollards making any vehicle passage impossible.
42. The problems with access are not only that the mooring walls and timber decking require repairs, but the lot owners need access to get their families and supplies to their boats and to conduct internal repairs and renovations to their boats as well.
43. I hold a major concern about access to the boats in case of an emergency, such as accident or illness. This has already been a problem when Norm William's son was injured, the details of which are set out in his letter to me dated 14 May 2007 and is annexed and marked ***NG-K.***
44. In my opinion it is also only a matter of time before Lot 16's concrete bollards prevent a fire truck from attending a fire on a houseboat laden with gas and fuel and moored only 30 centimetres from houseboats on either side.
45. I also have serious concerns about the ability of the community to access the electrical boxes that supply all of the power to the individual houseboat mooring berths as these are wholly contained within the private development lot being Lot 16. I have formed the view that this is a clear indication of the developer's intention that the land directly to the north of the mooring berths, where the roads and meter boxes are, was intended to form part of community property. Indeed this is the only practical way to have vehicle access to moorings and the moorings themselves are only practical and worthwhile if the owners have vehicle access to them. In my view, many, many persons would not have bought into the community scheme if they knew they would not have vehicle access.

282 In cross-examination Mr Giffin agreed that the work could be done from a barge, but added that that would be totally unsatisfactory. I agree. He agreed that since obtaining development consent he had not approached the developers to use Lot 16. In my view, there was little, if any, point in attempting to obtain such an approval. The attitude of the developers was clear.

Access for emergency vehicles

283 There is a serious problem of access by emergency vehicles due to the placement of the concrete bollards by the developers. This is illustrated by the evidence of Mr Williams

above. On 3 December 2007 the council served on the developers two notices of intention to serve an order under s 121H of the *Environmental Planning and Assessment Act 1979* (NSW) (***EPA Act***). One notice required the following:

> **Order 6, Section 121B of the Act**
>
> To remove as many of the concrete barriers located along the eastern boundary of the Property (as identified in the attached photograph marked annexure *A*), as is necessary to enable access to emergency vehicles and to refrain from blocking access to emergency services to ensure or promote adequate fire safety or fire safety awareness.
>
> **Reason for Proposing to Issue the Order (Section 121L)**
>
> The reason for the proposed Order is that the concrete barriers may restrict access to emergency services that require access to ensure or promote adequate fire safety including the ability to prevent fire, suppress fire or prevent the spread of fire.
>
> **Period for Compliance (Section 121M)**
>
> The period allowed for the removal of the concrete barriers will be seven (7) days from the date of service of the Order.

284 The other order required the following:

> **Order 15, Section 121B of the Act**
>
> To comply with Development Approval 48/93 and remove concrete barrier(s) located along the eastern boundary of the Property (as identified in the attached photograph marked annexure *A*), in order to enable Council to have unrestricted access along the nominated right of carriageway required to service the houseboat pump station (Lot 11, DP 839320).
>
> **Reason for Proposing to Issue the Order (Section 121L)**
>
> The reason for the proposed Order is that the concrete barrier(s) restrict access to Council along the approved right of carriageway to enable required works to be undertaken on the houseboat pump station. Development Approval 48/93 is not being complied with by those persons entitled to act under the Development Approval.
>
> **Period for Compliance (Section 121M)**
>
> The period allowed for the removal of the concrete barriers will be seven (7) days form the date of service of the Order.

285 The developers have failed to comply with the notices.

Access and other problems for Lots 14 and 15: Mr O'Brien

Lease of mooring at Deep Creek

286 For three months from about June 2003 Mr David O'Brien leased a mooring in the Eastern Neighbourhood from Mr Watson. During that period he accessed his mooring by driving his car along the access track closest to the eastern moorings, unloading his family and gear, parking the car next to the access track on the upper access track, then walking down to his houseboat. During this period he was not aware of any mooring owner on the eastern side of the marina who did not access their houseboat in this way. He was never told by Mr Watson or anyone else that he did not have the right to access his mooring in this way.

287 During this period Mr O'Brien would sometimes patronise the general store at the marina contained in "*Watson's Bar and Restaurant*" located on the then Lot 9 (now Lot 14). He observed that many patrons of the general store accessed the business by bringing ski boats in from the Murray River and tying the boats up at a custom built ski boat parking pontoon tied to the wharf located directly in front of the business. This ski-park accommodated about ten ski boats. There were steps in the waterline of the wharf so that people could easily step out of their ski boats, onto the pontoon, up the steps onto the wharf and then continue over the wharf to the business. The ski boat parking pontoon was marked "*Watson's Bar and Restaurant*".

Purchase of restaurant

288 During the first half of 2003 Mr O'Brien became aware from a newspaper advertisement that the Watson's Bar and Restaurant land and business were being sold by tender. He contacted the selling agents and they forwarded him an advertisement. The first two photos on the first page of the advertisement showed the view of the lagoon from near the business. The main photo on that page showed open access from the wharf to the business. The plan on the second page did not indicate any obstructions between the business and the water and the wharf. He considered the access to the wharf and lagoon to be a real feature of the business and the land.

289 Mr O'Brien contacted the agents again and obtained the information memorandum and tender documents referred to in the advertisement. This documentation identified the vendors as Mr Watson, D C Marina Pty Ltd, Hillington Valley Pty Ltd and Ozzie Pty Ltd. D C Marina Pty Ltd was not in fact an owner. It was an agent for the developers and owners of Lot 16. D C Marina Pty Ltd later changed its name to Deep Creek Marina Pty Ltd.

290 The information memorandum sent to Mr O'Brien included the statements:

> The land has frontage to Deep Creek Lagoon, which provides direct access to the Murray River…
>
> The marina restaurant development forms an integral part of the Deep Creek Marina complex

291 The information memorandum also included a photo which showed unobstructed access from the wharf to the land and business, including steps built into the retaining wall to make that easier. The photo was accompanied by the statement:

> The area fronting the restaurant and lagoon is planted to lawn and the large native river red gums provide a most pleasant outlook.

292 Mr O'Brien relied on all that he had seen and experienced in his time at the marina and on what he had read in these documents when his wife and he, together with their partners, the Harrisons (who left the partnership shortly thereafter), decided to tender for the "*Watson's Restaurant and Bar*" land and business using the tender documentation provided. They were successful. Mr Jarman was an unsuccessful tenderer.

293 The contract of sale included a plan which showed the public wharf and adjacent to it a ski park facility comprising berthing spaces with adjacent fingers so there were two ski boats within the confines of each finger. The practice at that time (when Mr Watson owned the restaurant and store) was for people to come in their boats to the ski park, tie up their boats, walk across the public wharf, across the lawns in front of the restaurant and partake of the amenities. Mr Watson would sell them things with the intention of making a profit.

294 Before the necessary land subdivision was complete, Mr O'Brien settled on the purchase and went into occupation under a lease arrangement. The council granted consent No 282/03 to subdivision on 2 September 2003. It was a condition of consent that the adjacent carpark and access roads must be sealed or a bank guarantee in the equivalent cost submitted. The O'Briens and their partners then took a transfer dated 17 February 2004 of the new Lot 10.

Extensions to the premises

295 During the early period that he operated the restaurant and bar, Mr O'Brien agreed with Mr Watson, Mr Bares and Mr Robertson that if he could get a general hotel licence for the premises he would lodge a development application to extend the hotel premises and build a separate supermarket. Subsequently, he purchased a general hotel licence and accordingly lodged development application 049/04, which the council approved on 15 June 2004. The proposed development was described as "*extension to existing restaurant/bar and new retail store*". A report considered by the council before granting consent noted that 80 car spaces were to be provided adjacent to the new supermarket, on Lot 16. A condition of consent required the car parking area to be sealed and landscaped.

296 On 21 October 2004 Mr O'Brien entered into a contract with the developers to acquire from them a small further piece of adjacent land on which the supermarket would be built. The price was low, $5,000, because it was Mr O'Brien's responsibility to build the supermarket and extend the hotel and the vendors told him that they believed his work would improve the value of their land for residential development within the scheme. As a result they agreed that this second contract for sale would be effected by a re-subdivision of Lot 10 (which had been transferred to the O'Briens, and Lot 13 (the remainder of Lot 9 belonging to the developers) to create Lot 14 (the land that the hotel is now on), Lot 15 (the land that the supermarket is now on) and Lot 16 (the developers' remaining land in the scheme).

297 On 7 December 2004 the council granted development consent 131/05 for extension to the supermarket to include a manager's residence in accordance with specified plans. One of those plans showed some 80 car parking spaces adjacent to the supermarket, on Lot 16. One of the conditions of development consent 131/05 was that the conditions of development consent 049/04 still applied. Those car parking spaces have never been provided on Lot 16.

298 On the creation of Lot 15 (the supermarket land), Mr O'Brien agreed to an easement benefiting Lot 16 across the waterfront of Lot 15. This easement allows the owners of Lot 16 a permanent right of access across the waterfront of the supermarket. Mr O'Brien directed his solicitors to include that land in the area the plaintiffs seek to be included in community land by these proceedings.

299 Construction of the supermarket was complete by Christmas 2004. Later Mr O'Brien obtained development consent 131/05 for a caretaker residence above the supermarket.

Access problems

300 At Easter 2005 two large men stood on the road outside the supermarket. When Mr O'Brien asked who they worked for and what they were doing, one replied that they worked for Deep Creek Marina Pty Ltd and had been told to collect $20 per day or $50 per week from anybody who wanted to use the boat ramp but who didn't rent a storage shed from Deep Creek Marina Pty Ltd.

301 This situation upset many boat owners. It also upset Mr O'Brien because it was reducing his patronage. Several of his customers accused him of being affiliated with these men and he had to explain that he certainly was not.

302 These two men were there for a week or two. Finally Mr O'Brien observed a confrontation between the two men and one of the mooring owners in the scheme, Mr Peter Armstrong. Following this, the two men came into his supermarket and said to him "*We are bouncers from OPT Nightclub. We have had a much harder time working out here than we've ever had there. We are out of here*". Mr Jarman owned the freehold of OPT Nightclub in Echuca at that time. The men then stopped demanding money from users of the boat ramp. None of the money collected by these men was handed over to the community association by Mr Jarman or his then employer, Deep Creek Marina Pty Ltd.

303 In mid 2005 Mr O'Brien's workmen were installing the concrete access way across the front of the supermarket land. He had a conversation with Mr Jarman:

Mr O'Brien:	"*Can I get my workmen to upgrade the steps in the wharf down to the ski-park?*"
Mr Jarman:	"*No – not unless Neil Giffin retracts the statement that he made*" (Mr O'Brien cannot recall what statement Mr Giffin had made that Mr Jarman was talking about). "*In fact you can't use the wharf to access the ski-park any more because it's our land*".
Mr O'Brien:	"*Ok, I'll move the ski-park away from 'your' wharf and put it in front of the supermarket*".

304 In cross-examination Mr Watson agreed that statement of Mr Jarman might have been reported to him and said he agreed with it because there were "*insurance issues to address*". He said he didn't allow Mr O'Brien at his own expense to repair the steps to the public wharf because it wasn't his final decision to make because (in effect) he was now a minority owner

of Lot 16. When asked whether he was well aware that fencing off the public wharf and failing to repair the steps would have a definite impact on and hurt Mr O'Brien's business, Mr Watson replied that he didn't think it would be fenced off for as long as it has been and he supposed no-one would rush in to do anything while these proceedings were on foot.

305 At this time, Deep Creek Marina Pty Ltd was operating a houseboat hire business from the wharf alongside the ski boat parking pontoon. It was about this time, mid 2005, that two poles were installed on the wharf to provide a power outlet at the top to service those houseboats – which Mr O'Brien later discovered had been connected to his electricity supply.

306 After his discussion with Mr Jarman, referred to at [303] above, Mr O'Brien shifted the ski-park to the front of the supermarket – abutting the easement which he had granted in favour of Lot 16. His workmen built a concrete walkway to improve the walkway area affected by the easement. At that time one of the houseboats offered for hire by Deep Creek Marina Pty Ltd used the public wharf.

307 In or about September 2006 Mr O'Brien's wife told him that Mr Robertson had towed the ski-park away. He subsequently asked Mr Jarman for its return in the following conversation:

> Mr O'Brien: "*I want my ski-park back*".
>
> Mr Jarman: "*It's not your ski-park – it belongs to Deep Creek Marina Pty Ltd. And anyway you weren't permitted to put a ski-park in front of the supermarket – the water in the Marina belongs to us*".

308 After Mr O'Brien bought the Watson's Bar and Restaurant business from Mr Bares, Mr Bares called him and told him he needed to insure the ski-park. Mr O'Brien did this. He also maintained the ski-park by painting it. In cross-examination it was suggested to him that when the ski-park was removed it was the property of Deep Creek Marina Pty Ltd or some other entity not associated with Mr O'Brien or his wife. However, Mr O'Brien responded that he always believed it belonged to the Watson's Restaurant and Bar business as it was labelled with that name when he purchased the business. It is unnecessary to resolve that issue.

309 At about the time that Mr Robertson towed the ski-park away in September 2006, the developers fenced off the wharf in front of the hotel.

310 Mr O'Brien recognised immediately that the removal of the ski-park and the closing of the wharf would have a serious impact on his business turnover and goodwill. He had previously estimated that 90 percent of his business during peak times came from visitors to the marina from the river. He therefore engaged a third party to build two new ski boat parks for him at a cost of $30,000 so that each could fit on a privately owned mooring in the scheme.

311 When his new ski-parks were completed in October 2006, Mr O'Brien was unable to use the boat ramp to launch them because manoeuvring them into position was made

impossible by the wooden post fencing that by that stage the developers had largely completed around Lot 16. Rather than pay the $2,200 that Mr Jarman demanded to allow him to use the boat ramp in the new marina that had been developed further along Deep Creek on Lot 23 by Messrs Watson, Bares and Robertson, Mr O'Brien paid $300 to have a crane come and launch them.

312 The owners of the moorings immediately on either side of the hotel and supermarket allowed Mr O'Brien to use their moorings to place his new ski boat parking pontoons. They moved their houseboats to other moorings which were not otherwise being used. This situation continues today.

313 Shortly afterwards, Mr O'Brien was contacted by the council and instructed to move his ski boat parking from those moorings because, the council stated, it was an unauthorised use. He was amazed at this because Deep Creek Marina Pty Ltd had operated their houseboat businesses from the wharf for a long time without any development approval that he was aware of. Nevertheless, he made a development application for permission to continue to use the ski-parks on those moorings.

314 Notwithstanding the new ski boat parks, more than one group of customers arrived from the river quite agitated and annoyed with him and asked him aggressively "*Why did you fence off the wharf? What good is it now?*" He had to explain to these people that he did not fence off the wharf and that in order to access his business now they should park at his new ski boat parking and make their way up.

315 Mr O'Brien advised his patrons to take one the following routes:

(a) the eastern route requires patrons to tie up at his ski-park, make their way over the boat ramp area (which can be quite busy and dangerous with vehicles reversing at peak times), along the walkway in front of the supermarket, up the wooden stairs in the supermarket lot, past the fuel bowsers on the supermarket lot and across to the hotel;

(b) the western of these routes requires patrons to tie up at his ski-park, make their way over the neighbourhood and community land, up the retaining wall in the edge of the community property without the assistance of adequate steps, and over to the hotel.

316 Mr O'Brien has observed many ski-boats arriving at the fenced-off wharf and turning around and heading out of the marina again – apparently unaware that they are welcome to use these new ski-parks.

317 This problem was made worse by signs that the developers put up at the mouth of the marina which stated:

> Private Property – No Entry
>
> Perricoota Boat Club – Private Property – No Unauthorised Mooring – Trespassers Prosecuted

318 Mr O'Brien has been told many times by patrons that other potential patrons have not come into the marina from the river due to these signs. The signs have since been removed.

319 In late 2006, Mr O'Brien was told by the head of the Echuca – Moama Houseboat Hire Association that Mr Jarman had made a presentation to them and instructed them to tell all their renters not to moor anywhere near or in Deep Creek Marina because it belonged to him.

320 The developers concreted in a sign on the river frontage of the Honeyman Lot which points upstream (past the mouth of the marina) and states "*Perricoota Boat Club – 6.5 km - No unauthorised mooring – Trespassers Prosecuted*". They also erected a further sign, upstream, on the river frontage of Mr Bares' property pointing downstream past the marina mouth which states "*Private Property – 6.5 km – Perricoota Boat Club – No unauthorised mooring – No trespassing*". The two signs, which point 6.5 km up and downstream respectively, each point across the mouth of the marina and across land belonging to the community association.

321 The developers have not maintained the wharf since they fenced it off. This was upsetting to Mr O'Brien because he bought the goodwill of the business from those same people. He believes that their actions have damaged this goodwill significantly.

322 Just before Christmas 2006 the developers arranged, and Mr Watson and Mr Jarman personally undertook, the installation of concrete barricades around Lot 16 preventing any vehicle access to the moorings. They engaged a former boxer and other men to patrol their new concrete boundary. They also placed a concrete bollard over the boat ramp. Mr Giffin and Mr O'Brien immediately arranged the removal of this particular bollard by crane to Lot 16 on legal advice that it was placed on community land or was obstructing access over the easement over the lagoon. The developers subsequently shifted that bollard back by crane. Mr Giffin and Mr O'Brien again immediately arranged its removal by crane to Lot 16 where it has remained since. Their moving of that bollard was made particularly difficult by the physical intervention of the former boxer.

323 After the installation of the barricades there were far fewer people using the marina and patronising Mr O'Brien's businesses. It was also no longer possible for people to get older or younger members of their family to and from their moorings by car. Mr O'Brien was no longer able to offer the services previously offered to houseboat owners whereby they would let him know when they needed their gas bottles for their houseboats replaced and he would attend to that using his utility.

324 He has observed that at night-time people are now staying in their houseboats rather than walking up to his hotel. There is little or no lighting throughout the marina, making it very difficult to walk around at night. When people were able to get their cars to their moorings they would drive their family up the restaurant, have dinner at night and then drive them back to the mooring afterwards. That is no longer possible. He estimates that it is about 500 metres from the furthest mooring to the door of his hotel.

325 If Lots 14 and 15 were to be fenced off, it would be impossible for people to get from the eastern side of the marina to the western side and vice versa without going around that property and through the carpark at the back of the hotel – except for the owners of Lot 16 because they have the benefit of the easement referred to earlier.

326 Mr O'Brien and his family lived in the manager's quarters built into the supermarket premises. All of the actions of the developers have, in his view, made Deep Creek Marina a very unpleasant place to live and not the environment that he bought into at all.

327 Mr O'Brien testified, and I accept, that the wharf was not in an unsafe condition until the developers fenced it off. Until then he used to keep it clean and safe. The erosion that can now be seen in parts of the wharf occurred subsequently due to rainwater from Lot 16 which flowed over Lots 14 and 15.

328 During the course of the hearing Mr and Mrs O'Brien were made bankrupt.

EVENTS AFFECTING THE COMMUNITY ASSOCIATION IN 2005 - 2006
Early 2005

329 In 2005, negotiations for the transfer of land from the developers to the community association continued but were confounded to some extent by the developers' application in March 2005 to the Consumer, Trader and Tenancy Tribunal (**CTTT**) for an order under s 85 of the *Management Act* appointing a managing agent to perform all the functions of the community association for 12 months.

330 From February 2005 Mr Jarman was employed full time by the developers as their site manager. In early 2005 Mr Neil Giffin, then the manager of the Central and Western Neighbourhood Associations (and now also the manager of the Eastern Neighbourhood Association) was concerned that the community association did not appear to be functioning. Mr Jarman informed him that the community association records were with Andreones Lawyers (the developers' lawyers) in Sydney. Despite Mr Giffin requesting these records from those lawyers in order to get the community association operating, the lawyers did not provide him with the records for, it seems, at least six months.

331 According to Mr Jarman, by early 2005 Deep Creek Marina gave the impression of being neglected, run down and in need of repair to the point of replacement in some areas of the community parcel, and of something needing to be done to enable it to function property. He considered that the problems included the community association not holding properly constituted meetings and not taking action to prevent parking on community property, no full time caretaker to look after community property, no maintenance program and the electrical system appeared to need upgrade or serious maintenance due to usage increases and lack of maintenance. Mr Jarman also considered that the problems included that the potable water supply was failing, there were unsafe areas of neighbourhood and community property and capital works were needed to upgrade infrastructure that had run down. Also, he testified, there was a potential public liability exposure which had become of major concern to developers. Consequently, he said, the developers decided to take two courses of action. One was to apply to the CTTT in March 2005 for the appointment of a managing agent under s 85 of the *Management Act*. The other was to give the community association an opportunity resolve the problems referred to above. He was approached by Mr Michael

Gannon, the president of the Central Neighbourhood Association, with a view to reactivating the community association.

332 In the first half of 2005 the developers were also looking to advance their development of Lot 16. According to Mr Jarman, to do this they were anxious to resolve their perceived issues with the community association. My impression is that it was their interest in developing Lot 16 that drove their actions in relation to the community association.

CTTT proceedings commenced: March 2005

333 On 7 March 2005 Andreones Lawyers, acting on behalf of the developers, applied to the CTTT for the order to which I have referred appointing a managing agent to perform all the functions of the community association for 12 months. The annexed reasons alleged that the management structure was not functioning or not functioning satisfactorily because of: (a) failures to act in accordance with the *Management Act*, to repair and maintain the community property, to enforce the association's by-laws, and to conduct meetings in accordance with the *Management Act* and the by-laws; (b) financial and accounting malpractice; and (c) failure to properly deal with other issues. The CTTT listed the matter for consideration and hearing on 13 December 2005.

334 At a general meeting of the Eastern Neighbourhood Association on 12 March 2005 it was resolved to obtain quotes for an independent body corporate manager to manage the community association.

335 On 16 April 2005, the community association resolved to appoint Mr Haydon as its manager. Mr Giffin considered that this resolved the issue. However, despite the appointment of Mr Haydon, the developers pushed ahead with their application to the CTTT. A letter from Andreones Lawyers to Mr Haydon of 22 September 2005 indicated that the developers did not accept Mr Haydon's appointment as satisfactory.

336 On 9 May 2005 Mr Gannon wrote the CTTT a letter which included the following:

> The Marina was first developed in 1994 by Mr Anthony Watson and ran smoothly until Mr Watson sold the majority of his interest to Mr Gary Barr [sic] (Hillington Valley P/L). A short time after that Ozzie Erections also became financially involved with Mr Gary Barr.
>
> …As part of Lot 13 [now Lot 16], the land between the boundary of neighbourhood lots excluding community property, contain access roads to the houseboat moorings. What has happened over the last few months, is that these roads have been fenced and blocked off. Also a boat ramp which is on community property has also been blocked off with the erection of a boom gate. This was done at Easter this year. There has also been considerable intimidation to anyone who voices any objections to the behaviour of the developer… We are now of the opinion that the main reason for the appointment of the manager over the Community Association is for the benefit of the parties who have lodged this application…

Annual general meeting of community association – 16 April 2005

337 In consultation with the owners of Lots 14 and 15 (the hotel and supermarket), Mr Jarman and Mr Briffa, the then managing agent of the Eastern Neighbourhood, Mr Giffin sent a notice to all owners within the community association, calling a meeting to reactivate it. This meeting was held on 16 April 2005. At the meeting Mr Giffin said that its main purpose was to try to re-constitute the community association which had been inactive for the past three years or so and then to move to where it was going in the future and to appoint a manager. The meeting resolved to appoint Mr John Haydon of Albury Strata Services Pty Ltd as the community association manager. Mr Jarman had earlier told the meeting that the developers would prefer that company to be the manager.

338 The minutes record:

> Members requested Deep Creek Marina Pty Ltd open the boat ramp boom gate. Mr Paul Jarman tabled the boom gate will remain locked.
>
> Members requested correspondence be forwarded to the developer to unlock the boom gate and permit access to lot owners

In cross-examination Mr Jarman indicated that at that time he held the keys to the boom gate.

339 The minutes record that Mr Jarman tabled issues affecting the community association. Mr Jarman appears to have indicated to the meeting that about 20 apartments were going to be built above the eastern moorings and that what they would be going to overlook was just not acceptable.

340 Subsequently Mr Jarman obtained from the developers' project manager Mr Paul Bird, fee proposals for a proposed upgrade from GMR Engineering Services Pty (**GMR**) and ERM Consultants (**ERM**) referred to below. They totalled about $118,000.

GMR fee proposal for civil and structural engineering assistance – March 2005

341 On 21 March 2005 Mr Glen Ryan of GMR provided Mr Chris Bell of ERM, who were acting for the developers, with a fee proposal for civil and structural engineering assistance. It included the following:

> Re: Deep Creek Marina – Civil & Structural Works
> CAPABILITY STATEMENT & FEE PROPOSAL
>
> …We understand that you require general civil and structural engineering assistance with the advancement of the above project. From our site visit on Thursday (17/3/05) and discussions with yourself, Paul Bird and Ozzie we understand the client's requirements to incorporate the following key elements:
>
> Preparation and development of design solutions and documentation necessary for the construction of the following assets;
>
> a) **Main Access Road**:
> The existing bitumen surfaced, two lane access road from Perricoota Road to the car park at the rear of the hotel (about 600m long), to be redeveloped as an asphalt surface with a formal drainage solution, which may discharge to

ornamental lakes to be developed adjacent to the roundabout. This work will also incorporate a roundabout at the Perricoota end and a divided road connection to Perricoota Road.

b) **Internal Access Road:**
The existing part bitumen and gravel surfaced extension of the two lane access road from the hotel to a the intersection at the rear of the supermarket and adjacent to the boat ramp (about 150m long) to be redeveloped with an asphalt surface with a formal drainage solution, discharging via an interceptor to Deep Creek.

c) **Western Moorings Access Track:**
The existing western house boat moorings gravel surfaced access track (single lane) from the car park through to the turn around at the sewage pump station (about 300m long) to be redeveloped as a reinforced concrete surface with a formal drainage solution, discharging via an interceptor to Deep Creek. The Council operates a sewage pump out point at the end of this track and requires unhindered access for a light truck/service vehicle.

d) **Eastern Moorings Access Track:**
The existing eastern house boat moorings gravel surfaced access track (single lane) from the boat ramp through to the turn around at the boundary with the new marina (about 350m long). There is also another turn around situated mid way along its length, to be redeveloped as a reinforced concrete surface with a formal drainage solution, discharging via an interceptor to Deep Creek.

e) **Hotel Access Ramp & Bench**:
The access ramp/track to the mooring level bench in front of the hotel site and adjacent to the boat ramp (about 60m long) to be redeveloped as a reinforced concrete surface with a formal drainage solution, discharging via an interceptor to Deep Creek.

f) **Hotel Car Park**:
The existing 2 bay gravel surfaced car park will be paved and surfaced in asphalt, with formal drainage discharging to Deep Creek via the internal access road drainage solution. The existing car park will be divided into two distinct parking areas preventing drive through and discouraging the parking of cars and boat trailers. The car park closest to the Hotel will be the only car park from which access can be gained to the western moorings.

g) **Redevelopment of House Boat Moorings**:
The existing red gum timber retaining and wall and deck structures shall be replaced with a precast concrete and steel pile solution. The moorings shall incorporate a retaining wall structure and be designed to minimise impacts upon the trees.

…

THE MOORINGS;

The moorings will also incorporate free standing driven piles at the end of the vessels (one pile per two vessels). The client advises that they have worked successfully with Murray Valley Piling in the past. Also the client proposes the replacement of the existing service arrangements with all-in-one bollards which include a light, GPO's, metered treated water outlets and provision of data/com's. These bollards have been already sourced, evaluated and used in the recently developed marina.

The reconstructed moorings will include provision for designated tie up points, also consideration of the landscape solution, removal of the existing stairways and facilitate the replacement of the existing stairways and facilitate the replacement of the existing raw water irrigation system. The client prefers the house boat owners provide their own on-board vessel bumper protection.

TRAFFIC MANAGEMENT;
We also note the client's concern that the mooring access tracks will be for set-down, drop-off and pick-up only. Boat owners will be discouraged from parking adjacent to the moorings. Parking on the lawn areas adjacent to the mooring access tracks will actively discouraged by the client and closely supervised. A boom gate will control access to the moorings. The boom gate and controls will sourced and provided by the client.

342 The letter included a fee proposal in the sum of $38,093 for the design of these works. This amount was increased to $44,022 in Mr Ryan's email of 22 March 2005 to Mr Bell, which noted some "*omissions or areas requiring clarification*".

Brolec assessment of electrical requirements - 13 May 2005

343 On 13 May 2005 Mr Jarman obtained from Mr Rick Brockwell of Brolec Electrical Contractors an assessment of electrical requirements for the Deep Creek Marina, which was expressed as follows:

Please find for your information points that need consideration for the Electrical installation for the Marina extension stage 2 as discussed with yourself and Chris Bell from E.R.M.

1. Substation is now at peak load and needs urgent upgrade.
2. Substation needs to be relocated to a *ground mount type* kiosk and new main switchboard/metering board constructed to house all individual meters.
3. Existing mains power to old Marina is non compliant and needs attention we have already encountered dangerous situations on 3 moorings, cabling is single type insulation and is not recommended. In some cases conduit is barely 150mm underground and crosses other boundaries.
4. Safety RCDs must be fitted to all new bollards to comply with Standard to protect moorings and all lighting must be upgraded to comply.
5 New mains cable is recommended to all moorings so they can be individually metered and give mooring owners more capacity to feed their houseboats ie. Air Conditioning, pumps and equipment new houseboats, as you would know require more capacity.
6. Communication system via PABX can also be introduced

7. Country Energy require meters to be clustered to be read individually in common area, not the current check metering system being read through one main meter.
8. We have spoken with Chris Bell E.R.M. in regards to the above and also in reference to water and irrigation system. Any information needed re water speak with Rob Knight [telephone number].
9. All existing check meter boards will be made redundant and would probably be an idea to move the pumping station board to a more suitable location.

Extraordinary general meeting of community association – 14 May 2005

344 An extraordinary general meeting of the community association was held on 14 May 2005. Among those in attendance were Mr Jarman, Mr Haydon (the community association manager) and Mr Giffin (neighbourhood associations' manager). Many lot proprietors were in attendance as observers.

345 Mr Jarman tabled preliminary concept plans indicating, he testified, the works which the developers considered needed to be considered for the site. The plans in evidence do not appear to be nearly as comprehensive as that; but do show (among other things) realignment and extension of the western access road with a turning circle at the end and vehicle turnoff areas, a two metre wide concrete boardwalk around the whole marina (apparently over the neighbourhood strip), and the lower eastern access road apparently with vehicle turnoff areas. The total cost of all the planning works and the plans was identified by Mr Jarman at $118,000.

346 The minutes record the following:

COMMUNITY ASSOCIATION RECORDS

RESOLVED that:

1. Paul Jarman arrange for the transfer of all documents held by Andreones to John Haydon of Albury Strata Services Pty Ltd;
2. Paul Jarman also be requested contact the Consumer Trader & Tenancy Tribunal to formally withdraw an application for the appointment of a compulsory manager;
3. John Haydon, on receipt of the records presently held by Andreones (Solicitors), be authorised to re-establish, reconstruct the records of the Community Association to comply with statutory requirements…

OCCUPATIONAL HEALTH & SAFETY (O H & S)

RESOLVED that a quote be obtained from a professionally qualified person to carry out an OH & S report on the Community Association Property.

FUTURE DEVELOPMENT OF THE DEEP CREEK COMPLEX

Mr Paul Jarman was provided with an opportunity to table a development proposal to those present on future developments within the Deep Creek Marina site.

Mr Jarman advised that the up-grade would need to include a new sub-station for the supply of electricity to the site, as there was concern that the current supply would not [sic] be insufficient to supply future demand especially

when the complex was full of owners, guests and visitors, the ball park figure suggested was $200,000.00.

The future plans also included, roads, car parking, retaining walls and the marinas, Paul Jarman tabled a set of drawings of the future project and provided an overview to those present at the meeting.

As part of the project there would be a need for the Community Association (including the neighbourhood schemes) to contribute to the costs.

Deep Creek development would contribute some funds and provide a parcel of land, 1 meter wide X 200 meters in length that would be used as a future car park, however would require sealing at the cost of the Community Association.

Paul Jarman then vacated the meeting to allow representatives present to discuss the proposal.

Peter Gray suggested that the Community Association could not meet its share of the total cost of the project, which was expected to cost in excess of two million dollars, ($2.000.000.00), however he would be comfortable to make a non-binding recommendation that each marina berth lot proprietor contribute fifteen thousand
dollars, $15,000.000 towards the project.

The members present then RESOLVED to put forward a proposal for Paul Jarman to take to his company, as follows:

- a detailed proposal be prepared and provided to the manager of the Community Association to be distributed to the representatives of each community association lot to in turn be distributed by the manager of the neighbourhood associations to the appropriate neighbourhood association lots;
- the proposal to contain specific details on each part of the development that funding is expected to be contributed by the Community Association, each section to be accompanied by a site plan identifying where the works will be carried out…

Mr Jarman agreed in cross-examination that the word "*not*" before "*be insufficient*" under the heading "*FUTURE DEVELOPMENT OF THE DEEP CREEK COMPLEX*" was a typographical error.

347 Mr Jarman's note in relation to that meeting on 14 May 2005 included the following:

Paul Jarman presented

- A concept layout of the site
- Guestimations of price for works based on previous works carried out on site (this was clearly explained as not accurately costed)
- Approximant [sic] works totalled $2,000,000.00 plus

- Almost all works tabled were for OH & S reasons (that we have had preliminary advice on to say there is significant risk)
- Deep Creek Marina P/L conceded significant land concessions to the community and neighbourhood association to help resolve this matter once and for all.
- As a result of the presentation to the executive committee came back and offered $15000.00 per boat ($1,275,000.00 total) but are not in a legal position for 14 days to vote and ratify the decision because of the Comm. Assoc Act I believe.
- This is a first offer I believe we will get more but have to now present a case with more pressure for them to work a bit harder.

ERM proposal for landscape architectural services – 2 June 2005

348 On 2 June 2005 Mr Bell and Mr Allan Wyatt of ERM wrote to DC Marina Pty Ltd care of Mr Paul Bird, providing a proposal in the sum of about $70,000 for landscape architectural services in relation to the entry road, a roundabout and entry signage; and a landscape concept plan associated with (inter alia) the marina frontage, associated access roads and river entry.

Special general meeting of community association – 18 June 2005

349 A special general meeting of the community association was held on 18 June 2005. The agenda items included:

> 6. That the Community Association determine if a formal occupational health and safety report on the condition of Association Property should be arranged.
>
> …
>
> 9. That a draft development proposal by Deep Creek Marina Pty Ltd be tabled and approved.
>
> …
>
> 12. That a draft budget estimate be tabled for approval by the Community Association including raising funds to contribute to the preparation of specifications for the development of Association Property (civil engineering and environmental engineering) totalling $118,000 and that levies be determined pursuant to the Act.

350 All lots in the community association were represented at the meeting. Mr Jarman represented the developers' lot. The manager of the community association (Mr Haydon) and the managers of the Central, Western and Eastern Neighbourhood Associations (Mr Briffa and Mr Giffin) were in attendance. The community association resolved to obtain an occupational health and safety report from Solutions IE to (inter alia) enable any action to be taken in relation to maintaining the community property in a state of good repair and when used as a place of work. The community association discussed: (a) a recent letter from Deep Creek Marina Pty Ltd to boat owners concerning the proposed issuing of notices against owners for "*oversized houseboats*"; (b) letters from solicitors of behalf of the developers concerning parking on Lot 16; and (c) a draft development proposal from Deep Creek Marina

Pty Ltd, which was tabled. Mr O'Brien spoke in relation to the speedboat mooring facility and why it was needed by the hotel.

351 The meeting also discussed "*The proposal for the Community Association to obtain a transfer of ownership of the access roads, such land currently being part of [blank in minutes] would ensure that houseboat owners have vehicular access to their boats but with provisos eg parking, rubbish etc so that the Community Association Executive Committee would be able to enforce rules*". There was a question about whether this land would become community association property. Mr Jarman spoke in relation to proposed development of the marina. The minutes record in that context (apparently as a statement by him) that:

> In relation to the roads on Lot 13, currently the houseboat owners have access through this area and the developer has noted the title of that land will be given to the Community Association on the proviso that the work that has to be done to the roadway to bring it to the required level (concrete roads and edging), will need to be at the cost of the Community Association on the basis that access controls are put on the road, loading/unloading zones, only 15 minute limits, no vehicular access between 12 midnight and 6 am and that the cost to the developer to be cost neutral (developer pays by the contribution of the land). This would be the same with second section of land and that the only cost to the lot owners will be only the cost of the upgrade. The benefit to the developer is that the site will be clean.

352 The minutes also record that:

> Paul Jarman noted that for the Community Association to move forward, the Community Association would need to approve the $118,000 budget and approve the levies today so that the Community Association is in a position to move forward and that no legal transfers would occur until the resulting information is available for the Community Association to make a positive decision to move forward with the works.

353 It was resolved that a budget be approved by the community association which included raising funds to contribute to the preparation of specifications for development of association property (civil engineering and environmental engineering) totalling some $118,000 and that this special levy be payable on 1 July 2005.

Planned subdivision of Lot 16 – 16 June 2005

354 On 16 June 2005 the developers' consultant ERM (Mr Bell) provided another consultant GMR (Mr Ryan) with a plan showing over 30 lots, apparently for residential or holiday accommodation, in the area immediately above the eastern moorings; the upper eastern access road apparently connected to Lot 23; and no lower eastern access road. Notes by Mr Bird, the developers' project manager, appear on the document. The plan reflected the developers' intentions which had been communicated to Mr Bird earlier than 16 June 2005 and possibly as early as February or March.

GMR fee proposal to community association – July 2005

355 On 17 July 2005 GMR sent Mr Haydon a fee proposal which was almost identical with its fee proposal of 21 March 2005 (set out above), stating that Mr Bell and Mr Bird had instructed them to do so. Mr Haydon replied two days later that all instructions should come through his office; GMR should not accept any instructions from the developers that placed

financial obligation on owners; and he anticipated the executive of the community association would meet to review the matter.

Developers' proposed heads of agreement – 12 August 2005

356 On 12 August 2005 Mr Haydon (as managing agent of the community association) received a letter from Mr Jarman entitled "*Re: - Heads of Agreement for Deep Creek Marina P/L (Lot 13) to Transfer Land to Community Association No. 270026 in Exchange for Improvement Works Carried Out by the Community Association*". The heads of agreement referred erroneously to Deep Creek Marina Pty Ltd as if it were the owner of the developers' land (then Lot 13, now renumbered Lot 16). Clauses 1-13 provided:

1. No Agreement is reached until contracts are signed.
2. Deep Creek Marina P/L has full right of refusal if planning and design is not considered to be acceptable by Deep Creek Marina P/L.
3. Deep Creek Marina P/L (lot 13) to pay 50% of Cost towards upgrade works & Planning for the following areas:-
    a) The Entrance to the marina from Perricoota Road
    b) The Entrance to the marina from the Murray River
4. The Cost of all other works on community property that Lot 13 must contribute to is to be the exact value of the land to be transferred to the community association based on our Neighbourhoods share of the unit entitlements.
5. Community Association and individual Neighbourhood associations to pay for all remaining Planning & Upgrade works on land being transferred to it in this agreement as follows and not limited too [sic]:-
    a) Road seal, Kerbing, Drainage & landscaping on all Community & Neighbourhood association property as is stated and or shown on scope of works provided by ERM & GMR at stated specifications in those documents.
    b) Power Up grades to be payed [sic] entirely by each neighbourhood associations depending on usage required.
    c) Water Up grades to be payed [sic] entirely by each neighbourhood associations depending on usage required.
    d) Retaining wall upgrade to be payed [sic] for by each neighbourhood association depending on what upgrade required.
6. The Community Association will agree to take complete and full responsibility for maintenance of all lands and the up grades transferred to the community association property in this agreement.
7. All access roads have access control systems manage [sic] by (DCM P/L). Management Agreement must be struck between Comm. Assoc and DCM P/L prior to signing.
8. Access control System to be installed at Community Associations Cost.
9. Conditions of usage are to be added to the Lands transferred to the community Association from Deep Creek Marina P/L (lot 13) (legal advice will be required for what form these conditions will take.)
    a) All roads are access roads only and have a 15 minute loading and unloading limitation placed on them
    b) All access roads and parking area's [sic] are no access for trailers
    c) All access roads have hours of usage limitations 6.30am to 12 midnight

d) All penalty and warning notices are to be payable to Community Association
e) Penalties to be determined by Comm. Assoc Exec committee and DCM P/L before agreement signed off on

10. All legal and establishment costs are payable by Community association.
11. The Land will only transfer when the works have been completed to project management and Council specifications and signed off on.
12. **The land to be transferred can not be confirmed exactly as we have only got to a concept stage because the community association has not engaged the contract, so indicative lands can only be given as on the concept drawings at this stage**
    a) But we do agree Deep Creek Marina P/L will transfer lands that are required for the proposed up graded roads, parking and upgrades that meet Deep Creek Marina Pty Ltd approval as a result of the planning and design of ERM & GMR
    b) This transfer will be in the form of a complete title change over to the community associations ownership
13. A Interim agreement must be reached to address public liability exposure to lot 13. Due to delays in start of planning and the whole project because of time frame issues the Community Association 270076 has at present:-
    a) Community association Must commission and act immediately on an O H & S and Public liability report for the entire Community Parcel.
    b) If this cannot be achieved we have no option but to lock all access to our lot 13 properties to reduce our exposure to any liability.

(emphasis added)

357 In cross-examination Mr Jarman said that the reference in paragraph 12 of this document to the "*indicative lands…on the concept drawings*" was a reference to the drawings behind tab 5 of his affidavit, which were draft refurbishment concept plans outlining what works needed to be considered on the site. Those concept plans showed, inter alia, the western access road with vehicle turnouts and extended to include a turning circle; the eastern lower access road with vehicle turnouts; and parking bays on Lot 16 opposite the carpark and Lots 14 and 15.

September to December 2005

358 On 28 September 2005 a meeting of the executive committee of the community association was held and attended by (inter alia) Mr Haydon, Mr Giffin and Mr Jarman. The minutes record inter alia that:

(a) works were required on the Lot 13 (now Lot 16) steps at the edge of the lagoon and Mr Jarman stated "*It is our responsibility however we will not be fixing this until we know that you are going to fund the upgrade, we will fence it off*". The meeting then resolved that those steps be repaired;

(b) Mr Jarman representing the owners of Lot 13 advised that upgrading of community and neighbourhood properties had to be carried out as per the specifications of EMR and GMR;

(c) the executive committee determined that the community association would not enter into negotiations to purchase part of Lot 13 at the present time, and that a large number of lot owners were agreeable to enter into a purchase agreement but a detailed, formal proposal would be needed.

359 At this meeting, the initial safety report of Solutions IE was tabled. Each community and neighbourhood association undertook to carry out the necessary work on their property. As at that date less than 50 percent of the levy of $118,000, struck three months earlier, had been collected. Mr Jarman pressed for the developers' proposed upgrade to be carried out as per the specifications of EMR and GMR.

360 Mr Haydon responded in detail on 27 October 2005 to Mr Jarman's letter of 12 August 2005. He stated inter alia that once a draft agreement became available he would recommend to the community association executive committee that an intention to sign a contract be authorised. Negotiations halted on receipt of a letter dated 16 November 2005 from Andreones, lawyers acting on behalf of the developers, stating that until the CTTT proceedings were decided, no further negotiations would occur.

361 On 5 October 2005 Mr Haydon wrote a letter to Mr O'Brien (as secretary of the community association) in which he stated that during a discussion with Mr Bares, Mr Haydon asked Mr Bares "*what would make the CTTT hearing for a compulsory manager go away*", primarily as it was financially expensive and time consuming for himself and for the community and neighbourhood schemes as well as Mr Bares as the developer. The letter recorded that Mr Bares said that they would have to commit to the development as per Mr Bares' specifications, and that they "*should not muck around with other engineering consultants but use the GMR and EMR groups*". Mr Bares went on to discuss the slow pace that the money was coming in. Mr Haydon told him that it was the fault of the Neighbourhood Managers, but that most of the money had now been received from the schemes managed by Mr Giffin. The letter stated that it was Mr Haydon's understanding that the developers wished to move very quickly with the project.

362 By the time of the meeting of the community association executive committee on 2 December 2005 some $66,000 had been collected of the levy of $118,000.

CTTT hearing: 13-14 December 2005

363 At the CTTT hearing on 13 December 2005, the developers were represented by their solicitors and a barrister. Mr Haydon spoke on behalf of the community association. Although the three Neighbourhood Associations were not parties to the hearing, some neighbourhood members and managers attended, namely, Mr and Mrs Hannay, Mrs Briffa, Mr Gannon and Mr Giffin.

364 After the introduction by the representative for Lot 16, the tribunal member said:

> It will take a lot to convince me that I should take the draconian step of replacing Mr Haydon, who has been democratically appointment by the community, with a compulsorily appointed manager. I want both sides to go and negotiate.

365 Just before 3 pm, the developers' barrister presented Mr Haydon and the neighbourhood members and managers with a lengthy proposal. They let the barrister know that the timeframes proposed for certain works the subject of proposed orders were "*ridiculous*": for example, the developers proposed some works to be done within 14 days and it was only two weeks before Christmas. Also, the view of the developers as to what work was required was different to that of the neighbourhood members in attendance.

366 The matter was adjourned until the following day. When Mrs Hannay arrived at her motel that evening, she was told that the barrister wanted to speak to her. She went to his room and found the barrister, the solicitors, Mr Bares, Mr Jarman and Mr Honeyman there. Mr Bares said:

> Things aren't happening fast enough for me. I need things to be fixed by September.

367 Mrs Hannay understood this to mean that he needed work to be done by September 2006 because of his development ambitions for the adjoining land. Mr Bares also said:

> I want to get rid of John Haydon and replace him with Dynamic Property Services. They are a big organisation and know what they're doing.

368 Mrs Hannay had her own concerns about Mr Haydon, in particular, that he was not standing up sufficiently to what she considered to be the "*bully-boy*" tactics of Mr Jarman at community association meetings.

369 At breakfast the following morning, Mr Haydon said to Mr Giffin, Mrs Briffa and Mr and Mrs Hannay:

> I would like to make an announcement. I am resigning as community manager. There is too much pressure on me and these disputes are taking up too much of my time. My other work is suffering and will suffer more if I continue to take this on.

They discussed this at the breakfast table and formed the conclusion that the community association had no alternative but to accept the appointment of Dynamic Property Services (**Dynamic**).

370 When the hearing resumed that morning, Mr Haydon informed the CTTT of his decision. After an adjournment so that the parties could discuss the matter, the barrister for Lot 16 presented a proposal that the community association agree to orders appointing Dynamic and other orders that seemed to the members of the neighbourhood associations to basically be orders that the community association obtain reports in relation to what work was required to address occupational health and safety issues and that they then undertake that work. The developers withdrew their earlier demand to include deadlines for carrying out the work.

371 Mrs Hannay said that the feeling among the group was that these proposed orders were "*okay*". The work to be done by the community association was only to be that recommended by professional reports. They trusted that Dynamic would be competent in managing the process.

372 When the CTTT reconvened, the barrister handed up the proposed orders. The tribunal member asked if the orders were consented to, and nobody objected. The orders were made.

373 In evidence, Mr Jarman had a recollection of the events of 13 and 14 December 2005 which differed somewhat from that set out above based on other evidence. I prefer the latter, taking into account my assessment of the witnesses.

Works commissioned by Dynamic – 2006

374 Dynamic commissioned a risk assessment report from Matrix Risk Pty Limited. Matrix produced the report in January 2006.

375 Dynamic commissioned Brolec Express Services Pty Limited to conduct various electrical works at the community scheme. This work included supply of a new 500kVA pole mount sub-substation, a new mains supply from substation to new main switchboard and new metering facility in the carpark at the rear of the hotel, and supply of all street and public lighting as required around the site. This was at a cost of $774,302. On 7 March 2006, Brolec advised that there were further works to add to its previous quotation, costing $21,341.76.

376 Dynamic also commissioned or embarked on commissioning civil works, indicated by the following documents:

(a) report entitled "*Engineer's Review of Existing Timber Structures*" by GMR dated March 2006;

(b) "*Tender Specifications for Moorings Refurbishment & Modification Works*" by GMR dated May 2006. The document recorded that it was the intention of the developers to close the existing access road to the moorings, reinstate that land with top soil and sow it with grass cover. The proposed works included removal of the access stairs to moorings and to close the boat ramp;

(c) development application 035/07 dated 28 July 2006 submitted by GMR for "*refurbishment of the western (timber) moorings and abutments, replacement of the eastern moorings (concrete), removal of the access stairs, the development of the pedestrian (Community/Neighbourhood) access paths and associated landscape works*"; and

(d) advertisement in the Riverina Herald on 4 August 2006 by GMR for a civil works tender, stating "*Dynamic…invites Tenders for the supply of necessary*

material for Construction of Access Roads, Car Parks and Associated Stormwater Drainage Works at the Deep Creek Marina".

377 In order to finance the works, Dynamic caused the community association to enter into a loan agreement on a drawdown basis for the sum of $2,000,000.

378 The carpark work that was carried out in 2006 included demolishing the existing carpark (apparently with about 60 car spaces) including the trees and landscaping and constructing a much larger carpark which provided for 125 car spaces. Drainage was installed which connected to a special detention system. Tonnes of crushed gravel was then brought in. By about November 2006 the work appears to have been completed except for sealing. No work has been done since that time.

379 The plaintiffs suggested in cross-examination that the reason that this larger carpark had capacity for 125 cars was to provide for the 80 car spaces for the supermarket which a condition of consent to Mr O'Brien's development applications 131/05 and 049/04 required to be put on the adjacent Lot 16: see [295] – [297] above. It is not clear to me whether or not this is so.

380 During 2006, Dynamic did not consult with any of the Neighbourhood Associations. Mr Giffin was very concerned by this lack of consultation. He was also concerned when he became aware that Dynamic was receiving its legal advice from the developers' solicitors, Andreones.

381 Mr Clinch was concerned that significant work was being commissioned in early 2006 by Dynamic, as compulsory manager, that the community association was going to have to pay for. His concern was twofold:

(a) that members of the community association had no say over decisions being made by Dynamic to spend the community association's money; and

(b) the works being commissioned mirrored the works he believed Mr Watson and Sammy One were obliged to do pursuant to the terms of the community and neighbourhood development contracts, and had previously sought to have done and paid for with a contribution by the community association.

382 Mr Clinch and Mr Giffin expressed their concerns to Dynamic.

383 In June 2006 GMR produced a sketch marked "*for tender 21/06/06*" apparently, it seems, as a result of discussions between Mr Ryan of GMR and Mr Jarman, showing an enlargement and reconfiguration of the community carpark.

384 On 4 August 2006, solicitors for Mr Giffin as managing agent of the Central and Western Neighbourhoods applied to the CTTT for orders revoking its previous orders appointing Dynamic as managing agent.

385 On 17 November 2006, the proceedings in the CTTT were settled and consent orders made which terminated the appointment of Dynamic from 6 December 2006.

Mr Bares' letter – 19 December 2006

386 On 19 December 2006 Mr Bares wrote a letter addressed to "*Houseboat Lot Owner*" which he sent to the managing agents for the Neighbourhood Associations with a request that they distribute it to each of the houseboat lot owners. The purpose of the letter was said to be so that the recipients could better understand his position in relation to a number of "*areas of dispute*" including the following:

(i) as regards access roads to houseboat lots, Mr Bares wrote that the roads in front of the moorings were construction roads used primarily as temporary access to facilitate construction; over the years the developers had continuously and unsuccessfully tried to come to some form of more permanent access arrangement; that there was no planning approval for any access roads to houseboat lots; it was therefore illegal for the developers to continue to allow houseboat lot owners to use the construction roads to access their houseboats; and if an accident occurred the developers would be uninsured.

(ii) it was illegal to park in the "*flood plain*" because the developers had no planning permit which would permit it.

(iii) oversized houseboats were encroaching on Lot 16. The developers would not agree to this as it would encroach on other lot owners' right of carriageway.

(iv) the boat ramp had no planning approval to be used as a boat ramp. Mr Bares wrote that as the developers had been unsuccessful in controlling use of the ramp by the public, they would therefore close it. Lot owners would be given the opportunity to use the new boat ramp (on Lot 23). Casual permits for visitors and guests of lot owners would be issued at a nominal cost.

(v) there were security issues in respect of property damage including damage to the developers' boom gates.

(vi) there was a trespass issue. Cars parked illegally on Lot 16 and parking in the flood plain would be towed away.

* * *

387 That completes my analysis of the history of the marina development and the statutory framework. I now propose to address the issues which arise for determination.

WHAT WAS INCORPORATED IN THE DEVELOPMENT CONSENTS?

388 The development contracts and the statutory covenants in the *Development Act* refer to development consents. There is an issue as to what is incorporated in the development consents. In particular, does development consent 66/92 incorporate the subdivision plans in DA 66/92 (**annexures B** to **E** to this judgment) and does development consent 18/90 incorporate Plan 4 in DA 18/90 (**annexure A** to this judgment)? It is important to the plaintiffs' case that the question be answered yes. The developers submit that it should be answered no. In my opinion, the question should be answered yes for the following reasons.

389 In construing a development consent, the development application and plans or other documents accompanying a development application can only be looked at if they are incorporated in the consent expressly or by necessary implication and only where this is necessary for the purpose of interpreting the consent. This principle has been repeatedly affirmed in the authorities. A seminal statement appears in ***Auburn Municipal Council v Szabo*** (1971) 67 LGRA 427 (NSWSC) at 433 – 434 where Hope J held:

> …in determining what a council has approved, one primarily looks at the document constituting the approval, and construes it… The terms of another document may be incorporated in a development approval either expressly or by necessary implication, but I do not think that it is possible otherwise to go to documents outside the formal approval in order to determine what has been approved. In particular, it is not possible to go to the form of application for approval unless in some way that document has in whole or in part, expressly or by necessary implication, been incorporated in the consent. On some occasions no doubt there is such an incorporation. Thus, if an application were made and a council did no more than approve the application, it seems to me that by necessary implication the terms of the application must be incorporated.

390 In ***Shell Company of Australia Ltd v Parramatta City Council [No 2]*** (1972) 27 LGRA 102 (NSWCA) Hope JA (Jacobs and Manning JA agreeing) held at 107:

> … it is not permissible, in order to determine what development has been approved, to construe the document constituting the approval in the same way as if it evidenced some inter partes transaction, for development approvals operate, as it were, in rem and may be availed of by subsequent owners and other occupiers of the land. The nature and extent of the approved development must be determined by construing the document of approval, including any plans or other documents which it incorporates, aided only by that evidence admissible in relation to construction which establishes, or helps to establish, the true meaning of the document as the unilateral act of the relevant authority, not the result of a bilateral transaction between the applicant and the council.

391 In ***Stebbins v Lismore City Council*** (1988) 64 LGRA 132 the NSW Court of Appeal found that the notice of determination of a development application should have been read together with a plan accompanying the application, as the application was meaningless without the plan. In a joint judgment, Mahoney, Priestley and Clarke JJA held at 135 – 136:

> The notice of determination of the development application should, we think, be read together with the plan. The written form of application is meaningless unless the plans accompanying it are considered as part of the application.

> Similarly when the notice of consent refers to the determination of the development application it must be referring to the application including the plans without which that application would not be an application at all. The consent as granted was to an application incorporating a plan on which, at the time of consent, a marking had been placed showing that the development being approved did *not* include the new entrance. Read together the documents returned to the appellants informed them that the works shown on the plan were the subject of the development consent except insofar as an amendment was required in relation to the new entrance to the Bruxner Highway. The consent could not, in view of the stamp, be regarded as allowing for development in that area in the precise terms shown by the plan.
>
> If the written notice of consent alone is to be regarded as the consent so that it alone would appear on the public register the fact inescapably remains that it could not be understood by a searcher without recourse to the application itself, including the accompanying plans. The searcher wishing to gain a full appreciation of the terms of the consent would then see a plan showing that no approval had been given to the new entrance. The point is that consent was not in fact given to the new entrance nor can the notice of consent accompanied by the stamped plan be regarded as an unqualified approval of the application to develop the new entrance as originally but no longer shown on the plan.

392 These and other authorities were reviewed in ***Hubertus Schuetzenverein Liverpool Rifle Club Ltd v Commonwealth of Australia*** (1994) 85 LGERA 37 (FCA) by Wilcox J, who concluded at 46:

> The authorities clearly establish that it is legitimate, in construing a development consent, to look at the plans that accompanied the application. However, this may be done only where the consent document expressly or inferentially incorporates the terms of the application and only where this is necessary for the purpose of *interpreting* the consent. For example, where the council simply approves an application without describing the development, it is permissible to look at the application to determine what it was that the applicant sought to have approved (as in *Szabo* and *Shell Co*). It is not legitimate to look at the documents that accompanied the application, or even the application itself, to contradict (whether by way of extension or contraction) the scope of a consent stated in clear terms. *Stebbins* is consistent with the last-stated proposition. On the view of the case taken by the Court of Appeal, in order to learn the terms of the council's consent it was necessary for a person to read the notification of consent in conjunction with the copy plan endorsed by the council. When the documents were read together, it became apparent that the unrestricted consent suggested by the letter of notification was in fact given subject to the elimination of the new entrance.
>
> Applying these principles to the present case, it seems to me that, if a question ever arose as to what Liverpool City Council intended by its reference, in the letter of 10 October 1973 or the subsequent formal consent, to *club building*, *beer garden* or *children's playground*, it would be legitimate to look at the plan dated January 1973 in which each of these facilities was graphically described. To look at the plan for that purpose would be to use it to interpret the consent. But it is not legitimate, in my opinion, to look at the plan for the

> purpose of extending the consent; for the purpose of adding a facility that was not mentioned in the consent document to those listed as approved. This would be to use the plan to contradict the document, not to interpret it.

393 In ***Woolworths Ltd v Campbells Cash and Carry Pty Ltd*** (1996) 92 LGERA 244 (NSWCA) at 249, Sheller JA held:

> Development approvals operate for the benefit of subsequent owners and other occupiers of land and denote the consent authority's unilateral act, not a bilateral agreement between the parties. Generally, if the terms of the approval are clear, it is not permissible to look to the application or to other documents which accompany the application to qualify or contradict its terms. But if the approval incorporates the application, the two must be read together…

Beazley JA agreed with Sheller JA (I note that the LGERA report erroneously omits Beazley JA's reasons for judgment).

394 In ***Winn v Director-General of National Parks and Wildlife*** (2001) 130 LGERA 508 (NSWCA) at [2] and [3] Spigelman CJ accepted, and cited many authorities in support of, the proposition that "*documents accompanying an application for consent are not taken as incorporated in the consent, unless incorporated expressly or by necessary implication"*. Stein JA held at [199]:

> As Hope J observed in *Auburn Municipal Council v Szabo* (1971) 67 LGRA 427, in determining what development a consent authorises, one looks primarily at the approval and construes it. The reason for this is that a consent is issued in rem and it would be inconvenient, to say the least, if one had to have regard to a series of documents to know what the consent authority intended to approve. The consent may incorporate another document if it does so expressly (not here relevant) or by necessary implication. In *Szabo*, Hope J gave the example (at 434) of a council merely approving an application and no more. In such a case, the terms of the application would be incorporated by necessary implication. *Szabo* was applied by the Court of Appeal in *Sydney Serviced Apartments Pty Ltd v North Sydney Municipal Council [No 2] (*1993) 78 LGERA 404 at 407-408.

395 In ***Weston Aluminium Pty Ltd v Alcoa Australia Rolled Products Pty Limited*** [2004] NSWLEC 551 Lloyd J held at [13]:

> In accordance with settled principles in interpreting what is the subject of this consent it is not permissible to look at any other document other than a document either expressly or impliedly referred to in it. In this case it is permissible to look at the plan referred to in condition 20 as forming part of that consent.

396 In ***Loreto Normanhurst Association Inc v Hornsby Shire Council*** (2001) 122 LGERA 347 (NSWLEC) one of the two notices of determination which fell to be construed was in substantially the same form as the notices of determination of DA 18/90 and 66/92. The form was prescribed by the regulations. Bignold J held that each development consent expressly incorporated each development application: at [20]. His Honour went further and held that the comprehensive and detailed statutory regime "*necessarily*" meant that the

development application (and its supporting materials) was incorporated in the development consent: at [30]. ***Loreto*** was cited with apparent approval in ***Council of the City of Sydney v Pink Star Entertainments Pty Ltd*** [2008] NSWLEC 176 at [86]; ***Tip Fast Pty Limited v South Sydney City Council*** (2002) 120 LGERA 292 at [22], [24]; and ***Kindimindi Investments Pty Ltd v Lane Cove Council*** [2005] NSWLEC 398 at [52].

397 In ***Weston Aluminium Pty Ltd v Environment Protection Authority*** (2007) 156 LGERA 283 at [17] the High Court found it unnecessary to examine these principles:

> Whether, as Alcoa submitted, reference may not be made when construing a consent to anything but the consent itself and any documents incorporated expressly or by necessary implication need not be examined. In particular, it is not necessary in this case to consider what reference may be made to the development application to which the consent responds.

398 In my opinion, DA 66/92 and its accompanying subdivision plans (**annexures B – E** to this judgment) were incorporated expressly or impliedly in development consent 66/92. The notice of determination is set out at [92] above. It is unnecessary to consider the "*necessary*" incorporation proposition (arising from the statutory regime) advanced in ***Loreto***. The notice of determination stated that DA 66/92 "*has been determined by…granting of consent subject to the conditions specified in this notice*". The notice stated that the conditions were set out "*as per attached letter*". That letter from the council is set out at [93] above. It is impossible to understand what DA 66/92 was without looking at it. It is impossible to understand what were the "*Community Titles Subdivision*" and "*the proposed subdivision*", to which the council's letter referred, without looking at the development application and the enclosed subdivision plans. It is impossible to know what the council intended in condition (a) in its letter by the submission of "*formal*" subdivision plans, community development contracts, community management statements, neighbourhood development contracts and neighbourhood management statements unless one knows what the subdivision plans and other documents enclosed with DA 66/92 were that had to be the subject of formalisation. Condition (c) of development consent 66/92 referred to "*Neighbourhood Development Lots 2 – 11 (moorings or berths)*". That cannot be understood without looking at the plans which accompanied DA 66/92. Condition (b) of development consent 66/92 required compliance with a host of conditions in development consent 18/90. That condition cannot be understood without referring to development consent 18/90, which in turn cannot be understood without referring to DA 18/90 and its accompanying plans. Condition (d) referred to "*Development lots*". It is necessary to refer to the Stage 2 plan to understand this reference.

399 In my opinion, DA 18/90, including Plan 4, was incorporated expressly or impliedly in development consent 18/90 (set out at [76] above). That consent cannot be understood unless the application and the plans accompanying it are looked at. The council's letter (set out at [77] above), which was incorporated by express reference in the notice of determination, granted consent to "*the abovementioned Marina and tourist development subject to the following conditions*". The conditions are pervasive in their references to matters which can only be understood by reference to the development application and plans. They include references to "*the entrance of Deep Creek to the River*", "*gravel roads*", "*the houseboat storage area*", "*the access road*", "*the intersection with the main road*", "*the boat ramp*", "*the motel, cabins, restaurant and kiosk*", "*internal roads and parking areas*",

"*moorings within the Marina*", "*the map in the supplementary Environmental Impact Statement*" and "*the Environmental Impact Statement*".

400 The developers submit that even if Plan 4 were incorporated in development consent 18/90, it is merely a proposal for landscaping on community property. I do not accept the submission. The narrative in the SEIS stated that Plans 2 and 3 were the "*masterplan*" for the marina development and that Plan 4 showed Stage 1 of the development: see [68] above. Plan 2 included the notation "*Refer to Detailed Landscape Masterplan for enlargement of the central area*". This was a reference to Plan 4.

401 The developers also submit that the mere incorporation of Plan 4 in development consent 18/90 does not thereby permit the development of anything which happens to be on the plan, for example, potentially three 60 storey motels, 20 holiday cabins and a manager's residence all of the same height. The plaintiffs submit that it does permit this, subject to obtaining a building consent as was required at that time under s 311 of the *Local Government Act 1919* (NSW). In 1996 such a consent was obtained by Mr Watson to construct the restaurant: see [127] above. Under the statutory regime at that time, when a development consent was granted a subsequent building application to approve construction had to be made pursuant to s 311 of the *Local Government Act 1919,* which provided: "*A building shall not be erected unless the approval of the council is obtained…beforehand*". The later changes to this legislative regime were summarised in ***Over Our Dead Body Society Inc v Byron Bay Community Association Inc*** (2001) 116 LGERA 158 by Bignold J at [29]:

> There is one further preliminary matter that I must refer to, namely the purpose of the statutory requirement for the obtaining of a construction certificate in respect of an approved development (that is, a development which is the subject of the grant of development consent). The concept of *certification of development* as is now provided in the EP&A Act, Pt 4A was not introduced into the statutory regime until 1 July 1998 when the *Environmental Planning and Assessment Amendment Act* came into force. As I have earlier mentioned, one of the significant legislative changes introduced by that amending Act was the abandonment of the necessity for obtaining a separate approval under the *Local Government Act* for the erection of a building and approval for other allied matters, for example, the demolition of a building. Instead of the complementary or supplementary approval processes concurrently operating under the *Local Government Act* in addition to the requirement of the EP&A Act for the obtaining of development consent for the carrying out of development, the *Environmental Planning and Assessment Amendment Act* introduced a system of *certification of development* as contained in Pt 4A together with the subsidiary or ancillary provisions contained in Pts 4B and 4C. The various types of certificate referred to in s 109C(1) had counterparts under the *Local Government Act* but they were repealed by the *Environmental Planning and Assessment Amendment Act.*

402 As discussed at [416] below, in my view Plan 4 was a concept plan for use of the land by putting certain facilities on it at specified locations. The consent was to that use. I construe it as requiring a further consent for the construction of the facilities and carrying out of works consistently with the approved use. Thus, for example, the height of buildings would be controlled by the further consent.

403 Mr Watson acknowledged in evidence that he understood he had development consent for what was depicted in Plan 4 and was then required to get building approval for the restaurant, which he did in 1996. This may be relevant to discretionary relief if the case reaches that stage.

404 Condition 12 of development consent 18/90 provided: "*Buildings shall not be constructed nearer than 60 metres from the bank of the River or Deep Creek*". The developers contrast that with Plan 4 which shows two motels within 60 metres of Deep Creek. They submit that there is an irreconcilable difference and therefore Plan 4 cannot be incorporated. I disagree. The development application, which included Plan 4, was modified by the conditions of the consent.

UNREGISTERED PLANS

405 The plans which I have held were incorporated in the development consents were not registered by the Registrar General. The developers submit that a plan, even if it is incorporated in a development consent referred to in a community plan or the statutory covenants, cannot form part of a community development contract unless it is registered by the Registrar General with the community plan. In my opinion, a plan incorporated in a development consent which is expressly or impliedly incorporated in the development contracts or in the statutory covenants forms part of the development contracts or statutory covenants even if it is not registered. My reasons are as follows.

406 The developers submit that registration of plans is required by the following definition of "*development contract*" in s 3 of the *Development Act* and s 3 of the *Management Act*:

> ***development contract*** means instruments, plans and drawings that are registered with a community plan, precinct plan or neighbourhood plan and describe the manner in which it is proposed to develop the land in the community plan, precinct plan or neighbourhood plan to which they relate.

407 The relevant plans, in my view, describe the manner in which it is proposed to develop the land in the community plan. However, since the definition refers (inter alia) to "*plans…that are registered*", the developers submit that a development contract cannot include a plan that is not registered. They say this is consistent with the general principle of the Torrens system that people seeking to understand how or what "*instruments, plans or drawings*" affect their land need only look at the register: ***Westfield Management Ltd v Perpetual Trustee Co Ltd*** (2007) 239 ALR 75, [2007] HCA 45.

408 In ***Westfield*** at [4] – [5] the High Court succinctly described the scheme of the Torrens system to provide third parties with information concerning the registered title, as follows:

> [4] Section 31B of the RP Act [*Real Property Act 1900* (NSW)] requires the Registrar-General to maintain the register. The register comprises, among other instruments and records, both folios and dealings registered therein under the RP Act: s 31B(2). A *dealing* includes any instrument registrable under the provisions of the RP Act: s 3(1). Section 96B classifies the register as a public record and provides for its inspection.
>
> [5] Together with the information appearing on the relevant folio, the registration of dealings manifests the scheme of the Torrens system to provide

> third parties with the information necessary to comprehend the extent or state of the registered title to the land in question. This important element in the Torrens system is discussed by Barwick CJ in *Bursill Enterprises Pty Ltd v Berger Bros Trading Co Pty Ltd*. It will be necessary later in these reasons to refer further to the significance of this for the present appeal.
>
> (footnotes omitted)

409 The principle expressed in ***Westfield*** is referable to ascertaining the state of an existing title under the *Real Property Act 1900* (NSW). That is because the Torrens system is one of title by registration.

410 Several distinguishing observations may be made about the community titles legislation. First, it introduces an additional concept of future proposed development described in an optional registered community development contract related to a registered community plan or described in a development consent. Secondly, s 3(2) of the *Development Act* and s 3(2) of the *Management Act* each provides that "*This Act is to be interpreted as part of the Real Property Act 1900 but, if there is any inconsistency between them, this Act prevails*". Thirdly, at common law a contract may incorporate another document by reference.

411 Fourthly, the statutory covenants in Part 1 of Schedule 2 to the *Management Act* expressly incorporate the development consent, which may include plans, into every community development contract without any requirement that the development consent be registered. Thus, at least the development consent, including any plans which may be incorporated in it, may be looked at for the purpose of construing the statutory covenants, regardless of whether the development consent or its incorporated plans are not registered.

412 Fifthly, the regulations under the *Development Act* required certain provisions to be inserted in all development contracts, including a reference to particulars about details of the scheme in an identified development consent and a covenant by the original proprietor to develop the land in accordance with the development consent as modified or amended with the consent authority's approval from time to time: see [50] above. Again, there was no legislative requirement that the development consent, which may incorporate plans, had to be registered. In the present case, the development contracts included the provisions required by the regulations in relation to (at least) development consent 18/90. Consequently, for the purpose of construing these provisions, development consent 18/90 (at least) can be looked at, including any plans incorporated in it, even though that consent and any plans incorporated in it are not registered.

413 The references to "*development consent*" in these statutory covenants can be taken to include development consents in the plural because s 8(b) of the *Interpretation Act 1987* (NSW) provides that: "*A reference to a word or expression in the singular form includes a reference to the word or expression in the plural form*".

414 The "*development consent*" to which the statutory covenants refer must, in my opinion, be the development consent or consents that bring land under the community titles legislation. That legislation contemplates subdivision of land incorporating common

property which may be developed in stages in accordance with a pre-determined theme and development contracts that describe the proposed amenities – which ordinarily require development consent. Therefore, in the present case, in my opinion, the "*development consent*" referred to in the statutory covenants at least includes development consent 66/92 which was for a community title subdivision. The Stage 2 plan accompanying DA 66/92 also described the proposed facilities.

415 It is less clear whether the "*development consent*" to which the statutory covenants refer also includes development consent 18/90 relating to proposed amenities because that development application was lodged two months before the community titles legislation commenced in 1990. I am inclined to think that it does. However, I do not think that it matters whether or not it does. That is because preliminary cl 4 of the community development contract contains an express covenant to develop the land in accordance with development consent 18/90 and the statutory covenants require the land to be developed in accordance with the community development contract. Further, the Stage 2 subdivision plan accompanying DA 66/92 showed essentially the same proposed facilities as are shown in Plan 4 of DA 18/90. If the Stage 2 subdivision plan was incorporated in development consent 66/92, then the statutory covenants apply to it.

416 I construe DA 18/90 as a staged development application that, in its accompanying Plan 4, set out concept proposals for development of facilities on the site, for which detailed proposals were to be the subject of subsequent construction applications. I construe DA 66/92 in the same way so far as concerns the same facilities shown on the Stage 2 subdivision plan. Plan 4 and the Stage 2 plan both showed only rudimentary marks depicting facilities in various locations. They could not have been any more than concept plans. The concept proposals were of a type now provided for in s 83B of the *EPA Act*, although that section was not in force at the relevant time. Given the conceptual nature of the proposals, the consent to DA 18/90 and the consent to DA 66/92 (insofar as the latter showed the proposed facilities) were consents to the use of the land for such facilities. "*Development*", as defined in the legislation, may be limited to the use of land and does not necessarily extend to construction of buildings authorised by that use (the definition is set out at [42] above). In the present case, in my view, neither development consent authorises the construction of buildings or the carrying out of work for those facilities shown on the plans. A further council consent would be required before those facilities could be constructed and no doubt the council would require detailed plans and specifications before granting consent. If that were not so, the developers would be permitted, for example, to construct an enormously high motel in any design in the location indicated in those plans accompanying DA 18/90 and 66/92 without any need for a further development consent.

417 In my opinion, for the reasons I have expressed, a development consent (including a plan or other document incorporated therein) contemplated by the statutory covenants in the *Development Act* may be looked at for the purposes of construing those covenants and the development contract, without the development consent having to be registered. It is unnecessary in the present case to consider the wider question whether other documents (including plans), which are unrelated to a development consent, have to be registered in order to form part of a community scheme development contract or management statement.

VARIATION OF THE COMMUNITY SCHEME: IMPRACTICABILITY

418 The plaintiffs claim that continuation and completion of the community scheme have become impracticable and, consequently, that the community scheme should be varied pursuant to s 70 of the *Development Act.* The claim requires close attention to the definition of "*community scheme*" in the *Development Act*, the terms of s 70 of the *Development Act* and the terms of the statutory covenants in Schedule 2 to the *Management Act*. They are set out above at, respectively, [39], [53] and [57]. The claim also requires close attention to the provisions of the community development contract, which are set out at [111] – [112] above.

419 First, the plaintiffs submit that **completion** of the community scheme has become impracticable because:

(a) fundamental proposals contained within the "*Warning*" cl 4 and cll 1.1, 1.3.2 and 1.3.3 of the community development contract cannot now be delivered by the original proprietors, Mr Watson and Sammy One;

(b) the original proprietors have breached the developers' statutory covenant by failing to develop the land:

- in accordance with the development contract; and
- in accordance with development consents 18/90 and 66/92,

to the extent that compliance can no longer practicably be achieved.

420 The plaintiffs submit that as the proposals within the community development contract and the terms of the statutory covenants are elements of the "*community scheme"*, as defined, it has become impracticable for the original proprietors to complete the community scheme, which should therefore be varied.

421 Secondly, the plaintiffs submit that **continuation** of the community scheme has become impracticable for the following reasons:

(a) *Practical physical reasons*: The breaches of the original proprietors' obligations pursuant to their statutory covenant contained within cl 1 of Schedule 2 to the *Management Act*, primarily the failure to develop the land in accordance with development consent 66/92 – especially the failure to subdivide in accordance with the accompanying subdivision plans for Stages 1 and 2 (**annexure B – E** to this judgment) – have manifested in a "*manner of subdivision of land by a community plan*" that is impracticable for practical physical reasons. As the "*manner of subdivision*" is also an element of the "*community scheme*", the continuation of the community scheme has become impracticable for practical physical reasons and should accordingly be varied.

(b) *Continual breach*: An effect of the fact that the scheme can no longer be practicably completed is that the original proprietors continue in breach of their obligations, for each day that passes, and then for each time a person purchases a lot within the scheme – whether from the original developer or another transferee.

422 Although it seems to me that matters relevant to the so-called "*completion*" impracticability are also relevant to "*continuation*" impracticability, and vice versa, it is convenient to stay with the plaintiffs' dichotomy.

First limb of completion impracticability

Proposal: clause 1.1 community development contract

423 Clause 1.1 of the community development contract relevantly provides:

> **1.1. Description of land**
>
> …
>
> The land is to be developed for the purposes of a marina (known as the Deep Creek Marina) and associated works as shown in Development Application to the Council of the Shire of Murray dated 23 May 1990.

424 This is a reference to DA 18/90. The developers submit that the relevant part of cl 1.1 is not a proposal but merely part of the description of the land because cl 1.1 is headed "*Description of Land*" and the relevant part was not placed under the heading "*1.3. Further Development*". I do not accept the submission. Part 3 of the community development contract relevantly provides that "*In this contract unless the contrary intention appears…(g) headings are inserted for convenience and do not affect the interpretation of this Management Statement*". The reference to "*Management Statement*" is an obvious drafting error. The obvious intention was to refer to "*this*" community development contract. This point of construction should not to be resolved merely by looking at the heading. The first paragraph of cl 1.1 states: "*The land to be developed is Lot 12 in Deposited Plan No. 846348 in the Local Government Area of Murray, Parish of Benarca, County of Cadell and State of New South Wales*". That is a complete description of the land to be developed. The remainder of cl 1.1, on which the plaintiffs rely, is superfluous if not interpreted as a proposal. Its language is that of a proposal.

425 Clause 1.1 does not expressly refer to any plans. However, DA 18/90 comprised documents including plans and cannot be understood except by a reference to the plans. DA 18/90 included an EIS and SEIS (discussed at [65] – [66] above). The former included a concept drawing. The latter included "*landscape plans*" including Plan 4 (**annexure A** to this judgment) which are different to the concept drawing although, in my view, they are also conceptual. The plans in the SEIS, in my view, superseded the concept drawing in the EIS because the SEIS was later in time. Also, the SEIS stated that the "*Masterplan for the Marina Development*" was shown on Plans 2 and 3 and that:

> Stage One of the marina development is shown on Plan 4. Stage One will be implemented over a 12 month period to be completed by December 1992 and can be divided into 4 phases. The first phase will commence in September and will include excavation of the creek entrance, construction of 30 moorings and associated earthworks, establishing gravel entrance roads and sewage system, power and water supply, fencing, stormwater retention wetland and site planting.

During Phase 2, all the buildings associated with Stage One, a further 30 moorings and houseboat hardstand area will be constructed and the fuel supply installed.

During Phase 3, the winter months, there will be no construction. In the final phase of Stage One, the remaining 40 moorings will be constructed, all roads will be surfaced and further site planting will occur.

Proposal: clauses 1.3.2 and 1.3.3 community development contract

426 Clause 1.3 of the community development contract is entitled "*Further Development*". Clauses 1.3.2 and 1.3.3 concern subdivision and are in the following terms:

> 1.3.2 Community Development Lots 2, 3 and 4 are to be further subdivided into neighbourhood lots for the purpose of houseboat berths.
>
> 1.3.3 Community Development Lot 5 is to be developed in a further subdivision to provide facilities incorporated in the Development Consent in accordance with plans approved by the Council of the Shire of Murray. (Refer Development Consent No 18/90 dated 12th September 1991).

427 The community plan registered with the community development contract subdivided the land into five lots. Lot 1 was community property. Lots 2 to 5 were development lots. Lot 5 was the Lot 12 earlier referred to in Mr Mitsch's letter of 7 October 1992 (the renumbering occurred because the number of mooring neighbourhood lots became reduced to three – Lots 2, 3 and 4).

428 In my opinion, cll 1.3.2 and 1.3.3 contained proposals for subdivision and for provision of facilities. Therefore the proposals were part of the "*community scheme*" as defined in the legislation.

429 Under cl 1.3.2 the developers proposed to create three houseboat mooring neighbourhoods on Lots 2, 3 and 4.

430 Under cl 1.3.3 the developers proposed that the residual Lot 5 would be developed in a "*further*" subdivision to provide the facilities incorporated in development consent 18/90 in accordance with plans approved by the council. Clause 1.3.3 was concerned not with the present subdivision affected by the registered community plan but with a "*further*" subdivision. Such a "*further*" subdivision had been approved in development consent 66/92 and was shown in the subdivision plans accompanying that development application. The Stage 2 subdivision plan accompanying that development application had shown the same facilities as appear on Plan 4 in DA 18/90. As for the "*facilities incorporated in the Development Consent*" to be provided by the "*further subdivision*", cl 1.3.3 refers to development consent 18/90 and plans approved by the council. Such facilities are shown on Plan 4 accompanying DA 18/90. Clause 1.3.3 as I construe it, treats Plan 4 as having been approved by the council in development consent 18/90. That accords with my earlier finding that it was.

431 The developers submit that the statement in cl 1.3.3 "*Refer Development Consent No 18/90*" merely means "*Refer to the conditions in Development Consent 18/90 for a*

description of the sewerage facilities which are to be provided in a further subdivision of Lot 5". They submit that the facilities referred to in the statement "*Lot 5 is to be developed in a further subdivision to provide facilities*" means "*the sewerage facilities referred to in conditions 2 and 19 of Development Consent 18/90"*. Conditions 2 and 19 respectively provide that the "*sewerage system shall be installed to the requirements of the State Pollution Control Commission*" and "*Access to the sewage treatment works shall be from within the property and a separate entrance to this facility shall not be permitted from the main road'"*. The developers submit that the sewage facilities were indicated to be on the community property on the Moama – Barham Road (i.e. Perricoota Road) shown in the first of Mr Mitsch's subdivision plans in DA 66/92 (**annexure B** to this judgment) and shown as part of Lot 5 in the registered community plan (**annexure F** to this judgment). The submission overlooks that, prior to registration of the community plan in January 1995, that area had been excluded from the community scheme and from Lot 5. In any case, I can see no reason for reading down cl 1.3.3 in the way submitted by the developers.

Proposal: preliminary clause 4 community development contract

432 Preliminary cl 4 (under "*Warning*") of the community development contract provides:

> 4. The terms of this contract are binding on the original proprietor and any purchaser, lessee or occupier of a lot in the scheme. In addition, the original proprietor covenants with the association concerned and with the subsequent proprietors jointly and with each of them severally to develop the land subject of the scheme in accordance with the development consent as modified or amended with the consent authority's approval from time to time.

433 In my opinion, this is a proposal to develop the land in accordance with the development consent. Therefore, the proposal is an element of the community scheme. The plaintiff submits that the "*development consent*" here means both 18/90 and 66/92. That is not the way the contract appears to be drafted because preliminary cl 3 refers only to development consent 18/90. It is to that consent which cl 4 appears to refer. However, I do not think that this is of consequence because (as discussed at [414] above) a statutory covenant in cl 1 of Schedule 2 Part 1 to the *Management Act* provided for the land to be developed in accordance with (at least) development consent 66/92. Indeed, I am inclined to think that the regulations under the *Development Act* required preliminary cl 4 to have referred to development consent 66/92: see [50] above.

Second limb of completion impracticability: scheme not developed in accordance with what had been proposed

434 The plaintiffs submit that completion has become impracticable because the scheme has not been developed in accordance with what had been proposed.

435 I accept the submission. The community plan that was registered represented a major departure from what was approved by the council in development consent 66/92. The facilities that have been developed on the land depart significantly from that which was the subject of development consents 18/90 and 66/92. Development consent for the Honeyman Lot and the carrying out of development thereon precludes the provision of facilities the subject of development consents 18/90 and 66/92 in that location. A plan in evidence

(Exhibit N) illustrates that to develop the land in accordance with the facilities shown on Plan 4 and the Stage 2 subdivision plan (**annexures A** and **E** to this judgment) is now impossible without demolishing development that has since occurred on the Honeyman Lot and Lots 14, 15 and 16. The Honeyman Lot, where a significant number of the facilities are shown on those plans, has been developed in the form of luxury holiday cabins, a swimming pool, a lake and tennis court. A hotel/restaurant and supermarket have been built on what are now Lots 14 and 15 in the areas marked for other uses on those plans.

Continuation impracticability

436 In this component of the claim for variation of the community scheme, the plaintiffs submit that continuation of the scheme has become impracticable for two reasons. First, continuation has become impracticable because of physical access difficulties on the site arising from "*the manner of subdivision of land by the community plan*". This is an element of the statutory definition of "*community scheme*", set out at [39] above. Secondly, construing the proposals in the development contract in the way that I have earlier accepted, then the original developers are and, will nearly always be in the future, in breach of their obligations in the development contract to deliver the scheme in accordance with those proposals.

437 I think that the second reason (breach) is correct. The original developers covenanted under the statutory covenants in the *Management Act* that the land will be developed in accordance with the development consent. That at least included development consent 66/92. Many of the facilities shown on the Stage 2 subdivision plan, which I have held was incorporated in development consent 66/92, cannot be developed as shown on that plan because of other superseding development.

438 I turn to consider the first reason advanced by the plaintiffs, physical impracticability. The plaintiffs submit, and I accept, that a major consequence of denying the plaintiffs the benefit of the community property, originally proposed in DA 66/92, is that the access to most of the private lots within the scheme is dysfunctional. This did not necessarily manifest until about 2005 as, until then, the developers allowed access across their land.

439 In my opinion, physical impracticability arises largely, albeit not entirely, because of three access problems:

(a) there is no registered vehicular access road to the moorings and the developers have denied vehicular access to the moorings;

(b) the developers have closed the public wharf since 2006 (and removed the ski boat parking facility), there is no access to and across the public wharf;

(c) for a time in 2005 the developers denied access to the public boat ramp. The threat is still there because the boom gate remains in place, although open.

440 The evidence suggests that the marina ran reasonably smoothly until these three access problems manifested in 2005 and 2006.

441 The parties' competing submissions as to physical impracticability are set out below.

442 The plaintiffs submit that there is inadequate legal and physical access to private lots for members, guests and emergency services via common property to and from the houseboat moorings for the reasons set out below. These reasons are generally supported by evidence that I have earlier reviewed and accepted; by the evidence as to impracticability (which I generally accept) of Mr Peter O'Dwyer, a planning consultant; and by my own observations on my site inspection with the parties. The reasons, the developers' submissions, and my conclusions are as follows:

(a) there is no vehicular access to any houseboat berths within the scheme, which prevents the loading and unloading of luggage, food provisions, fuel, houseboat furniture and other required equipment for the ordinary use and enjoyment of houseboats.

The developers submit that no vehicular access is required to the houseboat berths. The public wharf, which Mr Bares says has been temporarily closed as a result of required maintenance, is available for loading and unloading, as is the boat ramp and the strip of land in front of the supermarket. There is no evidence that the developers have denied access to this strip of land, and the owner of the supermarket has expressed a desire to make it available to the community association. In addition there is 11.035 metres of community property which adjoins Deep Creek to the west of the public wharf which can be utilised for the purpose of loading and unloading of houseboats.

I accept the plaintiffs' submissions. They are amply supported by the access evidence set out at length above. It would be impractical and, at peak times, chaotic for houseboats to attempt to load and unload at the public wharf (assuming it were open), the boat ramp (assuming the boom gate remains open), or the strip of land in front of the supermarket (assuming the houseboats could dock there at all, which they cannot). They would be competing not only with each other but with the public for the use of those facilities. Houseboats, as such, cannot practicably access the boat ramp. If a houseboat happened to have a ski boat it could access the ramp but it would be highly inconvenient to have to do so for the purpose of substantial loading and unloading people and things. Moreover, as things stand at the moment, there can be little confidence in the availability of the wharf because the developers have closed it for years. As to the 11.035 metres of community property to the west of the wharf, houseboats could not dock square to it because they would be impeded by the first mooring berth next to that location.

(b) there is no emergency service vehicle access directly to the houseboat berths for the evacuation of persons in need and no emergency vehicle access is available to the neighbouring Lot 16 land, it having being sealed off by concrete barriers on or about 22 December 2006.

The developers refer to two notices of intention to issue an order issued by Murray Shire Council. One of these notices indicated that the council intended to serve an order upon the developers requiring them to remove the concrete barriers to enable access to emergency vehicles. The developers submit that these notices address the issue of emergency access, and that there is no evidence that the council has proceeded with these orders, nor that the emergency services are concerned regarding the access to the community parcel.

I accept the plaintiffs' submissions, which are supported by the evidence concerning emergency vehicle access set out earlier, including the evidence of Mr Williams. The developers have not responded to the council notices by removing the barriers. In any case, the matter should be resolved in these proceedings rather than leaving it to the possibility of resolution by the exercise of a council process.

(c) there is no access, or limited foot access only, to each of the houseboat berths.

The developers submit that the registered community plan delineates the land available to the houseboat owners to access their houseboat berths.

Both submissions are correct. However the plaintiffs' submission identifies the physical access difficulty while the developers' submission does not meet that point.

(d) foot access for the eastern marina berths is restricted by uneven sloping land with poor drainage and obstructed by large red gumtrees.

The developers submit that the land to the east of the supermarket did not present on the site inspection as unduly uneven or sloping. This Neighbourhood has undertaken landscaping works. If the Neighbourhood is concerned regarding trees on neighbourhood property, it is within the capacity

of the neighbourhood association to make any necessary application to the council regarding the removal or trimming of these trees.

The plaintiffs reply that by-law 4.9.1 in the community management statement prohibits cutting down or lopping of trees except where necessary to erect a residence or for the safety of residents.

I agree that the relevant land is not "*unduly*" sloping; otherwise I accept the plaintiffs' submissions. Subject to somehow overcoming the by-law, no doubt an application could be made to council as suggested by the developers. However, the removal or lopping of trees is unlikely to be possible without trespassing on Lot 16.

(e) in the Central Neighbourhood, foot access is restricted in that it is obstructed and/or interrupted between the east and the west by Lot 15 and part of Lot 16, which has been fenced off by the developers.

The developers submit that at no time has there been unfettered access between the eastern and western sections of the Central Neighbourhood. At registration of the community plan, the Central Neighbourhood was separated with no connection and no direct line of access between the two sections. Further, Mr Bares indicated that the public wharf area has been fenced off for maintenance.

Both parties' submissions are correct. However the developers' submission does not meet the access difficulty problem except by suggesting that the public wharf will at some undefined time be reopened by the developers.

(f) in the Central Neighbourhood, foot access to its eastern side is restricted by uneven sloping land with poor drainage.

The developers submit that the landscaping works undertaken by the neighbourhood associations may have impacted on the drainage and sloping land. Also, the neighbourhoods have the ability to manage and maintain their own property. If the neighbourhood is of the opinion that works should be undertaken to repair, this may be done. The types of works the neighbourhood associations may undertake include removal of fences, barricades and excavation works.

The plaintiffs' submission is correct. Substantial work on neighbourhood property is likely to be impractical without trespassing on Lot 16. I do not think that the evidence establishes the first sentence of the developers' submission.

(g) foot access to the western side of the Central Neighbourhood is obstructed by large red gums and a timber retaining wall with no steps to abutting community property to the east.

The developers submit that no retaining wall as described was put in place by the developers prior to handover. The neighbourhoods have the ability to manage and maintain the neighbourhood property.

The plaintiffs' submission is correct. However, the plaintiffs' identification of the access difficulty is not met by the developers' submission. It is likely to be impracticable to carry out substantial work on neighbourhood property without trespassing on Lot 16.

(h) the Western Neighbourhood is not physically accessible in that there is no pathway of any type on the community property linking the central part of the marina to it.

The developers submit that the access ways to the neighbourhood associations are defined in the registered community plan and in registered plan for the Western Neighbourhood. The developers submit that the neighbourhood associations have the ability to maintain and repair their neighbourhood property.

Both parties' submissions are correct. However, the developers' submission does not meet the access difficulty. Maintenance and repair are likely to be impracticable without trespassing on Lot 16.

(i) the Western Neighbourhood is not physically accessible without trespass onto the Central Neighbourhood or Lot 16.

The developers submit that this alleged physical inaccessibility is as a result of the physical features on the subject land, such as trees and landscaping. The

neighbourhood associations have the ability to take steps to remove or alter these physical features and to maintain and repair their neighbourhood property.

I accept the plaintiffs' submission; I have commented earlier on a similar submission by the developers.

(j) the restricted foot access to the houseboat moorings in the scheme is not suitable for persons with mobility disabilities, particularly having regard to the facts and matters described above.

The developers submit that there is no evidence that a claim has been made against the developers or any other party under the *Disability Discrimination Act 1992* (Cth). Houseboat owners may make use of the public wharf area, and the area directly to the west of the public wharf. The evidence of Mr Martin, an architect specialising in disability access, demonstrates that the plaintiffs' land, and the land of the community association, is sufficient to enable them to develop it so as to provide disabled access if they chose.

I accept the plaintiffs' submission, which is supported by the evidence set out earlier, including that of Mr Martin, and which corresponds with my own observations on the site inspection. It would be highly inconvenient and impractical for houseboats to have to use the public wharf to pick up and put down people with mobility disabilities (assuming it is opened). The community association area just to the west of the wharf cannot be used by houseboats for reasons which I have explained.

(k) development consent 18/90 requires the sealing of internal roads and car parking areas, which is impracticable while the neighbourhood associations do not have access across the informal gravel roads formerly providing access to the houseboat moorings.

The developers note that condition 13 of DA 18/90 requires that "*Internal roads and parking areas shall be sealed with bitumen when restaurant, motel and cabins are developed*." The developers submit that this "*trigger*" has not occurred and therefore there is no requirement to complete this work at this time. The developers also submit that this does not in itself make the scheme impracticable as claimed; and that no evidence has been provided that the

unsealed internal roads and car parking areas are impracticable while the neighbourhood associations do not have access across the informal gravel roads formerly providing access to the houseboat moorings.

I deal with this sealing issue below at [487] – [490] below.

443 The plaintiffs submit that there is inadequate access to common property to service the houseboat moorings for repairs and maintenance, and that there is no room for plant and equipment to access neighbourhood and community property improvements for essential maintenance and repair, for the following reasons:

(a) there is no vehicle access for service trades for the conducting of repairs and maintenance to houseboats, houseboat berths, neighbourhood property or community property abutting the houseboat moorings, which require the movement of heavy tools, plant, equipment and materials to and from the relevant repair or maintenance site.

The developers submit that the neighbourhoods and community associations may, if considered necessary, make use of s 7 of the *Access to Neighbouring Land Act 2000* (NSW). There is no evidence before the Court that this avenue has been attempted. There is evidence from Mr Giffin that he did not approach the developers for their consent to use Lot 16 for the purpose of access for works, and that specific work to which he referred may be undertaken without the need to access the land of Lot 16. Also, there is no evidence from tradespeople as to the alleged impracticability of access.

I accept the plaintiffs' submission. The proposition that mooring owners should apply to a court for access for such purposes under the *Access to Neighbouring Land Act 2000* is unreasonable. It is not apparent why they should do so if a remedy lies in these proceedings. Although there was no evidence from tradespeople about impracticability there was evidence from Mr Leorke directly on the point, which I accept. In any case, the impracticability was apparent from the site inspection. The developers closed the access roads and have not agreed to access for repairs and maintenance.

(b) Certain repair works, the subject of the CTTT proceedings, to the timber decking in property of the Central Neighbourhood have been prevented by the inability for plant and equipment to be allowed to be situated on the access roads, which the developers have closed.

The developers submit that in cross-examination Mr Giffin admitted to not seeking the consent of the developers to access Lot 16 for the purpose of undertaking these repairs; and accepted the reasonableness of Mr Jarman's actions in preventing the unlawful work. Further, the developers submit there was no evidence from Mr Giffin that an application under s 7 of the *Access to Neighbouring Land Act 2000* was made seeking the required access; and there is no evidence from the tradespeople as to the alleged impracticability of access.

I accept the plaintiffs' submission, which is supported by Mr Giffins' evidence to which I have earlier referred.

(c) the metal staircases that provide foot access from the informal gravel roads formerly providing access to the houseboat moorings cannot be repaired and maintained for the benefit of the houseboat owners in the neighbourhood schemes.

The developers submit that the metal staircases are on Lot 16; there is no evidence to suggest that the neighbourhoods or the community association placed the staircases in their current location; therefore their claim for repair and maintenance needs to be questioned, especially when the foot access is defined by the registered community plan and does not include the area where the staircases are located.

The plaintiffs' submission is correct. It is true that the metal staircases are on Lot 16 and they were placed there apparently by the developers, but they were used by mooring owners for years to access their moorings.

(d) the timber walls constituting the entrance of the marina are wholly within Lot 16 land on both the north and south and cannot be repaired for the benefit of the houseboat owners in the neighbourhood schemes. These are the subject of the CTTT proceedings referred to in [333] above.

The developers submit that Lot 16 has an obligation to repair the walls at its own cost under cll 1.2.2 and/or 1.4.1 and 4.12.1 of the community management statement. If it has not done the repairs, the community association can compel compliance (see s 60(1)(b) of the *Management Act*).

No evidence was led regarding the attempts or otherwise of the neighbourhoods or community association to repair the entrance walls, nor any request for access to Lot 16 to undertake this work. Again, if required, the neighbourhoods or community association may make an application under s 7 of the *Access to Neighbouring Land Act 2000*.

I accept the developers' submission.

444 The plaintiffs submit that there is inadequate access between the community and neighbourhood property, the boat ramp and the waterway in Deep Creek. In particular there is inadequate and interrupted access between community and neighbourhood property and the boat ramp.

The developers submit that the boat ramp is located partly on community property and partly on Lot 16. There is thus adequate and uninterrupted access between the community property and the boat ramp. No neighbourhood property is contiguous with the boat ramp. If it is suggested that this inadequacy is as a result of the closure of the public wharf, this has been closed for maintenance and repair and will be reopened when the maintenance and repair is complete.

As I understand it, the plaintiffs' submission is directed to inadequacy arising from closure of the public wharf. I do not accept that the developers' closure of the public wharf for years has genuinely been in order for maintenance and repairs. The conduct of the developers in this respect does not engender confidence that they will promptly repair and maintain it now or in the future.

445 The plaintiffs submit that there is inadequate and interrupted access between the eastern and western side of the marina.

The developers submit that from the registration of the community plan there was a part of what is now Lot 16 between the western and eastern limbs of the marina. At no time has there been uninterrupted access between the western and eastern limbs. In any event, access is available via community property behind the restaurant. To the extent the issue is about the closure of the public wharf, this is to be reopened after the repairs are completed.

I understand that the issue is about closure of the public wharf. In that context, the plaintiffs' submission is correct.

446 The plaintiffs submit that there is inadequate or no community speed boat parking for hotel and supermarket patrons or member visitors as there is no public wharf or no wharf accessible to the public. In particular:

(a) there is inadequate or no community speed boat parking for hotel and supermarket patrons or member visitors.

The developers submit that the hotel and supermarket should be responsible for speed boat parking if this is desired. Speed boats of member visitors may make use of the public wharf and the community property to the immediate west of the public wharf. Visitors and invited guests to the supermarket, which is located on Lot 15, may use the wharf area directly connected to Lot 15. The developers note that Mr O'Brien gave evidence that the council requested him to remove his ski park as it did not have development consent. He made a development application, but there is no evidence whether development consent has been granted.

I accept the plaintiffs' submission. Adequate speed boat parking depends on the availability of a ski park. The ski park which used to service the hotel and supermarket was removed by the developers. The ski park now servicing the hotel and supermarket has had to be relocated to private moorings, an unsatisfactory situation (see the evidence of Mr O'Brien set out earlier). Assuming the public wharf were to be opened, it is impracticable for speed boats to use the public wharf, particularly in numbers.

(b) there is no public wharf, in that it has been retained wholly by the developer (rather than partially as part of the hotel lot as per 66/92), has been fenced off and access is completely denied to scheme members and members of the public.

The developers submit that the area noted as the public wharf remains part of Lot 16, in accordance with the registered community plan. Mr Bares said that the public wharf was fenced off as a result of concerns about maintenance. Mr Jarman in cross-examination referred to holes in the public wharf.

I accept the plaintiffs' submission. As stated earlier, the developers could and should have repaired and reopened the public wharf years ago.

447 The plaintiffs submit that there is inadequate access for houseboat refuelling facilities.

The developers submit that houseboats can refuel directly from Lot 15 by tying up on the wharf section of Lot 15 adjacent to the fuel facilities.

I accept the developers' submission.

448 The plaintiffs submit that electrical installations for the neighbourhoods and for community property are constructed on private lots. In particular:

(a) there is no or limited access for the repair and maintenance of the electrical meter boxes servicing the neighbourhood associations.

The developers submit that the registered community management statement contains a diagram at sheet 28A of 29 of the statutory easements in relation to power and telephone services. "*Statutory easement*" is defined in s 36 of the *Development Act*:

> ***statutory easement*** means an easement conferring rights:
>
> (a) to provide a service line within a scheme and a service by means of the service line, and
> (b) to maintain and repair the service line, and
> (c) to enter:
> (i) land within the scheme that would include, or includes, the service line, or
> (ii) land within the scheme that is contiguous to the land referred to in subparagraph (i),
>
> and do all such things as may be reasonably necessary to exercise the rights referred to in paragraphs (a) and (b).

The developers also submit that the neighbourhoods and community association, as a consequence of the statutory easement, have the right to access Lot 16 for the purpose of repair and maintenance of the electrical service line. This includes access to Lot 16 for the purpose of repair and maintenance of the meter boxes because the neighbourhoods and community association have rights to "*do all such things as may be reasonably necessary to exercise the rights referred to in [the easement]*"as explained above. To the extent the Court finds that the easement does not provide those rights in relation to the meter boxes, the developers undertake to the Court to cause an easement to provide those rights to mirror the terms of the statutory easement.

The developers note that the diagram at sheet 28A of 29 of the community management statement does not include the electrical meter box at the eastern

end of the marina. They submit that the obligation is on the community association to submit a diagram showing this meter box to be registered, according to clauses 3.5.5 and 3.5.6 of the community management statement. To the extent the owners of Lot 16 are required to cooperate with the community association in this regard, the owners of Lot 16 hereby undertake to the Court to do so.

I note the developers' undertakings and accept their submissions.

(b) the proprietors of Lot 16 have taken steps or caused steps to be taken for the removal of the electrical meter boxes.

The developers submit that there is no evidence to support this allegation. The proposition that Mr Bares was seeking to have steps taken by others was put squarely to Mr Bares in cross examination, and was denied by him. Mr Jarman denied in cross-examination that it was he who suggested to the CTTT in 2005 that Mr Brockwell be the electrical engineer. A series of questions were put to Mr Jarman regarding the work of Brolec. In cross-examination, a direct proposition was put to Mr Jarman that it was his clients' intention to have the work he commissioned in 2005 done through the appointment of the compulsory manager in 2006. This was denied.

I accept the developers' submission.

449 The plaintiffs submit that dead man anchors to anchor sea walls for the marina are situated in Lot 16 with no concomitant legal right.

The developers submit that there is no evidence that the dead man anchors are located in or partly in Lot 16. Peter O'Dwyer in cross-examination was unsure of their location. In any event, there is no evidence to suggest there is any impediment to the dead man anchors being constructed on neighbourhood land.

I accept the developers' submission.

450 The plaintiffs submit that the design of the neighbouring marina to the east, also controlled by the developers, has a significantly different layout that avoids many of the problems of impracticable design referred to in the preceding paragraphs.

The developers submit that this says nothing as to the alleged physical impracticability of the registered community plan.

I accept the developers' submission.

451 The plaintiffs submit that pursuant to the management statement, the community association has responsibility for maintaining control of the water. It is clear that this is not the case, having regard to the granting by Lot 16 of easements over it, and the restriction of access to it, via the boat ramp, and the enforcement of strict rights in relation to oversized houseboats. As a practical measure, by-law 4.21 of the management statement has become meaningless as the water is not community property.

The developers submit that by-law 4.21 of the community management statement has not become meaningless. There is nothing contradictory in the title of the water being held by the developers and the community association having the control of all aspects of boat traffic and boat usage. The developers say that the by-laws by their very nature control what actions may be taken on both community property and individual lots. For example, by-law 4.7.1 purports to control all aspects of pedestrian and vehicular traffic within the community parcel. "*Community parcel*" is defined in the s 3 of the *Management Act* as "*land the subject of a community scheme"*. The developers submit that all land within the registered community plan is subject to the community scheme. The contents of the community management statement are regulated by Schedule 3 to the *Development Act*. Clause 2 states what matters must be included in the statement. Clause 3 refers to optional matters which may be included in the community management statement, and states at (2): "*This clause does not limit the matters that may be included in a management statement*". The developers say this supports their position that there is authority for making the by-law and that the by-law is not meaningless.

I considered this issue at [118] above. The position seems to me to be paradoxical. The provision of the management statement naturally belongs with ownership of the waters by the community association, as indeed was contemplated by DA 66/92.

452 The plaintiffs submit, and I accept, that these practical physical difficulties are manifest from two sources:

(a) directly as a consequence of the manner of subdivision of land by the community plan, that is, by what has been registered; and

(b) as a consequence of the failure to register plans in accordance with what was approved in DA 66/92 (that is, either at the time of the first registrations on 17 January 1995, or by further subdivision as promised in cl 1.3 of the community development contract), the common property in the scheme is insufficient to service the proper function of the development. Further, the failure by Mr Watson (and subsequent owners of Lot 16) to comply with development consents 18/90 and 66/92, to comply with the development contracts, and to amend the scheme to provide further community property (which was the subject of long negotiation from 2001 to 2005) has caused the continuation of the scheme to become impracticable.

453 The developers submit that the suggested physical impracticability is not something that has become impracticable within the meaning of s 70 of the *Development Act* but, rather, something that was always a characteristic of the registered scheme. The developers submit that the words in s 70 "*has become impracticable*" demonstrate the purpose of the section is to provide a power to vary or terminate a scheme where something has changed since the scheme was registered.

454 The developers' submissions refer to a "*registered*" scheme. A community scheme, as defined, is not registered. Rather, it is defined to comprise a number of elements. The elements include the manner of subdivision of land by a (registered) community plan, the proposals in any related (registered) development contract, and the rights conferred, and obligations imposed, by or under the *Development Act* and the *Management Act*. Those obligations include the statutory covenants in Schedule 2 to the *Management Act* whereby the original proprietors covenant that the land will be developed in accordance with the development consent and the development contract and subsequent proprietors covenant that they will permit the original proprietors to develop the land in that way.

455 "*Impracticable*" in the context of s 70 means that in the particular circumstances of the case the scheme cannot continue as a matter of practicality. This may be because a problem, inherent in the terms of the scheme itself and previously unrecognised, comes to be seen as inevitably producing impracticability even at some time in the future during the life of the scheme: ***Community Association DP 270212 v Registrar General for the State of New South Wales*** (2004) 62 NSWLR 25 at [19] – [22], [28] (quoted at [54] above).

456 The "*development consent*" referred to in the statutory covenants included 66/92 which required subdivision in accordance with the plans accompanying that development application. The subsequently registered community plan did not reflect that development consent. The disparity between the registered community plan and this "*obligation*" element of the community scheme gave rise to the physical impracticability which appeared in 2005 and 2006 when the developers denied access to the access tracks, public wharf and, for a time, the boat ramp. From that time at least, it can be said, in the words of s 70, that construction or completion of the community scheme "*has become impracticable*".

457 The developers submit that the alleged physical impracticability is not impracticability but inconvenience. They say that no vehicular access is "*required*" to the

houseboat berths because the public wharf has been only temporarily closed for repairs and is available for loading and unloading – as is the boat ramp, the strip of land in front of the supermarket, and the 11.035 metres of community property which adjoins Deep Creek to the west of the public wharf.

458 I reject the developers' submission. I do not accept that the public wharf has been temporarily closed for repairs. Mr O'Brien's evidence, which I have accepted, is that the wharf was not in an unsafe condition until the developers fenced it off: see [327] above. In any event, the repairs could have been done in short order years ago. I have the impression that the public wharf has not been repaired in order to put pressure on the plaintiffs. Be that as it may, I can see no reasonable excuse for closing the public wharf for so long. Assuming that the public wharf were repaired and reopened, I do not accept that it provides a reasonably practicable alternative to vehicular access. Persons would have to walk to their houseboat, then drive their houseboat to the public wharf to load and unload persons and things. This would not merely be an inconvenience, but would create chaos if numerous houseboat owners wished to carry out this manoeuvre at a similar time – as they would at the beginning and end of weekends. The alternative, perhaps, under the developers' proposal would be for a houseboat owner to use a ski boat – if a houseboat owner owned one – to come to the wharf for loading and unloading. It is also impracticable for ski boats to use the wharf, especially in numbers, unless there is a ski boat park tied to the wharf – which the developers have removed. Further, it is impracticable for the infirm, the unwell and the disabled to have to manoeuvre in and out of small boats.

459 Houseboats cannot dock at the 11.035 metre strip of community property to the west of the public wharf because of its oblique angle adjacent to the mooring berth. Even if they could, it would be impracticable to do so for the same reasons as the public wharf.

460 There is a great body of evidence, which I have accepted and set out earlier, concerning the very serious access problems caused by the closure of the access roads, public wharf and (for a time) the boat ramp. In my opinion, continuation of the community scheme has become impracticable because of the physical access problems.

RELIEF UNDER S 70 *DEVELOPMENT ACT*

461 In all the circumstances of the case, it is appropriate in my opinion to grant relief pursuant to s 70 of the *Development Act*. The plaintiffs propose orders to the following effect pursuant to s 70.

462 First, an order that the community scheme be varied by amending the community development contract, community management statement and the neighbourhood development contracts in accordance with appendices 1 and 2 to the Second Further Amended Statement of Claim. Appendix 2 is a plan and was substituted at trial (a copy is **annexure J** to this judgment). It is a modified version of Plan 4 in DA 18/90 and the Stage 2 plan in DA 66/92, both of which show the proposed facilities. This modified plan deletes the facilities shown on those DA plans that can no longer be constructed due to the supervening facilities (the Honeyman Lot development and the other buildings on what are now Lots 14, 15 and 16), which are all shown. I agree in principle with that deletion. Appendix 2 shows the existing access tracks (possibly extended) in lieu of the access track shown on those DA plans.

463 In my opinion, this modified plan should be modified further as follows:

(a) the facilities that were not shown on Plan 4 in DA 18/90 and the Stage 2 plan in DA 66/92 should be deleted. They are the Honeyman development, the restaurant/hotel, the supermarket and the existing access tracks. To include those facilities would be to subject them to the statutory regime, with potentially harsh results. For example, under the statutory covenants in the *Development Act* the original developers would thereby become subject (it would seem) to an obligation to develop the Honeyman Lot as shown on the proposed plan. That development is at the moment only partly complete.

(b) the access tracks should not be shown. The first reason is that, as discussed below, I have decided that the land where those tracks appear should be converted to community property in accordance with the subdivision plans accompanying DA 66/92. Secondly, these access tracks did not appear on the relevant plans accompanying DA 18/90 or DA 66/92. The single access tracks shown on the development application plans appears to have been in a slightly higher location than the existing upper eastern access track.

(c) the proposed road shown to the south of Lot 14 and bisecting Lots 14 and 15 (with a battleaxe next to the supermarket and adjoining paths) should be deleted. I consider that it has been superseded by the creation and development of Lots 14 and 15 in a way which is both substantially different to that shown in the DA plans and inconsistent with the existence of that road. The construction of a restaurant/hotel and supermarket on Lots 14 and 15 seem more beneficial to the community association and lot owners than the general store and storage shed that were originally proposed. In the circumstances, I do not think it appropriate to exercise my discretion to include the beneficial changes that have occurred in these locations in the community scheme while at the same time providing for this road.

(d) the facilities shown on Lot 14 – public toilets, underground fuel tanks and sewer pump – should be deleted. Again, I consider that they have been superseded by the restaurant/hotel on Lot 14.

(e) the green, tree fringed rectangular area immediately north of the carpark should be deleted and shown as part of the carpark. That is because it became part of the carpark in 2006 and, as discussed below, I propose to require the extended carpark to be sealed.

464 There should be related amendments to the text of the development contracts and the community management statement to reflect my decision.

465 Secondly, the plaintiffs propose orders that the community scheme be varied by converting into community property:

(a) that part of Lot 16 described as community property in sheets 1, 2 and 3 of the Stage 1 subdivision plans accompanying DA 66/92 (**annexures B – D** to this judgment); and

(b) the public wharf shown in those plans (shown in **annexure J** to this judgment);

(c) extinguishment of easements for access in favour of Lot 23 over the lagoon and a right of way over Lot 16 land above the eastern moorings.

466 In my opinion, it is appropriate to grant relief to the effect of the proposed order (a) to the extent shown in the plan which is **annexure H** to this judgment. The DA 66/92 plans (**annexures B** to **E** to this judgment) were part of development consent 66/92. The statutory covenants in cl 1 of Schedule 2 Part 1 to the *Development Act* bound the original developers to develop the land in accordance with the development consent. To order the conversion of land and waters shown as community property on those plans into community property, to the extent I have indicated, is to give effect to the statutory covenant. The relief could take the form of an order that that land be vested in the community association and an order for registration of a new community plan to reflect the vesting. The Court is empowered to make such orders under s 70(3) (c), (f) and (g) of the *Development Act*.

467 Unless the developers consent or do not object, I am not minded to make proposed order (b) – conversion of the public wharf into community property – if there is another reasonable means of ensuring that it will be promptly and properly repaired and thereafter kept in good repair and open to the public. My reluctance is because the public wharf was never shown as community property in any development application plan. Although it might reasonably have been anticipated that title to the public wharf would run with the title to Lot 14, that did not happen. On the other hand, it is implicit in the concept of a public wharf in this context that the owner would take all reasonable steps to keep it in good repair and open to the public.

468 If the public wharf were to be converted to community property the developers would be relieved of any further obligation to repair or maintain it. Presumably, this would also alleviate their insurance burden. Having regard to those considerations and in the context of the overall relief that I propose to grant in this case, the developers may prefer to consent or not object to an order converting it to community property. The alternative is to order them to repair and open it to the public within, say, 60 days and thereafter to take all reasonable steps to keep it in good repair and open to the public. It may be appropriate for the community development contract or the community management statements, or both, to be amended to impose an obligation on the public wharf owners to take all reasonable steps to keep it in good repair and open to the public.

469 I am not inclined to make proposed order (c) extinguishing the easements for access and right-of-way in favour of Lot 23. I consider that would be disproportionate, harsh and detrimental to third parties such as mooring berth owners on Lot 23.

470 Without descending into detail, I note that two of the three easements specifically identified in the plaintiffs' submissions as the subject of the proposed extinguishment order appear to have been erroneously identified because they were extinguished and replaced by other easements in favour of Lot 23 by an instrument registered in April 2008 (Exhibit 7). In particular, the easement for access (and other purposes) over Lot 16 is now somewhat further away from the Deep Creek lagoon than before. Formerly, that easement appeared to be over the upper eastern access track. I am unsure whether that easement is now wholly or partly within the land which is to be converted into community property. If it is, I am minded to modify the conversion order to the intent that the northern boundary of the land to be vested would be to the south of that easement.

471 I will hear the parties as to the final form of relief under s 70. I note that the owner of Lot 15 has submitted to an order that his waterfront strip be converted to community property. A consent order to that effect may be made.

472 In expressing these views I have taken into account the undertaking to the Court given by the developers at the end of the trial which they submit is relevant to discretionary relief. The developers submit that under this undertaking the plaintiffs would eventually have much of the access relief they seek. The developers say that they intend to give berth owners improved rights of access to their mooring berths pursuant to a new local environmental plan which they have proposed to the council to permit proposed development on Lot 16. In that context they have given the following undertaking to the Court:

> The owners of Lot 16 undertake to the Court to amend their plans for the development of Lot 16 so as:
>
> i. To give effect to the intention stated in the last sentence of the defendants' submission in paragraph 129 r and Ex 6(9) LES 7 drawing but in respect of access below the upper access road limited to use by pedestrians, bicycles, electric golf carts, wheel chairs and emergency vehicles, and
> ii. To create access for the berths to the west of the public wharf in a manner generally consistent with that shown in the plans behind Tab 5 to Mr Jarman's affidavit sworn 13 March 2008, but limited to use by pedestrians, bicycles, golf carts, wheel chairs and emergency vehicles.
>
> And to create easements for such use.

473 In order to glean some understanding of this undertaking it is necessary to look at the documents incorporated by reference therein:

(a) paragraph 129r of the defendants' submissions stated:

> 129. The Applicants' submission that the Defendants should be required, in effect, to specifically perform Plan 4 (B409) can also be met by the answer that the features in Plan 4 have been provided or are in the process of being provided. This is established by an analysis of the matters that have been

alleged, in the Second Further Amended Statement of Claim paragraph 89A(iv), not to have been provided. This analysis is set out below.

> …
> r. Access tracks
>
> "*Access tracks*" are not currently available beyond the roads to the car park and boat ramp. The "*access tracks*" currently on site were used as construction tracks during the construction of the marina. These tracks do not have council approval and are not designated as roads. There was no requirement to provide access tracks in accordance with DA 18/90 or DA 66/92. It is, however, intended to provide vehicular access along an area near the top road on the eastern side of the marina, and foot, golf cart and emergency vehicle access right to the eastern berths on that side, see Ex 6(9), LES 7; T822 ln.6 - T626 ln.6).

(b) the Exhibit 6(9) LES 7 drawing shows a sealed upper eastern access road and a gravel lower eastern access road, with residential lots between the roads. The latter road appears to correspond with the location of the existing lower eastern access track. The former road appears to be higher than the existing upper eastern access track and to correspond with the location of an easement for access of variable width, and other easements such as drainage and sewage, created in April 2008 in favour of Lot 23 (Exhibit 7). It replaced an easement for access of variable width which was somewhat lower over (it seems) the existing upper eastern access track;

(c) the plans behind Tab 5 to Mr Jarman's affidavit sworn on 13 March 2008 shows roads in the locations of the western access track and the lower eastern access track, but extended and with laybacks and, in the case of the western road, sealed and with a turning circle at the end. These appear to be the "*concept drawings*" referred to in cl 12 of the draft heads of agreement proposed by the developers in August 2005: see [356] above.

474 In my view, the undertaking is couched so unclearly that it raises doubt as to whether it could be enforced through the contempt of court coercive sanction. Further, I think it is of little weight as a discretionary consideration given the strength of the plaintiffs' case for relief, the uncertainty as to whether the proposed development will eventuate, and the fact that it could only give the plaintiffs a modified version of the relief to which I think they are entitled.

475 In light of my conclusions in relation to the s 70 claim, it is unnecessary to consider the plaintiffs' alternative claim for a right of vehicular access to the moorings under s 88K of the *Conveyancing Act 19*19 (NSW).

CLAIM IN RELATION TO CARPARK, ROAD WORKS AND SEALING

476 The plaintiffs claim that the original developers, Mr Watson and Sammy One, are in breach of cll 1.2.2 and 1.3.1 of the community development contract and cl 4 of the "*Warning*" section of the community and neighbourhood development contracts – incorporating conditions 6 and 13 of development consent 18/90 – in that they have failed to seal the access road, carpark and internal roads.

The contractual obligations

477 Those contractual provisions are in the following terms:

> **1.2.2** The developer is to provide a sealed access way in accordance with the Development Consent.
>
> **1.3.1** All driveways are to be sealed in accordance with the Development Consent No 18/90 issued by the Council of the Shire of Murray on the 12th September 1991.
>
> **4** …the original proprietor covenants with the association concerned and with the subsequent proprietors jointly and with each of them severally to develop the land subject of the scheme in accordance with the development consent as modified or amended with the consent authority's approval from time to time.

478 In my view, 1.3.1 of the community development contract is irrelevant for present purposes. It is limited to "*driveways*".

479 Condition 6 and 13 of development consent 18/90 are in the following terms:

> **6** The access road shall be surfaced with bitumen and the intersection with the main road shall be constructed to a standard required by the Traffic Committee.
>
> **13** Internal roads and parking areas shall be sealed with bitumen when restaurant, motel and cabins are developed.

480 The reason stated by the council for imposing conditions 6 and 13 were "*to* "*provide all weather access*" and also, in the case of condition 6, "*for traffic safety reasons*".

481 Clause 1 of Schedule 2 Part 1 to the *Management Act* provides that the original proprietor (here, the developers) covenants that the scheme will be developed in accordance with the development contract and the development consent. This is the source of the contractual obligation in cl 4.

482 Section 41(1) of the *Development Act* provides:

> All or part of the land comprising the community property in a community scheme may be set apart as a means of open access connecting part of the community parcel and a public place.

483 In my opinion, the "*access way*" referred to in cl 1.2.2 is the "*access road*" referred to in condition 6. It is also the "*access way*" referred to in by-law 3.1.1 of the community

management statement which is shown in the access way plan forming part of the community plan registered in January 1995. By-law 3.1.1 provides:

> A private access way is to be constructed by the developer according to plans and specifications supplied to the Council of the Shire of Murray, and more particularly as shown on the access way plan forming part of this statement, and will be open for use by members of the scheme or their guests only.

484 The access plan registered in January 1995 (sheet 29 of the community plan) states that "*it illustrates private access ways which are community property*". This access plan shows an access way from Perricoota Road with a "*claw*" encircling the carpark area and the area that is now Lots 14 and 15, except for the waterfront strip. This access plan was replaced in 2004 by another registered access way plan which states that it "*illustrates an open access way which is community property*". The latter plan shows a similar access way to the former plan although the "*claw*" may be larger on the western side.

485 In my opinion, under cll 1.2.2 and 4, read with condition 6, the obligation of the original developers is to surface the access way with bitumen. That does not include the carpark area.

486 Under cl 4, read with condition 13, the obligation of the original developers was to seal the carpark and internal roads with bitumen when the restaurant, motel and cabins are developed. The reference to "*internal roads*" in condition 13 does not, in my view, include the existing access tracks to the moorings. First, I do not construe "*internal roads*" as including an access track. I think that there is a distinction between a road and an access track in this context. Secondly, if an access track is a road (contrary to my opinion), condition 13 would still not apply to at least two of the existing access tracks because they were not shown on DA 18/90 Plan 4 and the DA 66/92 Stage 2 plan. I do not think it was contemplated that the sealing obligation would apply to something which was not shown on the DA plans and was created later. Only one "*access track*" is shown on those plans, on the eastern side, although it appears to be in a slightly different location to, and is longer than, the existing upper eastern access track.

487 Condition 13 is a contingent condition. That is, performance of its sealing obligation is subject to the condition precedent or trigger "*when restaurant, motel and cabins are developed*". The developers submit that the obligation has not yet arisen because the motel and cabins (and perhaps the restaurant) have not yet been developed. I do not accept the submission for the following reasons.

488 A restaurant has been developed on Lot 14. Development of a motel and cabins can no longer occur as indicated in the locations shown on Plan 4 and the Stage 2 subdivision plan (**annexures A and E** hereto). That is because they have been superseded by the consent for development of the Honeyman Lot in a different way. However, the Honeyman Lot development, which has been partly constructed, includes cabins. In that regard, the Environmental Service's Department Report to the Planning and Development Committee Meeting of the council on 1 October 2002 noted that an application to subdivide Lot 7 (the Honeyman Lot) had been made and stated:

> This development lot was included in the original development proposal for Deep Creek Marina. In particular this land was designated for holiday cabins

> or similar resort style development. The current owner does not wish to pursue this proposal any further.

489 In my opinion, if fulfilment of a condition precedent to a contractual obligation is within one party's control and that party prevents its fulfilment, that party cannot rely upon the non-fulfilment (or, as it sometimes put, the condition precedent is taken to be fulfilled or is excused): ***Mackay v Dick*** (1881) 6 App Cas 251 at 263, 270; ***Secured Income Real Estate (Australia) Limited v St Martins Investments Proprietary Limited*** (1979) 144 CLR 596 at 607-608; ***Newmont Pty Ltd v Laverton Nickel NL*** (1982) 44 ALR 598 at 606 (PC); ***Amber Holdings (Aust) Pty Ltd v Polona Pty Ltd*** [1982] 2 NSWLR 470 at 475; ***Sanctuary Investments Pty Ltd v St Gregory's Armenian School Inc*** [1999] ANZ Conv R 454 (Young J); ***Quinn Villages Pty Ltd v Mulherin*** [2006] QCA 433 at [19] – [24].

490 That principle, in my view, applies in the present case. The developers were under a contractual obligation to develop the land in accordance with the development consent, including condition 13. Development of the motel, cabins and restaurant in accordance with the DA plans was within the control of the developers. They allowed the land to be developed in a different way such that those facilities cannot be developed as contemplated by those plans. Therefore, to the extent that the condition precedent is unfulfilled, they cannot rely on its non-fulfilment. Accordingly, in terms of condition 13, they are obliged to seal the carpark with bitumen.

Breach

491 The next question is whether the original developers are in breach of their contractual obligations in relation to sealing of the access way and carpark with bitumen. The following history informs the answer.

492 In 1994, the developer commenced construction of the access way from Perricoota Road. The sealing of this access way stops about 50 metres short of the carparking area shown on Plan 4 and the Stage 2 subdivision plan. No other part of the access way, internal roads or carpark has been sealed. In 1996, Mr Watson commenced landscaping the carpark.

493 In September 2003, the developers were granted conditional development consent for the subdivision of what was then Lot 9 in the community scheme (DA 282/03). Condition 3 provided that:

> The adjacent car park and access roads must be sealed to the satisfaction of Council's Director of Engineering Services, or a bank guarantee in the equivalent cost of the work must be submitted prior to the certified plans being released.

The bank guarantee was lodged, and it remains with the council.

494 In November 2003, the developers were granted conditional development consent for a boat storage area on Lot 16 (DA 370/03). Conditions (k) and (l) provided that:

> (k) Within 18 months the owner is to seal the main access road from the property boundary to the entrance of the storage yards. Such sealed road is to be a minimum of 7m wide with 300 mm crushed rock base

and double coat seal. The design is to be approved by Council prior to work commencing on site.

(l) The intersection with Perricoota Road is to be upgraded as deemed necessary by Council's Director of Engineering Services.

495 In March 2005, the developers commissioned Chris Bell of ERM and Glen Ryan of GMR to do works in the community scheme and also on Lot 23. On 21 March 2005, Mr Ryan prepared a proposal for, inter alia, works on the main access roads and community carpark, internal roads and access tracks.

496 The developers accepted the proposal. The developers then endeavoured to have the fee proposal redirected to the community association, which rejected the endeavour. During this period, the developers were negotiating with the community association to have it agree to pay for works, including road sealing, in exchange for the title to the access roads on the creek foreshore. Ultimately, on 12 August 2005, Mr Jarman put forward heads of agreement, as discussed at [356] above.

497 On 6 October 2005, the developers met with the council. During the meeting, the council outlined issues of compliance with certain development consents and their conditions as follows:

(a) condition 13 of DA 18/90;
(b) condition 3 of DA 282/03; and
(c) condition (k) of DA 370/03.

498 After the meeting, the council wrote letters to the developers, stating that it considered certain conditions of consent to be outstanding, as follows:

(a) to Ozzie on 15 November 2005, in relation to (inter alia) condition 3 of DA 282/03;
(b) to Mr Watson on 15 November 2005, in relation to (inter alia) condition 13 of DA 18/90 and condition 3 of DA 282/03; and
(c) to Hillington on 15 November 2005, in relation to (inter alia) condition 3 of DA 282/03.

499 On 20 March 2006, the council issued to the community association a Notice of Intention to Serve an Order. It required compliance with all outstanding conditions of development consents 18/90 and 282/03, including conditions 6 and 13 of development consent 18/90 and condition 3 of development consent 282/03.

500 By letter dated 16 November 2005, the developers' solicitors in the CTTT proceedings wrote to the community manager withdrawing any offer to negotiate pending the outcome of the CTTT hearing. This meant that the heads of agreement put forward by Mr Jarman in August 2005 were no longer the subject of negotiations.

501 The compulsory manager engaged GMR to prepare designs for carparking. Mr Jarman had considerable input into the designs. GMR prepared the final specifications in September 2006. Works were done in anticipation of sealing the carpark and roadways.

502 When the compulsory manager was removed, the works were stopped. At this stage, the landscaping had been removed, and preparatory and drainage work had been done in anticipation of sealing and construction of a carpark, access way and internal roads in accordance with the final specifications prepared by GMR.

503 In my opinion, the above history establishes that the original proprietors are in breach of, first, their obligation to seal the carpark with bitumen and, secondly, their obligation to seal the access way with bitumen to a standard required by the council's Traffic Committee in that the access way has only been sealed to a point about 50 metres short of the carpark.

***Limitation Act* defence**

504 The developers submit that any claim for breach of cl 1.2.2 is not maintainable having regard to s 14 of the *Limitation Act 1969* (NSW). Section 14 relevantly provides that a cause of action founded on a contract, not being a cause of action founded on a deed, is not maintainable if brought after the expiration of a limitation period of six years running from the date on which the cause of action first accrues.

505 The plaintiffs' submit: (a) there was ongoing daily breach: ***Sheldon v McBeath*** (1993) Aust Torts Reports 81 – 209 (NSWCA) and other cases; (b) there are new causes of action for the plaintiff Mr Cunnington who only recently purchased into the scheme; and (c) the registered development contracts are deeds.

506 The parties' cryptic submissions on this limitation issue appear to proceed on the assumption that (subject to the deed point) s 14 of the *Limitation Act 1969* applies to a development contract and statutory covenants under the community titles legislation. It is unnecessary to decide whether that assumption is well founded. Assuming that it is, in my opinion s 14 of the *Limitation Act 1969* has no application because the development contracts are deeds. Section 15 of the *Management Act* provides that such a registered development contract "*has effect as if it included an agreement under seal*". Although an agreement under seal is not necessarily synonymous with a deed, in the present case I consider that it is. Section 36(11) of the *Real Property Act 1900* (NSW) provides that "*Upon registration, a dealing shall have the effect of a deed duly executed by the parties who signed it*". A "*dealing*" is defined to include any instrument which is registrable under the provisions of the *Real Property Act 1900*. That includes a community development contract. Consequently, in my opinion, s 14 of the *Limitation Act 1969* is inapplicable. It is unnecessary to address the plaintiffs' other points.

Relief

507 The plaintiffs seek an order for specific performance of the contractual obligation to seal the access road, internal roads and carpark. I address and grant that proposed relief, so far as it concerns the access road and carpark, after considering specific performance generally below.

CLAIM IN RELATION TO ELECTRICITY SERVICES

508 The plaintiffs claim that the original developers have breached:

(a) clause 1.2.1 of the community development contract by "*failing to provide all electricity services*"; and

(b) clause 1.2.1 of the neighbourhood development contracts by failing "*to provide all telephone and electricity services*".

509 Clause 1.2.1 of the community development contract provides:

> All electricity services are to be provided by the developer.

Clause 1.2.1 of the neighbourhood development contract for the Central Neighbourhood provides:

> All telecom and electricity services are to be provided to each lot by the developer.

Clause 1.2.1 of the neighbourhood development contracts for the Western and Eastern Neighbourhoods provides:

> All telephone and electricity services are to be provided to each lot by the developer.

510 The plaintiffs submit that the original developers breached these provisions of the development contracts in three ways:

(a) the development on Lots 14 and 15 of a larger shop and a hotel created a maximum demand for electricity that exceeded supply;
(b) the electrical services provided in 1994 did not conform with the relevant Australian standard and the *Electricity Supply Act 1995* (NSW) in respect of on-selling power and individual metering; and
(c) the cables were not laid at an adequate depth.

511 The developers deny the alleged breaches. They submit that by 1996 they had performed their electricity obligations by providing all electrical services in relation to the marina berths and the associated marina facilities.

Background

512 The first stage of the Deep Creek Marina development included the creation of 45 houseboat berths. Mr Watson intended each berth to have an electrical connection. The electrical connection was to be carried out progressively as berths were constructed.

513 In about 1991, Mr Watson contacted Murray River Electricity (**MRE**) (now Country Energy) regarding the process and capacity requirements for electrical connections to the Deep Creek Marina development and the houseboat berths.

514 In about October 1994, MRE connected power to the development site and installed a 25kVA transformer near where the restaurant is now located, on what is now Lot 15 near its boundary with what is now Lot 14.

515 Mr Watson engaged Moama Electrical Services (**MES**) to carry out electrical work not completed by MRE. MES devised a system to make electricity available to each berth. This involved laying of cables from the transformer to the five switchboards, two of which

are located to the west of the boat ramp, and the other three to the east of the boat ramp. All are located on Lot 16 so as to be above flood level.

516 Further cables were laid from the switchboards to the power pole connection points for each berth. The connections on the poles at the berths had to be above flood level.

517 Mr Watson assisted MES with digging the required trenches for cables and conduits, laying cables and installing the berth connection poles. Mr Watson testified that the depth of the conduits was at least 600mm.

518 The 18 berths to the east of the boat ramp were the first to have electricity connected. Mr Watson arranged for the payment of costs involved in the design and installation of electricity to the berths.

519 In 1996, Mr Watson decided to upgrade the transformer, as he wanted to develop a further 67 houseboat berths, and power was required for the new restaurant and the sewerage treatment works built in accordance with DA 18/90. Also, the Public Works Department wanted to install a sewerage pump out station, which would draw power from the Deep Creek Marina development.

520 In accordance with this upgrade, a 200 kVA transformer was mounted on a pole on what is now Lot 15 and a meter was located at the base of the pole. MES again carried out the electrical connection works, and Mr Watson again arranged for the installation work, including trench digging, conduit laying, and construction and installation of connection poles at the berths. All costs were paid by Mr Watson with a contribution from the Public Works Department.

521 As a result of the installation of the 200 kVA transformer, electricity was connected to:

(a) a total of 85 houseboat berths;
(b) the Public Works Department's sewerage pump out station;
(c) the restaurant/bar and shop;
(d) the sewerage treatment works; and
(e) the hardstand area.

522 At no time was Mr Watson approached by any houseboat berth owner regarding complaints about the electricity supply to berths, with the exception of individual overload switch issues.

523 Factors of which Mr Watson was aware that he thought had impacted upon the capacity of electrical service, included:

(a) the development of Lots 14 and 15 (previously Lot 10) into a hotel and larger shop which resulted in additional power being required;
(b) in about mid 2001, the Central Neighbourhood engaged a landscape gardener to install wooden retaining walls. During construction, the gardener used a hole digger which cut power lines and broke the stays for berth retaining

walls, causing them to fail, and also removed the tie-on point for houseboats prior to the installation of proper bollards;

(c) houseboat owners tied boats to power poles, resulting in an estimated 5 to 10 power poles in the Central Neighbourhood being bent, which damaged the conduits connecting the power cables to the poles.

(d) numerous poles had unauthorised works, including holes cut in the structure, removal of top caps and apparent addition of wiring;

(e) in around 2001 the Central and Eastern Neighbourhoods installed a watering system which extended onto Lot 16, the pump for which was connected to the power supply system. The watering system leaked at various locations which caused erosion and impacted on the stability of the surface in front of the berths. This, Mr Watson thought, impacted upon the conduits and the retaining walls.

524 In December 2004, the supermarket was completed. By this time, the extensions to the hotel had also been commenced. Mr Brockwell did electrical work in both these buildings. This work was linked to the existing 200kVA transformer.

525 Thereafter the hotel began to experience brownouts. No brownouts had been experienced before the extensions to the hotel and supermarket were built. A brownout is a situation in which the voltage through an electrical system is reduced because demand for the supply of electricity is greater than the supply capacity. It is a condition that causes a consumer's electrical devices to struggle, and in a lot of instances to fail, due to the weakness of the voltage.

526 On 13 May 2005, Mr Brockwell provided Mr Jarman with a report in relation to the supply capacity of electricity, which stated: "*Substation is now at peak load and needs urgent upgrade*".

527 Mr Jarman spoke about the electricity supply issues at a community association meeting held on 14 May 2005. The minutes record him saying that "*there was a concern that the current supply would not [sic] be insufficient to supply future demand especially when the complex was full of owners, guests and visitors*". In cross-examination, Mr Jarman said the word "*not*" was a typographical error. It obviously was. Mr Jarman tabled Mr Brockwell's report at another meeting of the community association held on 18 June 2005.

528 In December 2005, the CTTT made orders requiring the compulsorily appointed manager to obtain "*as soon as possible a report from an electrical engineer into the safety and adequacy of the electricity facilities and services to the entire community scheme (excluding the independently installed systems to lots 12 and 13*). Mr Brockwell performed this task.

529 On 1 February 2006, Mr Brockwell sent his report to Mr Patterson, the compulsorily appointed manager. It was to much the same effect as his May 2005 report. It stated:

"*Substation is overloaded and is experiencing brownouts*" and "*Existing substation is at peak load and requires upgrading to 500kVA*".

530 During the period of compulsory management in 2006, the Brockwell works were commissioned and commenced. In lieu of the 200kVA transformer and single meter on Lot 15, a 500kVA transformer was installed on community property as was a shed containing a distribution board with individual meters for lots and copper cabling was purchased. The individual meters are not yet connected to the mooring lots. When the connection is made, the existing meters will become redundant. The payments for this work and the materials were from community association funds.

First alleged breach: exceeding maximum demand by development on Lots 14 and 15

531 The plaintiffs submit that:

(a) the original developers are obliged by cl 1.2.1 of the community development contract to provide electricity to all the facilities shown in Plan 4 which require electricity;

(b) when new facilities are developed, the developers must ensure that electricity services are provided. If new facilities divert, drain and create demand on power already being supplied, the developers have to provide properly for electricity to all facilities;

(c) in developing the extensions to the hotel and the supermarket, the developers created a demand for power which exceeded supply. In order to properly facilitate supply they must provide services to meet the full demand. They have failed to do so.

532 As described above, in 1996 Mr Watson upgraded the 25kVA transformer to a 200kVA transformer to power a further 67 houseboat berths, a restaurant and a sewerage pump out station. The plaintiffs submit that by upgrading the transformer, rather than continuing to use the 25kVA, Mr Watson "*recognised his obligation to maintain existing supply when providing for the next stage of development*". They submit that this was the same obligation which arose at the time of the construction of the supermarket and hotel extensions; and thus the developers were obliged to upgrade the transformer to accommodate the new parts of the development.

533 The facilities for which power is supplied by the transformer are: the mooring berths; the pump out station; the hotel; the supermarket; and other associated communal facilities such as pumps. The supermarket, hotel and council pump out facility each have 100 amp circuit breakers. This totals 300 amps. For marina installations, maximum demand can be calculated by the "*calculation*" method in section 2.2.1.2 of the Australian Standard AS 3004-1993 "*Electrical installations – Marinas and pleasure craft at low voltage*". For an 85 berth marina, the maximum demand is 107 amps. Added together, 300 plus 107 gives a total of 407 amps. There are 1.33 amps to a kVA. Approximately 407 amps gives over 300 kVA, which exceeds the capacity of a 200 kVA transformer.

534 The evidence of Mr Wilson, the plaintiffs' electrical expert, establishes that about 320kVA on a 200kVA transformer would be likely to manifest as brown-outs.

535 It is common ground that after the hotel and supermarket were constructed, more than 200kVA power was being drawn from the electrical supply and the hotel experienced brown-outs.

536 The developers submit that:

(a) assuming they are obliged to provide electricity to all the facilities shown on Plan 4 which required it (which they dispute), those plans did not oblige or contemplate the provision of a hotel and supermarket, let alone a supermarket that contains commercial fridges and a laundromat, both of which draw heavily on electrical supply. Therefore, they say, any inadequacy arising out of something developed beyond the scope of those plans is not their liability;

(b) the developers did not develop the hotel and supermarket. Rather, they were developed by the O'Briens, who purchased the business and the land thereon, including some neighbouring land, and a hotel license. It was the O'Briens who applied to develop the land, and did so in 2004. This included the electrical work. The O'Briens converted the existing general store, which Mr Wilson thought would draw about 40kVA, when they were obliged to construct a general store only. This resulted in the capacity of the 200 kVA transformer being exceeded.

537 The developers' submission that the O'Briens were "*obliged to construct a general store only*" requires examination. It is based upon cl 31.5 of the contract of sale of what is now Lot 15 of October 2004 by the developers to Mr and Mr O'Brien which provided that the purchasers must "*erect on the land within 12 months of the date of the Contract a general store in accordance with the Development Consent issued by the Shire of Murray*". The developers' argument is that if the purchasers had merely put in a general store then the transformer would have continued to be adequate. However, they say, the purchasers went further and expanded the hotel/restaurant and put in a supermarket, which was the cause of the inadequacy of the transformer and the brownouts.

538 I am unable to accept the developers' submission. The unchallenged evidence of Mr O'Brien, which I accept, was that:

(a) he agreed with the developers that if he could get a general hotel licence for the premises he would lodge a development application to extend the hotel and build a separate supermarket;

(b) he subsequently purchased a general hotel licence and, accordingly, lodged DA 049/04 which was approved by the council in June 2004, apparently for an extension of the hotel and the building of a separate supermarket;

(c) he then entered into a contract in October 2004 with the developers to acquire Lot 15. The purchase price was low ($5,000) because it was his responsibility to build the supermarket and extend the hotel and the developers told him they believed that work would improve the value of their land for residential development within the scheme.

539 In context, the reference to "*Development Consent*" in cl 31.5 of the October 2004 contract appears to be a reference to the June 2004 development consent 049/04 and, according to Mr O'Brien's evidence, the reference to "*general store*" in cl 31.5 of the sale contract appears to be inaccurate. Be that as it may, by agreeing with Mr O'Brien that he would extend the hotel and construct the supermarket in exchange for their selling the land to him for a low price, the developers created the situation where the extension of the hotel and construction of the supermarket occurred. That led to the transformer becoming inadequate.

540 In my opinion, in the circumstances, the original developers are in breach of contract as alleged. The measure of damages, in my opinion, is the cost of the 500kVA transformer which was installed during the period of compulsory management.

541 The developers plead a defence to this claim under s 14 of the *Limitation Act 1969*. This defence appears to have been abandoned during final oral submissions. In any case I would, first, not accept that defence for the reasons which I gave when considering the same defence in the context of the claim in relation to the sealing of the carpark and access road (see [506] above); and secondly, because the cause of action did not arise until the hotel was extended and the supermarket constructed, which is within the limitation period.

Second alleged breach: metering

542 The second alleged breach concerns the situation whereby electricity was delivered to the Deep Creek Marina by the electrical supplier to a single meter located on Lot 15. The electricity was then on-supplied via submains from that meter to the supermarket and hotel and to four distribution boards on Lot 16. From these distribution boards the power was supplied through check meters located on the distribution boards to the final sub-circuits powering the individual mooring lots.

543 The plaintiffs submit that:

(a) section 72 of the *Electricity Supply Act 1992* prohibits the on-selling of power. This requires individual metering in accordance with the provisions of the NSW Service and Installation Rules. These meters are to be located in an accessible area on common property;

(b) in the present case there was no individual metering;

(c) that was a breach of cl 1.2.1 of the development contracts or, alternatively, a breach of the developers' obligation to provide all electrical services with care, diligence and skill. The onus is on a promisee to provide evidence that the promisor has not exercised the requisite degree of care, diligence or skill in

order to make out a prima facie case: ***Hobbs v Petersham Transport Co Pty Limited*** (1971) 124 CLR 220 at 229-230 per Barwick CJ;

(d) the developers ceased to assume responsibility for the receipt of the single bill being received for the one supply authority meter in about August 2005.

544 As I understand it, the plaintiffs' argument essentially is that the electricity was being channelled through the transformer and meter that used to be located on Lot 15 (the supermarket lot). This was billed by the electrical supplier to Mr O'Brien (or whoever owned Lot 15). Somebody had to come around and inspect it to allocate the charges among the individual lot owners. Because the *Electricity Supply Act* says that you must not charge for electricity and the best practice now reflected in the NSW Service and Installation Rules requires individual meters on common property, this arrangement was a breach of cl 1.2.1 or, alternatively, a negligent performance of those contractual obligations.

545 The developers submit that:

(a) the plaintiffs' case is really whether the developers supplied the electricity in a careless way (rather than that they have not supplied the electricity). However, the plaintiffs do not plead that the lack of individual metering is a breach of the developers' obligations to provide all electrical services with the necessary degree of care, diligence and skill. The plaintiffs only plead that the electrical services have not been provided;

(b) in any case, s 72 of the *Electricity Supply Act* contains no requirement that there be individual metering;

(c) the plaintiffs' electrical expert, Mr Robert Wilson, accepted that the original certificates provided by MRE (being the relevant electrical supply authority) show that, so far as they were concerned, the developers were not in any breach of s 72. There is no evidence of any subsequent dissatisfaction by MRE with this arrangement;

(d) there is no evidence that the NSW Services and Installation Rules were, at the date of installation, or at any time thereafter, mandatory (and it does not appear to be alleged that this was the case);

(e) the original certificates provided by MRE establish that, so far they were concerned, the developers were not in breach of any applicable rules of standards (as Mr Wilson accepted); and there is no evidence of any later complaint by Country Energy or any other person, of non-compliance with the NSW Service and Installation Rules;

(f) thus, there being no legal obligation to replace the current metering arrangement, nor any loss suffered by the current metering arrangement, any cost incurred by the plaintiffs in replacing the current metering arrangement

does not arise from a breach of the developers' obligations under the development contracts.

546 Section 72 of the *Electricity Supply Act 1995* (NSW) provides:

(1) A person to whose premises electricity is supplied under a wholesale supply arrangement or customer supply contract must not charge any other person for the use of electricity so supplied.
Maximum penalty: 200 penalty units (in the case of a corporation) and 50 penalty units (in any other case).

(2) This section does not prohibit a person from imposing a separate charge for the use of a specified service or facility as a result of the fact that the use of that service or facility involves the consumption of electricity.

(3) This section does not prohibit a landlord from imposing a charge for electricity supplied to a tenant if:
(a) the quantity of electricity so supplied is measured by a separate electricity meter that complies with the regulations, and
(b) the charge imposed for the electricity so supplied is no greater than the maximum allowable amount.

(4) A landlord who charges a tenant for electricity supplied to the tenant:
(a) must make such records relating to the electricity so supplied, and
(b) must keep those records for such period,
as may be prescribed by the regulations.

(4A) The regulations may, either unconditionally or subject to conditions, exempt:
(a) any specified person or class of persons, or
(b) any specified matter or class of matters,
from the operation of subsection (1).

(5) The regulations may require the landlord to furnish the tenant with a copy of any records made under this section.

(6) In this section:
landlord means:
(a) the owner or lessor of any premises, whether business, residential or otherwise, or
(b) the proprietor or operator of the premises of any hotel, motel, inn, hostel, boarding or rooming house, holiday flats or cabins, manufactured home estate, caravan park or campsite or any other premises prescribed by the regulations.
maximum allowable amount, in relation to a quantity of electricity supplied during a specific period, means:
(a) the amount prescribed by or calculated in accordance with the regulations for a similar quantity of electricity supplied during the same period, or
(b) if no such regulations are in force, the amount that the relevant standard retail supplier would have charged under a standard form customer supply contract for a similar quantity of electricity supplied during the same period.

> ***tenant*** includes any person who occupies premises in respect of which some other person is a landlord.

547 The Service and Installation Rules of New South Wales provide:

> 4.2 Service and metering equipment must be located in an accessible area on common property.
>
> 4.2.3 The metering for new multiple occupancy premises will be grouped at the one metering position. Provision should be made to cater for any future metering requirements.
>
> The grouped metering must be in a location accessible to all associated tenants. It must not be located within any one occupancy.

548 In his Community Managers' Report, which was to be tabled at the meeting of the executive committee of the community association on 23 August 2005, Mr John Haydon stated:

> Deep Creek Pty Ltd have also terminated an agreement for the supply of electricity to the site, the responsibility for payment now rests with the Community Association, there has been a request for a deposit of $10,000.00 (ten thousand dollars) these funds are not available however we also understand that the hotel/supermarket site consumes 80% of the electricity consumption, this being the case there would be an expectation that that lot owner will contribute 80% of the deposit.

549 The opinion of the plaintiffs' electrical expert Mr Robert Wilson was that, in line with the NSW Service and Installation Rules, the moorings, supermarket and hotel should have always been separately but centrally metered at the main meter board which should have been located on common property. In oral evidence Mr Wilson conceded that the issuing of a certificate such as a Notification of Electrical Work was proof of the satisfactory installation of electrical work; that the original certificates provided by MRE show that, so far as MRE were concerned, the developers had not breached s 72; and that if he were the installer and found a breach of s 72, he would not provide a certification.

550 The developers say that as there is no reference in the Notifications of Electrical Work to s 72 not having been complied with, it is a strong inference that if there had been a breach of s 72, MRE would have identified it. Furthermore, there is no evidence of MRE being dissatisfied with the arrangement. In my view, MRE's certification and Mr Wilson's concessions do not bear on the objective construction of s 72. However, it is clear that MRE has not expressed any concern about the issue.

551 The Service and Installation Rules in evidence were not in force at the relevant time. They commenced in October 2006. In evidence, Mr Wilson said that he had not made any searches for earlier versions of these rules because he only referred to the current version in his report. However, he indicated that between 1995 and the present day the practice reflected in the two provisions of the Service and Installation Rules quoted above reflected best practice. He said that in 1995 those two provisions were generally best practice known to everybody throughout the industry. However, enforcement was the responsibility of the individual suppliers. Here, the individual supplier was MRE.

552 I am inclined to think that there was no breach of s 72. On the evidence, it seems that the Lot 15 owner did not "*charge*" other persons for the use of electricity supplied to that owner's premises. Rather, there appears to have been a voluntary bill-sharing arrangement whereby other lot owners contributed to MRE's charges to the Lot 15 owner. However, that is not an end to the matter.

553 Clause 1.2.1 of the development contract required the original developers to provide "*all*" electrical services and cl 1.2.1 of the neighbourhood development contract required all electrical services to be provided to "*each*" lot.

554 An individual meter for each lot was, in my opinion, one of those electrical services. The contractual obligation was not discharged by providing only one meter to one privately owned lot (Lot 15) – and leaving it to the Lot 15 owner to work out an arrangement with the mooring lot owners as to how the electricity bill might be shared among them. Section 72 turns its face against arrangements where a person in the position of the Lot 15 owner would charge others for electricity on-supplied. The practice reflected in the Service and Installation Rules provides a solution by the installation of individual meters collectively on common property.

555 The community titles legislation and the strata title legislation are analogous in a number of respects. Take as an analogy a conventional residential strata building with 85 strata lots (the same number as the mooring lots in the present case. Suppose that: (a) a strata titles development contract contained a provision equivalent to cl 1.2.1 of the development contracts in the present case; (b) the developer, in purported fulfilment of that contractual obligation, installed one transformer and one meter in one residential strata lot from which electricity was on-supplied to all the other strata lots. The owner of that lot would be in the invidious position of having to enter into an arrangement with other lot owners for them to pay a proportion of his electricity bill and to enter his strata lot to inspect the meter. I think that would be a breach of the developers' contractual obligation. The present situation seems to me to be indistinguishable.

556 In my opinion, failure to supply individual meters was a breach of cl 1.2.1 of the development contracts.

557 The alternative analysis is that it was negligent in the sense of a breach of an implied contractual obligation to provide the electrical services with care, diligence and skill. It is true that the plaintiffs' pleading does not plead its case in that way. However, the report of Mr Wilson with which the developers were served prior to the trial supported such a case; the trial was conducted on both sides as though the matters in Mr Wilson's report were issues in the case; and the pleading point was not taken by the developers until final written submissions. In those circumstances, if it were necessary to decide the claim on the alternative basis, I would be inclined to do so favourably to the plaintiffs. That is, it seems to me to have been negligent to have provided only one meter on Lot 15 and not to have provided individual meters.

Third alleged breach: defects in cable depth

558 The plaintiffs submit that the developers failed to ensure that the cables were laid at an adequate depth of 500 mm prescribed by Australian Standard AS 3000 – 1991.

559 The developers submit:

(a) there is ample evidence that all cabling was installed to at least 500mm. Mr Watson was present at the installation and he is 99% sure the cable was laid at that depth. This is consistent with Mr Wilson's opinion that the certificates issued by Murray River Energy would not have been issued if they were not equally satisfied;

(b) Mr Compton's affidavits raise some suggestion that cables at a limited number of locations are not at that depth now, but he recognises that his measurement methods have a significant margin for error and that there are circumstances such as wheel tracks and excavation that would affect the depths over time. Mr Wilson agreed, adding flood as another possible cause, and there has been flooding at the marina.

560 Australian Standard AS 3000 – 1991 "*Electrical installations – Buildings, structures and premises*" (known as the "*SAA Wiring Rules*") states minimum depths for laying of underground wiring. Table 3.7 requires cables to be laid 0.5m below ground (other than where the cables are laid under continuous concrete paved areas of a minimum thickness of 75mm).

561 On 14 April 2008, Mr Dennis Compton, an underground cable locater, measured the depths of electrical cables at Deep Creek Marina. He gave evidence that in many locations around Deep Creek cables are buried shallower than 500mm. Mr Compton measured the depths of cables at 47 locations. At 15 of those locations (being Location Numbers 4, 5, 7, 15, 16, 19, 20, 23, 26, 28-32 and 39), the vertical depths of the cables were less than 500mm.

562 To measure cable depth, a transmitter was attached to the cable where it was above ground. The transmitter sent a signal down the cable which a receiver picked up. The receiver was placed on the ground at the point where the strongest signal was received. The machine which measured the depth had an inbuilt margin of error of 20mm.

563 In cross-examination, Mr Compton acknowledged that the location at which the receiver was placed would affect the reading. Where the land was not smooth or flat, for example at Location No 30, Mr Compton acknowledged that it would be fair to say that the reading may change by about 100-200mm if the receiver was moved a few centimetres to the left or right.

564 Mr Compton also acknowledged in cross-examination that the depth of the cable at the date of measurement is not necessarily indicative of the depth at the date the cable was laid. First, the cable itself may have been the subject of further works. Secondly, the level of the ground surface may be affected by works, or other factors such as erosion, irrigation, flooding or wheel tracks. There has been quite significant flooding at Deep Creek at times. These factors may mean that Mr Compton's measurements do not reflect the depths at which

the cable was laid. As Mr Compton said in cross-examination: "*Any work that's carried out after the pipe or cabling has been put in the ground, anything would affect*" the depth of the cabling.

565 In cross-examination, the following exchange occurred between counsel for the developers and Mr Compton:

> Q. …having regard to the factors that you've identified, your report is in fact consistent or not inconsistent with cables having been laid at that location [Location Number 4] at 500 millimetres. That's fair to say?
> A. That's right.
>
> Q. In respect of all the measurements that were carried out, the same position pertains, doesn't it, namely that having regard to the factors you've identified, your report is consistent with cable being laid in those locations of at least 500 millimetres?
> A. That's right.

566 Mr Watson was present when MES laid the cables. On the basis of his actual observations, he said that all cable laid by MES was at a depth of "*at least*" 600mm. In cross-examination, Mr Watson said he was there every day of the work, although he may have been away for an hour at a time. He said he did not measure the depths himself, but was "*99 per cent sure*" that all wire went in at least 600mm.

567 Two documents entitled "*Notification of Electrical Work*", referred to above at [545] and [549], were tendered, dated 2 December 1994 and 4 April 1996. These Notifications were provided to MRE, an independent supply authority, by the Electrical Contractors Association of NSW. The Notification is a prerequisite to an inspection by MRE.

568 The Notification dated 2 December 1994 was in regards to the connection of electricity to the 18 berths in October 1994. The Notification dated 4 April 1996 was in regards to the connection of electricity to the 67 berths in 1996.

569 After inspecting the electrical work, the MRE inspector wrote "*insp ok*" (presumably meaning "*inspection ok*"). Mr Wilson said that the words "*insp ok*" conveyed to him that it was more likely than not that the electrical work installed at the marina was inspected by MRE and found to be "*okay*". Mr Wilson said that he had signed a number of certificates such as "*Notification of Electrical Works*"; that before signing he would always satisfy himself that the cabling had been buried at at least 500 mm; and that he would not have signed a certificate unless satisfied that the cable had at least 500mm of covering.

570 I accept the evidence of Mr Watson and Mr Wilson. I am not satisfied that the cables were installed at a depth which was less than that prescribed by the Australian Standard. The probable explanation for the later measurement of those cables at lesser depths rests with post-installation events. The plaintiffs' claim in relation to the cable depth is rejected.

Damages

571 I turn to the assessment of damages for breach of the electricity provisions of the development contracts. I have allowed two of the electricity claims: the need to upgrade

from a 200 kVA to a 500 kVA transformer and the failure to provide individual meters to lots. The plaintiffs claim damages proportionate to their unit liability under the community scheme being 7,707 out of 10,000. The amounts to which they seek to apply this proportion are identified below.

572 First, the plaintiffs claim damages for the upgrade from a 200 kVA transformer to a 500 kVA transformer. The cost incurred by the community association for the latter was $46,110.57. On the proportion that they claim, the plaintiffs are therefore entitled to damages in the sum of $35,537.

573 Secondly, the plaintiffs claim that damages for the non-supply of individual metering should be on the basis of the lump sum quote of $774,302 dated 16 February 2006 by Brolec to the CTTT compulsorily appointed manager, which was discussed in Mr Wilson's report. On the proportion that they claim, the plaintiffs seek damages of $596,754 (7,707/10,000 x $774,302).

574 The Brolec lump sum quote was for the following items:

1. Supply of new 500 kva pole mount sub-station mounted at last pole on entrance road before bend. This is a direct cost to client from Country Energy estimate attached.
2. New mains supply from substation to new main switchboard and new metering facility in car park rear of Hotel. This facility will meter all Houseboats, Hire boats, Hotel, Supermarket and Public Light and Power.
3. New 15a single phase supply cabling to all houseboat moorings (85) plus 2 hire boat moorings.
4. All trenching and backfilling required for moorings, street lighting and public power and light.
5. Supply of Power head Bollards complete with 2 15a outlets RCD Protected 1 light 2 data/phone outlets key lock cover, 2 intergrated [sic] water meters. Eg. 1 Bollard per 2 moorings.
6. All concrete works and shed facility to house main switchboard and metering at one point. Light and power to this facility.
7. Supply of all street lighting and public lighting as required around site and main road entry into deep creek marina.
8. Supply of Power to front gate entry for future signage or lighting.
9. Power under Marina to Island at entry for entry lighting (only possible if we go ahead and dam the river and empty marina).
10. Re-route existing mains supply to Hotel, Supermarket and all auxiliary power to new main board.
11. Disconnect existing redundant services.

Item 1 was excluded from the amount of the quote.

575 The Brolec lump sum quote incorporates a number of items which are irrelevant to the claim for failure to provide individual meters. The relevant items appear to 2, 3, 6, 11 and possibly 10.

576 Only the actual cost of the cabling referred to in item 3 is known. The "*2 hire boat moorings*" referred to in item 3 were owned by the developers and at one time were kept on the public wharf but are no longer there. The new individual meters can only work if they are connected by 85 cables to the houseboat moorings. On 3 May 2006 Mr Brockwell of Brolec sent an email to the compulsorily appointed manager of the community association recommending that an order for this cabling should be locked in because of a forecast of an imminent rise in the price of copper. The cabling was supplied by Brolec to the community association. The price was $280,313 as recorded in Brolec's invoice dated 3 July 2006 addressed to the community association c/- the compulsorily appointed manager. The community association paid the invoice.

577 Apart from item 3 of Brolec's quote of 16 February 2006, there is substantial difficulty in allocating part of the lump sum quote to the other relevant items in the quote. There are invoices in evidence relating to progress claims, however they are so expressed as to be of no real assistance. The developers submit that the shortcomings in the quantum evidence are such that no damages should be awarded.

578 The new individual meters have been installed in a shed in the carpark, behind the hotel on community property. There is no evidence as to the actual cost of the shed and the meters. However, it is clear from the evidence and the site inspection that their cost must have been substantial. Difficulty in assessing damages is not generally a bar to recovery of the damages: ***Commonwealth of Australia v Amann Aviation Pty Limited*** (1991) 174 CLR 64 at 83, 125, 153. The Court should endeavour to do the best it can on the available evidence.

579 On the other hand, apart from item 3 in the Brolec quote, the difficulties in the evidence entitle the Court to take a conservative approach to the quantification of damages in order to ensure that there is no injustice to the developers. In the circumstances, I propose to take a conservative approach and to apportion $50,000 of the Brolec quote to the cost of the individual meters, the shed and any other relevant items. This will be added to the cost of the cabling ($280,313). The total is $330,313. On the proportion claimed by the plaintiffs, damages will be assessed in the sum of $254,572 (7,707/10,000 x $330,313).

580 Aggregating the said sums of $35,537 (for the 500kVA transformer) and $254,572, the plaintiffs should be awarded damages for their electricity claims against Mr Watson and Sammy One in the sum of $290,109.

An elaborate theory of causation

581 For completeness, I should mention that the plaintiffs put forward an elaborate alternative theory of causation of damages to support the proposition that the original developers should pay damages quantified by a reference to a schedule of damages in the sum of $1,111,126.44 plus whatever amount was required to repay the loan raised by the community association's compulsorily appointed manager. However, in final oral submissions the plaintiffs did not press some items in that schedule. The amounts in this schedule appear to relate largely to works commissioned by the compulsorily appointed manager and paid from community association funds (financed by a loan) and (so far as the schedule is pressed) appear to relate to electrical and carpark works.

582 The plaintiffs submit that this damage was caused by the developers' failure to discharge their contractual obligations (discussed earlier) in relation to the electrical works and sealing of the carpark and access road.

583 The steps in the plaintiffs' causation theory are as follows:

(i) the developers are minority shareholders in the scheme, despite having large interests in neighbouring land;

(ii) the developers had an overall plan to upgrade the marina and develop neighbouring land, and it was in their interest to upgrade the original marina originally built by the Watson interests;

(iii) the developers had a number of outstanding obligations in relation to development consent which they were required to do;

(iv) the developers did not want to pay for the work (both required under the development contract and other development consents);

(v) the developers were concerned that as a consequence of not complying with conditions of the consent, the council would not approve other developments on adjoining land which they had planned;

(vi) the developers used access as a tool for negotiation to require community contribution for the payment of these works and engaged in a course of pressure tactics to endeavour to secure their ends;

(vii) this failing, the developers had a compulsory manager appointed;

(viii) the compulsory manager was required to comply with a range of orders, specifically drafted by the developers to secure their plans for the marina (but now at 16 percent of the price);

(ix) the compulsory manager was advised during the process by the developers' lawyers;

(x) the compulsory manager was advised by the developers' site manager, Mr Jarman;

(xi) Mr Jarman directed and had significant inputs into works while also having a significant vested interest in the land in Lot 16;

(xii) the works were conducted against the will of the plaintiffs;

(xiii) the plaintiffs had the works, being done at their cost, cease on retaining control of the community association;

(xiv) the developers had brought new CTTT proceedings with a view to restoring the 2006 situation whereby a compulsory manager was appointed and performed prescribed work.

584 The plaintiffs are entitled to receive such loss as fairly and reasonably either arises naturally, that is, according to the usual course of things, from the breach of contract, or if it does not so arise, may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it: ***Hadley v Baxendale*** (1854) 9 Exch 341 at 355; ***St George Bank Ltd v Indigenous Business Australia*** (2007) 215 FLR 79 (Hammerschlag J). It is unnecessary to pass judgment on the accuracy of the various links in the plaintiffs' alleged chain of causation. In my opinion, even if they were to be proved, the chain is incapable of establishing that the claims for breaches of contract (in relation to electricity and the sealing of the carpark and access road), which I have upheld, caused the claimed damages within either limb of the principle in ***Hadley v Baxendale***.

CLAIM IN RELATION TO TELEPHONE CONNECTIONS

585 The plaintiffs claim that the original developers are in breach of their obligations under cl 1.2.1 of each of the neighbourhood development contracts by failing to provide any telephone services for mooring lots. Clause 1.2.1 relevantly provides that all telephone/telecom services "*are to be provided to each lot by the developer*". The plaintiffs claim damages of $59,193.20, which is the amount of a quote dated 23 June 2006 from Brolec to the CTTT compulsorily appointed manager for the supply of Telstra telephone conduits, pits and related services to all moorings.

586 It is clear, in my opinion, that the developers provided some but not all telephone services for mooring lots. On the one hand, there is evidence from Mr Bares, which I accept, that he was able to arrange telephone connections for three of his moorings in the Central and Western Neighbourhoods for $100 each. They appear to be connections to the telephone services provided by the developers. Therefore, telephone services appear to have been provided for at least the Western Neighbourhood and the western side of the Central Neighbourhood.

587 On the other hand, there is evidence from Mr Dennis Compton, an underground cable locater, which I accept, that he did not find underground telephone services to moorings on the eastern side of the marina with the exception of one telephone pit. This pit is near the boat ramp and has a connection from behind the supermarket. A connection runs from this pit to the first mooring on the eastern side of the marina. I conclude that telephone services have not been completely provided on the eastern side of the marina, although to precisely what extent is less than clear.

588 The developers submit that a telephone tower near the marina provides full telephone services. The submission is cryptic but I deduce that it is to the effect that the tower enables mobile telephones to be used at the moorings. The submission refers only to a very short piece of evidence by Mr Wilson in cross examination. I am not satisfied that that evidence supports the submission. In any case, I do not think that the contractual obligation is limited to providing telephone services that would only enable mobile telephones to be used.

589 The Brolec quote was for telephone services to all moorings. It therefore appears to be an upgrade so far as concerns telephone services that have already been provided. Consequently, the difficulty in apportioning part of it to the telephone services that have not been provided is such that I propose to take a particularly conservative approach to ensure that there is no injustice to the developers. I apportion $5,000 of the Brolec quote to the telephone services that have not been provided. On the proportion of the plaintiffs' unit liability, I assess damages at $3,853 (7707/10,000 x $5,000).

SPECIFIC PERFORMANCE

590 In the Land and Environment Court proceedings the plaintiffs seek specific performance of the development contracts in relation to:

(a) the construction of the facilities shown in the plan proposed to be annexed to the development contract pursuant to an order under s 70 of the *Development Act*: see [462] – [464] above;

(b) the supply of the electricity, telephone, and road and carpark sealing required by the development contracts and considered above: see [476] – [589] above.

591 The developers submit that this is not a proper case for specific performance because:

(a) it has not been established that damages are not an adequate remedy; and

(b) the orders sought are not suitable orders for specific performance.

592 The developers also submit that insofar as specific performance is sought for access, access has either already been provided or is in the process of being provided. In that regard they refer to their undertaking to the Court, considered at [472] – [474] above. However, it is unnecessary to consider access relief, given my decision that the foreshore land should become community property pursuant to an order under s 70 of the *Development Act.*

593 The High Court in ***Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia*** (1998) 195 CLR 1 at [78] – [80] gave general approval to the speech of Lord Hoffmann in ***Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd*** [1998] A.C. 1. Lord Hoffman held at 13:

> This is a convenient point at which to distinguish between orders which require a defendant to carry on an activity, such as running a business over or more or less extended period of time, and orders which require him to achieve a result. The possibility of repeated applications for rulings on compliance with the order which arises in the former case does not exist to anything like the same extent in the latter. Even if the achievement of the result is a complicated matter which will take some time, the court, if called upon to rule, only has to examine the finished work and say whether it complies with the order. This point was made in the context of relief against forfeiture in *Shiloh Spinners Ltd. v. Harding* [1973] A.C. 691. If it is a condition of relief that the tenant should have complied with a repairing covenant, difficulty of supervision need not be an objection. As Lord Wilberforce said, at p. 724:
>
> > *what the court has to do is to satisfy itself, ex post facto, that the covenanted work has been done, and it has ample machinery, through certificates, certificates, or by inquiry, to do precisely this.*
>
> This distinction between orders to carry on activities and orders to achieve results explains why the courts have in appropriate circumstances ordered specific performance of building contracts and repairing covenants: see *Wolverhampton Corporation v. Emmons* [1901] 1 K.B. 515 (building contract) and *Jeune v. Queens Cross Properties Ltd* [1974] Ch. 97 (repairing covenant). It by no means follows, however, that even obligations to achieve a result will always be enforced by specific performance. There may be other objections…

One of the objections which his Lordship proceeded to consider was imprecision in the terms of the order. He held at 14:

> Precision is of course a question of degree and the courts have shown themselves willing to cope with a certain degree of imprecision in cases of orders requiring the achievement of a result in which the plaintiffs' merits appeared strong; like all the reasons which I have been discussing, it is, taken alone, merely a discretionary matter to be taken into account: see *Spry,*

Equitable Remedies, 4th ed. (1990), p. 112. It is, however, a very important one.

594 The legislative intention for community titles schemes is easily set at nought or diluted unless specific performance is generally available in relation to the statutory covenants in Schedule 2 to the *Management Act*. The original proprietors thereby covenant to develop land in accordance with the registered community development contract and the development consent, and subsequent proprietors covenant to permit them to do so.

Manager's residence

595 I have explained earlier what facilities I consider should be included in the plan that is to become an appendix to the community development contract pursuant to s 70 of the *Development Act*: see [462] – [463]. One of those facilities is the manager's residence shown on Lot 16 adjacent to the carpark.

596 Mr Watson at one point in his evidence stated that the manager's residence shown on Plan 4 (and referred to in the brochure) had now been moved to the top of the supermarket. I reject that evidence. The supermarket is on Lot 15 which is not in the ownership of Mr Watson or the other current owners of Lot 16. Mr Watson's evidence is inconsistent with a statement made by Mr Jarman to a council meeting on 6 October 2005 indicating that the manager's residence on top of the supermarket was not to replace the manager's residence available to the marina at large. When confronted with that statement in cross-examination, Mr Watson conceded that his evidence was incorrect. He agreed that there is no reason why the manager's residence shown on Plan 4 cannot be built. He also agreed that the development contract, as he understood it, provided for an ongoing obligation on the original developers to build it. He said he was unsure when he proposed to build it.

597 In my opinion, an order for specific performance should be made in relation to the manager's residence shown on the plan which is to become an appendix to the community development contract pursuant to s 70 of the *Development Act*. The importance of the manager's residence to the development was emphasised in the developers' EIS accompanying DA 18/90, quoted at [65] above. The manager's residence appears next to the carpark on what is now Lot 16 on plans accompanying DA 18/90 and 66/92 which I have held were incorporated in the consents thereto. If the manager's residence is not built where indicated on Lot 16 in the development consent plans, the community association would have to find a location for the manager's residence on community property. In the circumstances, that is unreasonable. Damages for breach would also be very difficult to assess and I do not think damages would be an adequate remedy.

598 I disagree with the plaintiffs' proposal that the order should require the original developers to construct a manager's residence. As discussed at [416] above, in my opinion development consents 18/90 and 66/92, insofar as they were concerned with facilities, were on their proper construction for the use of the locations shown on the relevant plans for the facilities shown. They did not authorise construction of the buildings. Construction of buildings would require a further application to the council for approval, for which the council would no doubt require plans and specifications at an appropriate level of detail.

599 An appropriate order, I think, would be to the effect that the developers use all reasonable endeavours to within (say) two years: (a) obtain all necessary approvals for the construction of a manager's residence consistently with the plan which is (to become) appendix 2 to the community development contract; and (b) construct the manager's residence in accordance with the approvals. Anything will suffice that is consistent with the general description of a manager's residence in the general location shown in the plan. This is an order to achieve a result, of which Lord Hoffman spoke in ***Co-operative Insurance***. There should be liberty to apply to allow for the possibility of an appropriate application for a ruling on compliance with the order or for extension of the time for compliance.

Sealing access way and carpark

600 I consider it appropriate to make orders to the effect that the original developers:

(a) seal the access way with bitumen, to the extent that it has not already been sealed with bitumen, to the satisfaction of the Traffic Committee of the Council of the Shire of Murray;

(b) seal the carpark with bitumen.

Other matters

601 Apart from the manager's residence and sealing, I accept that damages are an adequate remedy.

602 One of the orders sought by the plaintiffs is an order to "*construct or plant, or effect the development of, shelterbelt planting*". Shelterbelt planting is a landscaping requirement. By-law 4.5.2 of the community management statement states "*the developer is responsible for the landscaping of community property only*". The developers did plant shelterbelt on the community property along the access road. The plants died because they were not watered by the community association. If there remains any breach of a planting obligation, I think that damages are an adequate remedy.

CONCLUSION

603 In summary, in the Supreme Court proceedings I have held that the plaintiffs are entitled to relief to the following effect under s 70 of the Development Act:

(a) conversion into community property of the land shown in **annexure H** hereto, with the possible exception of the public wharf as to which I will hear the parties: see [465], [467] – [468] above;

(b) amendments to the development contracts to provide for annexation of a modified version of **annexure J** hereto and related amendments to the text of the development contracts and community management statement: see [462] – [464], [466] above.

604 In summary, in the Land and Environment Court proceedings I have held that the plaintiffs are entitled to:

(a) orders for specific performance to the effect that the defendants -

(i) seal the access way with bitumen to the satisfaction of the Traffic Committee of the Shire of Murray: see [600] above;

(ii) seal the carpark with bitumen: see [600] above;

(iii) use all reasonable endeavours to obtain all necessary approvals for the construction of a manager's residence consistently with, and in the location shown on, the plan which is to become part of the development contracts (a modified version of **annexure J** to this judgment: see [599] above;

(b) damages for breach of the electricity and telephone provisions of the development contracts in the total sum of $293,962: see [572], [579] and [589] above.

605 There should be liberty to apply in both proceedings.

606 I will hear the parties as to the form of relief and, if not agreed, costs. Subject to hearing the parties, it seems to me that the developers should pay the plaintiffs' costs. The parties are to bring in agreed or competing short minutes of orders in both proceedings to give effect to my decisions.

Annexure A
[<img src="/scjudgments/2008nswsc.nsf/files/2008_NSWSC_876_Annexure_A.jpg/$file/2008_NSWSC_876_Annexure_A.jpg" alt="Annexure A">]
Annexure B
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Annexure G
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Annexure H

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Annexure I