

## Supreme Court New South Wales

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Case Title: Luen Fook Tong Incorporated & Ors v  
Daphne Lowe & Ors

Medium Neutral Citation: [2011] NSWSC 1004

Hearing Date(s): 1, 2 & 3 June 2011

Decision Date: 31 August 2011

Jurisdiction:  
Equity Division

Before: Slattery J

Decision: The first plaintiff's committee of management is presently comprised of the persons elected to that committee on 26 April 2009. The elections for the committee of management held on 1 May 2011 were invalid, as were the elections held on 3 January 2010. Directions given for consequential relief and to facilitate the holding of future elections of the first plaintiff Association.

Catchwords: ASSOCIATIONS AND CLUBS - officers, trustees, servants and committees - association incorporated under Associations Incorporation Act 2009 - whether the Association's present committee of management is a group of persons elected in April 2009 or another group of persons elected in May 2011 - issues of construction as to whether the Association's constitution requires the committee of management elected in 2009 to retire by 31 December 2009 - and whether general meetings called on 3 January 2010 and 1 May 2011 were validly called in accordance with the Association's constitution.

Legislation Cited: Associations Incorporation Act (NSW) 1984  
Associations Incorporation Act (NSW) 2009  
Associations Incorporation Regulation  
(NSW) 2010  
Corporations Act 2001 (Cth), s 1322

Cases Cited: Adamastos Shipping Co Ltd v Anglo-Saxon  
Petroleum Co Ltd [1959] AC 133  
Byrne v Macquarie Group Services Australia  
Pty Ltd [2011] NSWCA 68  
Club Flotilla (Pacific Palms) Ltd v Isherwood  
(1987) 12 ACLR 387  
Daphne Lowe v Australian Chinese  
Community Association of New South  
Wales (No. 2) [2010] NSWSC 1375  
Fitzgerald v Masters (1956) 95 CLR 420  
Goodwin v Vietnam Veterans Motor Cycle  
Club Australia NSW Chapter Inc (2008) 72  
NSWLR 224  
Ford Motor Company of Australia Ltd v  
Arrowcrest Group Pty Ltd [2002] FCA 1156  
Gosford Christian School Ltd v Totonjian  
(2006) 201 FLR 424  
Grant v John Grant & Sons Pty Ltd (1950)  
82 CLR 1  
Investors Compensation Scheme v West  
Bromwich Building Society [1998] 1 WLR  
896  
Maggbury Pty Ltd v Hafele Australia Pty Ltd  
(2001) 210 CLR 181  
McClelland v Burning Palms Surf Life  
Saving Club (2002) 191 ALR 759  
Modern Buildings Wales Ltd v Limmer &  
Trinidad Co Ltd [1975] 1 WLR 1281  
Morris v Kanssen [1946] AC 459  
North Eastern Railway Company v Lord  
Hastings [1900] AC 260  
Puccini Festival Australia Pty Ltd v Nippon  
Express (Australia) Pty Ltd and Anor (2007)  
17 VR 36  
Re Compaction Systems Pty Limited (1976)  
2 NSWLR 477  
Re Consolidated Nickel Mines Ltd [1914] 1  
Ch 883  
Re Zinotty Properties Ltd [1984] All ER 754  
Rose v Boxing NSW Inc [2007] NSWSC 20  
Singh v Commonwealth of Australia (2004)  
222 CLR 322

Singh v Singh; Flora t/as Flora  
Constructions v Budget Demolition and  
Excavation Pty Ltd [2008] NSWSC 386  
Toll (FGCT) Pty Limited v Alphapharm Pty  
Limited (2004) 219 CLR 165

Texts Cited: H.W.Fowler, A Dictionary of Modern English  
Usage, 2nd Edition, Revised by Sir Ernest  
Gowers, Oxford Clarendon, 1968, p 58

Category: Principal judgment

Parties: First Plaintiff- Luen Fook Tong Incorporated  
(Incorporation number: Y2225933)  
Second Plaintiff- Wai Tong Wong  
Third Plaintiff- Huanping Chen  
Fourth Plaintiff- Pei Yi Chen  
Fifth Plaintiff- Jin Xing Huang  
Sixth Plaintiff- Percy Wong  
Seventh Plaintiff- Ping Chiu Wong  
Eighth Plaintiff- Hong Chu Huang  
Ninth Plaintiff- Pei Hua Graham

First Defendant- Daphne Lowe  
Second Defendant- Dimity Ling  
Third Defendant- Wayn Chew  
Fourth Defendant- Cheuk Biu Wong  
Fifth Defendant- William Ling  
Sixth Defendant- Kwun Ng  
Seventh Defendant- Jackson Chan  
Eighth Defendant- Bei Lian Wu

Representation

- Counsel: Plaintiffs- T. Brennan  
Defendants ((First, Third, Fourth, Sixth,  
Seventh, Eighth)- J.D. Smith  
Second and Fifth Defendants- Submitting  
appearances

- Solicitors: Plaintiffs- Angela Lee, Excelsior Lawyers  
Defendants (First, Third, Fourth, Sixth,  
Seventh, Eighth)- Keith Robert Spencer,  
Adams Raves Marsh & Co  
Second and Fifth Defendants- Submitting  
appearances

File number(s): 2011/55972

Publication Restriction: No

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## **Judgment**

### **Introduction**

- 1 Migration to Australia from the Jung Seng district in the southern Chinese province of Guangdong commenced in the 1860's. These early migrants formed a social and cultural association, the Luen Fook Tong. The first plaintiff in these proceedings, Luen Fook Tong Incorporated ("the Association") is the corporate successor of that original nineteenth century community association.
- 2 In 2011 the Association conducts its affairs as a robust democracy; so robust indeed that two groups of members now dispute each other's entitlement to act as the Association's committee of management ("committee") and as its office bearers.
- 3 The Association has itself taken no active role in these proceedings. But the other plaintiffs claim: that on 1 May 2011 the Association's members elected them as its committee members; that they presently constitute the Association's committee; and, that some of them are now the Association's office bearers. The defendants dispute that the plaintiffs were validly elected as the Association's committee and office bearers. Instead they contend that: on 26 April 2009 the members elected them, the defendants, as the Association's committee and office bearers; that they have held those positions ever since; and, that the plaintiffs are no more than usurpers.

- 4 Only one committee and one set of office bearers can run the Association. But this dispute about the governance of the Association cannot be resolved, so the members have asked the Court to intervene. The issues in these proceedings principally concern the impact of the proper construction of the Association's Constitution on the validity of the April 2009 and May 2011 elections and on another election that took place in January 2010, at which the plaintiffs claim that for a period a predecessor of the 2011 committee was elected, the 2010 committee.
- 5 These reasons describe: the group of people that the defendants propound as the Association's validly constituted present committee, originally elected on 26 April 2009, as "the 2009 committee"; the group of people that the plaintiffs propound as the Association's validly constituted present committee, and elected on 1 May 2011, as "the 2011 committee"; and the group of people that the plaintiffs propound as the Association's validly constituted committee between an election on 3 January 2010 and 1 May 2011 as the "2010 committee". For convenience all the active plaintiffs (the plaintiffs other than the Association) will be referred to in these reasons as "the plaintiffs", except where the context indicates otherwise.

### **The Proceedings**

- 6 The issues in the proceedings are joined on an amended statement of claim and a cross claim. In their amended statement of claim the plaintiffs seek declarations, which, if made, would confirm the validity of the appointment of the 2011 committee and its office bearers. The plaintiffs ask the Court to make the following declarations:-

(1) The following individuals are committee members of the Association;

- (a) Wai Tong Wong,
- (b) Huanping Chen,
- (c) Huai Bo Wu,
- (d) Tim Chen,

- (e) Pei Yi Chen,
- (f) Ping Chiu Wong,
- (g) Hong Chi Wong,
- (h) Hong Chu Huang,
- (i) Jin Xing Huang,
- (j) Kay Ing Lee,
- (k) Pei Hua Graham.

(2) The following individuals are duly elected office bearers of the Association;

- (a) Huanping Chen, President
- (b) Wai Tong Wong, Vice President
- (c) Jin Xing Huang, Vice President
- (d) Kevin Wu, Vice President
- (e) Ping Chiu Wong, Secretary.

7 On the first day of the hearing, the defendants were given leave to file their cross-claim. Some orders were made to permit the plaintiffs a degree of procedural latitude to adjust their case to the issues that the defendants raised at this late stage. By their cross-claim, the defendants sought declarations, which if made, would confirm the validity of the appointment and continuation in office of the 2009 committee and its office bearers. The defendants/cross-claimants sought declarations that the following people are members of the Association's committee:-

- (a) Daphne Lowe,
- (b) Dimity Ling,
- (c) Wayn Chew,
- (d) Cheuk Biu Wong,
- (e) William Ling,
- (f) Kwun Day Ng,
- (g) Jackson Chang,
- (h) Bei Lian Wu

8 The defendants/cross-claimants contend: that the Association's committee is comprised of these eight members elected on 26 April 2009; that the plaintiffs (named in the cross claim as the second to ninth cross-defendants) are not members of the Association's committee; and, that the Association has not validly retained the solicitor acting on its behalf in the conduct of these proceedings.

- 9 These proceedings were heard in the expedition list on 1, 2 and 3 June 2011. Mr T. Brennan of counsel appeared for the plaintiffs/cross-defendants including the Association. Mr J.D. Smith of counsel appeared for the defendants/cross-claimants. Counsel and solicitors on both sides conducted the proceedings efficiently to deal with all the matters in issue within the three days allotted for the hearing.

### **The Association**

- 10 The Association was incorporated under a Statement of Objects and Rules of Incorporated Association on 26 March 1995 (incorporation number Y2225933). The members of the Association are still either immigrants or (now more commonly) their descendants, from the district of Jung Seng (sometimes also referred as "Jung Sing") in the Guangdong province of Southern China. A sister association, the Goon Yee Tong serves the similar needs of immigrants from a nearby district in Guangdong province, the Dongguan district.
- 11 In 1899 members of both these associations formed a joint association, the Loong Yee Tong. In 1916 this joint association purchased land in Dixon Street, Haymarket and constructed buildings for the use of the Association and its sister association the Goon Yee Tong. The joint association, the Loong Yee Tong, is the registered proprietor of the Association's clubhouse at 52 Dixon Street, Haymarket and has a committee made up of members from both organisations. The two associations still share clubrooms and office facilities in this Dixon Street building for social activities, the playing of majong, for cultural activities, and for traditional Chinese practices including the celebration of Chinese New Year, the mid-autumn Moon festival and other special festivals to honour ancestors.
- 12 Some of the relationships among the members of these three associations appear to be one source of the tension that now exists between the plaintiffs and the defendants.

13 Consistent with the social and cultural activities in which it is involved, the Association's objectives are declared in its Constitution to be:-

- "(1) To arrange for a reunion of residents in Australia of Jung Sing District in China;
- (2) To encourage mutual assistance amongst membership and their family;
- (3) To encourage, guide and support the future generations of children of the members;
- (4) To offer welfare assistance to any new migrant members settling in Australia;
- (5) To conduct various activities (social, cultural or otherwise) involving its members, other associations, or the public generally, in order to further the above objectives."

The Association's activities maintain connections between their members, and provide some support for them and their families.

### **Two Factions and Three Elections**

14 Three elections at three general meetings have led to the contest between the Association's two competing committees of management. The first relevant election for a new committee was held at what is said to be an annual general meeting of the Association on 26 April 2009. It is common ground that in 2009 there was no annual general meeting of the Association before 26 April. Since then, the elected 2009 committee has met on a regular basis and, subject to the inconvenience of the plaintiffs' intervention, claims that it has administered the Association's affairs. But not all parties accepted the election of the April 2009 committee.

15 In mid 2009 one of the plaintiffs, a member of the Association, Mr Percy Wong, requisitioned the Association in writing to hold a general meeting to consider a resolution to rescind the result of the April 2009 election and to hold another election in its place.

16 The Association's 2009 committee did not convene the meeting that Mr Percy Wong requisitioned, claiming that it had been validly elected and



that there was no valid basis to requisition another meeting. Mr Wong and the other plaintiffs did not accept this answer to their requisition and decided to hold another general meeting without the co-operation of the 2009 committee.

- 17 In October 2009, Mr Percy Wong and an associate, Mr Wai Tong Wong, compiled their own list of candidates for election to the Association's committee of management and sent a letter to the Association's members announcing that there would be an election in December 2009. On 3 January 2010 the plaintiffs went ahead and convened what they claim to be a general meeting of the Association at which an election was also held and a new committee elected, the 2010 committee. After these elections the plaintiffs notified the Department of Fair Trading that the Association's Public Officers were Mr Percy Wong and Mr Wai Tong Wong, both members of the 2010 committee.
- 18 The 2009 committee denies that the 3 January 2010 meeting was properly called and that the January 2010 committee was validly elected. They contend: that the Association itself did not compile the list of nominations for the election of the 2010 committee; that the notice letter the plaintiffs issued did not constitute the Association's own notice of election (but merely a notice from some of the plaintiffs) and that as a result the Association neither convened a general meeting on 3 January 2010, nor held an election.
- 19 Thus, throughout 2010 the Association had two competing committees of management, the 2009 committee and the 2010 committee, each of whom competed in administering its affairs. Some of the unfortunate consequences of this lengthy dual administration will be dealt with later in these reasons, once the issue of which committee was validly elected is resolved.
- 20 In what these reasons now show was a misguided endeavour to bring this unstable situation to an end, in March 2011 the plaintiffs took steps to

requisition a general meeting to consider a resolution to replace the 2010 committee with a new elected committee. On 5 April 2011 Mr Percy Wong sent a notice of a "special general meeting" to what he claims to be all members of the Association. Then on 1 May 2011, a special general meeting was held at which a new committee was elected for the Association, "the 2011 committee", a committee comprised of the members listed in the plaintiffs' second claimed declaration in these proceedings.

- 21 The contest among the parties about the validity or otherwise of the 2009, 2010 and 2011 elections depends upon differing views about the proper construction of the Association's Constitution.

### **The Association's Constitution**

- 22 The Association's Constitution first defines its objects as set out earlier in these reasons. Then it provides in Part II for the nomination of members, for the cessation of membership and for members' rights and liabilities in relation to the Association. Part III the Constitution provides, in rules 12 and 13, for the governance of the Association through its committee of management ("the committee") as follows:-

"Part III The Committee

The Committee Power, etc, of Committee

12. The committee shall be called the committee of management of the Association and, subject to the Act, the Regulation and these rules and to any resolution passed by the Association in general meeting -

- (a) shall control and manage the affairs of the Association;
- (b) may exercise all such functions as may be exercised by the Association other than those functions that are required by these rules to be exercised by general meeting of members of the Association; and
- (c) has power to perform all such acts and do all such things as appear to the committee to be necessary or desirable for the proper management of the affairs of the Association;

(d) the total number of committee members shall not be more than 21.

#### Constitution and Membership

13(1) Subject in the case of the first members of the committee to section 21 of the Act, the committee shall consist of:

- (a) the office-bearers of the Association; and
- (b) not more than 15 ordinary members, each of whom shall be elected at the annual general meeting of the Association pursuant to rule 14.

(2) The officer-bearers of the Association shall be:

- (a) the President;
- (b) the three Vice Presidents;
- (c) the Treasurer; and
- (d) one English and one Chinese Secretary.

(3) Each member of the committee shall, subject to these rules, hold office until the conclusion of the annual general meeting following the date of the member's election but is eligible for re-election.

(4) In the event of a casual vacancy occurring in the membership of the committee, the committee may appoint a member of the Association to fill the vacancy and the member so appointed shall hold office, subject to these rules, until the conclusion of the annual general meeting next following the date of the appointment."

23 The electoral provisions of Part III of the Constitution allow, in rule 14, for the nomination of persons for direct election by members, as either office bearers of the Association, or as ordinary members of the Association's committee.

#### "Election of members

14 (1) Nomination of candidates for election as office-bearers of the Association or as ordinary members of the committee:

- (a) shall be made in writing, signed by 2 members of the Association and accompanied by the written consent of the candidate (which may be endorsed on the Luen Fook Tong Inc's nomination form); and
- (b) shall be delivered to the secretary of the Association not less than 7 days before the date fixed for the holding of the annual general meeting at which the election is to take place.

...

(5) If the number of nominations received exceeds the number of vacancies to be filled, a secret ballot shall be held.

(6) The secret ballot for the election of office-bearers and ordinary members of the committee shall be conducted at the annual

general meeting in such usual and proper manner as the committee may direct."

- 24 Apart from the election of members to the committee, the Constitution Part III also provides in rules 17 and 18 for the filling of casual vacancies and the removal of members of the committee.

#### "Casual Vacancies

17. For the purposes of these rules, a casual vacancy in the office of a member of the committee occurs if the member.

- (a) dies;
- (b) ceases to be a member of the association;
- (c) becomes an insolvent under administration within the meaning of the Corporations Law;
- (d) resigns office by notice in writing given to the Secretary;
- (e) is removed from office under rule 18;
- (f) becomes of unsound mind or a person whose person or estate is liable to be dealt with in any way under the law relating to mental health; or
- (g) is absent without the consent of the committee from all meetings of the committee held during a period of 6 months.

#### Removal of Member

18(1) The Association in a general meeting may by resolution remove any member of the committee from the office of member before the expiration of the member's term of office and may by resolution appoint another person to hold office until the expiration of the term of office of the member so removed.

(2) Where a member of the committee to whom a proposed resolution referred to in clause (1) relates makes representations in writing to the secretary or president (not exceeding a reasonable length) and requests that the representation be notified to the members of the association, the secretary or the president may send a copy of the representations to each member of the association or, if the representations are not so sent, the member is entitled to require that the representations be read out at the meeting at which the resolution is considered."

- 25 Part III also provides for the regular meeting of committees on a monthly basis or at such additional times as convened by the President: Constitution rule 19. And it provides for the delegation of the committee's business from time to time to sub committees: Constitution rule 20.

- 26 Constitution Part IV in rules 22 and 23 controls the Association's calling of, holding of and the business conducted at annual general meetings, and at special general meetings.

"General meetings, annual general meetings - holding of

22(1) With the exception of the first annual general meeting of the Association, the Association shall, at least once in each calendar year and then 6 months after the expiration of each financial year of the Association, convene an annual general meeting of its members.

(2) The Association shall hold its first annual general meeting-

- (a) within 18 months after its incorporation under the Act;
- and
- (b) within the period of 6 months after the expiration of the first financial year of the Association.

(3) Clauses (1) and (2) have effect subject to any extension or permission granted by the Commission under s.26(3) of the Act.

Annual General Meetings - Calling of and Business At

23(1) The annual general meeting of the Association shall, subject to the Act and to rule 22, be convened on such date and at such place and time as the committee thinks fit.

(2) In addition to any other business which may be transacted at an annual general meeting, the business of the annual general meeting shall be-

- (a) to confirm minutes of the last preceding annual general meeting and of any special general meeting held since that meeting;
- (b) to receive from the committee reports upon the activities of the Association during the last preceding financial year;
- (c) to elect office-bearers of the Association and ordinary members of the committee biannually; and
- (d) to receive and consider the statement to which is required to be submitted to members pursuant to section 26(6) of the Act.

(3) An annual general meeting shall be specified as such in the notice convening it."

- 27 A matter in dispute between the parties is whether or not the meetings of the Association's members called by the plaintiffs qualify as special general meetings. The Constitution, rule 24 provides for the calling of special general meetings.

"Special General Meetings - Calling Of

24(1) The committee may, whenever it thinks fit, convene a special general meeting of the Association.

(2) The committee shall, on the requisition in writing of not less than 5% of the total number of members, convene a special general meeting of the Association.

(3) The requisition of members for a special general meeting:

(a) shall state the purpose or purposes of the meeting;

(b) shall be signed by the members making the requisitions;

(c) shall be lodged with the secretary; and

(d) may consist of several documents in a similar form, each signed by one or more of the members making the requisition.

(4) If the committee fails to convene a special general meeting to be held within 1 month after the date on which a requisition of members for the meeting is lodged with the Secretary, any one or more of the members who made the requisition may convene a special general meeting to be held not later than 3 months after that date.

(5) A special general meeting convened by a member or members as referred to in clause (4) shall be convened as nearly as is practicable in the same manner as general meetings are convened by the committee and any member who thereby incurs expense is entitled to be reimbursed by the Association for any expense so incurred."

- 28 Notice for the holding of general meetings, other than meetings where special resolutions are to be passed, is provided for by Constitution Part III, rule 25, which requires written notice of such meetings to all members:-

"Notice

25(1) Except where the nature of the business proposed to be dealt with at a general meeting requires a special resolution of the Association, the Secretary shall, at least 14 days before the date fixed for the holding of the general meeting, cause to be sent by prepaid post to each member at the member's address appearing in the register of members, a notice specifying the place, date and time of the meeting and the nature of the business proposed to be transacted at the meeting.

(2) Where the nature of the business proposed to be dealt with at a general meeting requires a special resolution of the association, the secretary shall, at least 21 days before the date fixed for the holding of the general meeting, cause notice to be sent to each member in the manner provided in clause (1) specifying, in addition to the matter required under clause (1), the intention to propose the resolution as a special resolution.

(3) No business other than that specified in the notice convening a general meeting shall be transacted at the meeting except, in the case of an annual general meeting, business which may be transacted pursuant to rule 23(2).

(4) A member desiring to bring any business before a general meeting may give notice in writing of that business to the secretary, who shall include that business in the next notice calling a general meeting given after receipt of the notice from the member."

- 29 The Association's Constitution in rules 26 to 32 provides for the procedure at general meetings. A quorum of eleven members is required for the transaction of business: Constitution rule 26. The President, or in the President's absence the Vice President, presides at each general meeting of the Association or if they are both "absent from a general meeting or are unwilling to act" the members present may elect someone to preside: Constitution rule 27. Questions arising at the general meeting are determined on a show of hands unless a poll is demanded: Constitution rule 29. Special resolutions of the Association are passed by a majority of not less than three quarters of the members of the Association and the requisite notice of intention to propose the resolution in question as a special resolution has been given: Constitution rule 30. Each member has one vote and is entitled to appoint another member as a proxy by notice given to the Secretary not less than 24 hours prior to the meeting in respect of which the proxy is appointed: Constitution rules 31 and 32.
- 30 Part V of the Constitution provides for miscellaneous aspects of the Association's management including insurance (rule 33), for the deposit of all monies received by the Association to the credit of the Association's bank account as soon as practicable after receipt and without deduction (rule 34(2)), and for the management and application of the Association's funds (rule 35).

### **Relevant Legislation**

- 31 The *Associations Incorporation Act 2009* (NSW) ("*the 2009 Act*"), which came into force on 1 July 2010 now governs the affairs of the Association.

The Association was incorporated in 1995 under that Act's predecessor, the *Associations Incorporation Act 1984* (NSW) (" *the 1984 Act* "), which was therefore in operation at the time of the election of the 2009 committee and the 2010 committee, but not the 2011 committee.

32 The rules of an incorporated association constitute contracts among its members and between the Association and its members, which contractual relationship makes the present dispute justiciable: *2009 Act* , s 26(1); and see *McClelland v Burning Palms Surf Life Saving Club* (2002) 191 ALR 759 at 788; [2002] NSWSC 470 at [109], Campbell J (as his Honour then was); *Rose v Boxing NSW Inc* [2007] NSWSC 20 at [57] Brereton J; and, *Goodwin v Vietnam Veterans Motor Cycle Club Australia NSW Chapter Inc* (2008) 72 NSWLR 224, White J; [2008] NSWSC 154 at [30]-[38].

33 Other provisions of the *2009 Act* are relevant to the present application. The plaintiffs found part of their argument for the validity of the acts of the 2010 committee upon an alleged defect in the Association's Constitution, which the plaintiffs contend must be filled by the provisions of the model constitution provided for in the *2009 Act* , Schedule 1. The relationship under the *2009 Act* between an association's constitution and the model rules is provided for in s 25:-

"25 Provisions of model constitution to apply if appropriate provision not otherwise made

(1) If an association's constitution fails to address a matter referred to in Schedule 1, the provisions of the model constitution with respect to the matter are taken to form part of the association's constitution.

(2) For avoidance of doubt, an association's constitution may address a matter referred to in Schedule 1:

(a) by adopting the provisions of the model constitution with respect to the matter, or

(b) by adopting a modified version of the provisions of the model constitution with respect to the matter.

(3) Subsection (2) does not limit the way in which an association's constitution may otherwise address a matter referred to in Schedule 1.



(4) A provision of an association's constitution is of no effect to the extent to which it is contrary to this or any other Act or law."

- 34 The *2009 Act* sets minimum requirements for the management of associations by their committees: *2009 Act* , Part 4 - Management of associations, Division 1 - committee members:-

"28 Committee to be established

(1) An association must establish a committee to manage its affairs.

Note. *An association's registration is liable to be cancelled if it does not comply with this subsection.*

(2) The committee must include 3 or more members, each of whom is aged 18 years or more and at least 3 of whom are ordinarily resident in Australia.

Note. *An association's registration is liable to be cancelled if its committee does not comply with this subsection.*

(3) The committee may exercise such of the association's powers as are not required by this Act or its constitution to be exercised by the association in general meeting.

(4) A committee member's acts are valid despite any defect in his or her appointment.

(5) Within 14 days after vacating office, a former committee member of an association must ensure that all documents in his or her possession that belong to the association are delivered to the public officer for delivery to his or her successor."

- 35 The *2009 Act* , Part 4-Division 1 also provides for the keeping of a register of committee members, the holding of committee meetings, as the Association's Constitution requires, and the disclosure of the conflicting interests of committee members: *2009 Act* , ss 28, 29, 30 and 31.

- 36 The *2009 Act* also defines the important position within the Association of public officer: *2009 Act* , Part 4, Division 2 - Public Officer and Authorised Signatories. An issue arises in these proceedings as to who held the position of public officer of the Association from time to time. The Association's committee must appoint its public officer; the position of public officer may, but need not be, held by a committee member; and the public officer's acts are valid despite any defect in his or her appointment: *2009 Act* , s 34. Vacation of the office of the public officer is provided for in *2009 Act* , s 35 as follows:-

"35 Vacation of office of public officer

(1) An association's public officer vacates office in the following circumstances:

- (a) if he or she dies,
- (b) if he or she resigns the office in writing addressed to the association's committee,
- (c) if he or she is removed from office by resolution of a general meeting of the association,
- (d) if he or she becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with his or her creditors or makes an assignment of his or her remuneration for their benefit,
- (e) if he or she becomes a mentally incapacitated person,
- (f) if he or she ceases to ordinarily reside in New South Wales,
- (g) in such other circumstances as the constitution of the association may provide.

(2) Within 14 days after vacating office, a former public officer of an association must ensure that all documents in his or her possession that belong to the association are delivered to a committee member of the association.

Maximum penalty: 1 penalty unit.

(3) An association's committee must fill any vacancy in the office of public officer within 28 days after the vacancy arises."

37 An Association's public officer has a special role as an authorised signatory on behalf of the Association by virtue of holding that office; and, the Association may appoint or revoke the appointment of other authorised signatories from time to time who must be other committee members:  
*2009 Act* , s 36.

38 The parties are at issue about whether the Association's 2009 and 2010 annual general meetings should by now already have been held or whether applications should have been made to extend the date for the holding of those meetings. The timing of the holding of general meetings is provided for in the *2009 Act* , s 37 as follows:-

"37 General meetings

(1) An association's committee must ensure that the association's first annual general meeting is held within 18 months after its registration under this Act.

Maximum penalty: 1 penalty unit.

(2) An association's committee must ensure that annual general meetings are held:

(a) within 6 months after the close of the association's financial year, or

(b) within such further time as may be allowed by the Director-General or prescribed by the regulations.

Maximum penalty: 1 penalty unit.

(3) If the association's constitution so provides, a general meeting may be held at 2 or more venues using any technology that gives each of the association's members a reasonable opportunity to participate.

(4) In any legal proceedings, a general meeting held in accordance with subsection (3), or part of such a meeting, is not to be declared invalid on the ground that one or more of the association's members did not have a reasonable opportunity to participate unless the court is satisfied that:

(a) substantial injustice has been, or may be, caused, and

(b) the injustice cannot be remedied by any other order available to the court."

- 39 The parties also put competing submissions about the relationship between the *1984 Act* and the *2009 Act*. The *2009 Act*, Schedule 4 provides for savings, transitional and other provisions governing the transition of associations incorporated under the *1984 Act* to the control of the *2009 Act*. Schedule 4 authorises the making of regulations of a savings or transitional nature consequent upon the enactment of the *2009 Act*: Schedule 4, Part 1, clause 1. Associations that were formerly registered under the *1984 Act* are taken to have been registered under the *2009 Act*; the rules of associations incorporated under the *1984 Act* are taken to be its constitution under the *2009 Act*; and, to the extent that a former association adopted the model rules established under the *1984 Act*, and until it changes its rules under the *2009 Act*, those model rules continue in force in relation to that association: *2009 Act*, Schedule 4, Part 2, clauses 1 and 2. Otherwise the transitional provisions of Schedule 4 provide a general saving for anything begun under the *1984 Act* which has a corresponding provision of the *2009 Act*: Schedule 4, clause 11.
- 40 With this factual and legislative background I now turn to the questions for decision.

## **The Questions for Decision.**

41 The plaintiffs maintain that the 2010 and 2011 committees were both elected through valid electoral processes authorised by the Constitution. It is not strictly necessary for the plaintiff's case, which seeks to uphold the 2011 committee as the current committee of the Association, to maintain the validity of the election of the 2010 committee. But common issues arise in the proceedings concerning the election of the 2010 committee and the 2011 committee. Also to give complete consequential relief concerning the past administration of the Association it is necessary for the Court to decide whether the 2010 committee was validly elected.

42 The defendants maintain that they are still members of the 2009 committee, which continues in office under the Association's Constitution and that there is no basis for the election of either of the 2010 or the 2011 committees.

43 These issues raise questions for the Court's determination in the following order.

(a) Was the April 2009 committee of the Association validly elected at a General Meeting?

(b) Did the April 2009 committee continue in office after 31 December 2009?

(c) When does any committee of the Association validly holding office cease to hold office?

(d) Was it necessary to hold a general meeting in January 2010 meeting and was the January 2010 committee validly elected?

(e) Was the May 2011 election at the May general meeting valid?

44 After these questions are determined it will be necessary to consider or give directions for the grant of any necessary consequential relief to ensure that the affairs of the Association are conducted in the future according to law.

***(a) Was the April 2009 committee of the Association validly elected at a General Meeting?***

45 *The Original 2009 Committee.* The plaintiffs at first contended that the 2009 committee was not elected at a general meeting of the Association on 26 April 2009. But later in the hearing they acknowledged that the 2009 committee was validly elected at that meeting, which was also conceded to be a general meeting. Thus it is no longer necessary to analyse the grounds of the plaintiffs' challenge to the election of the 2009 committee.

46 The plaintiffs' concession on this issue was rightly made. Constitution rule 13(1) provides that committee members "shall be elected at the annual general meeting of the Association pursuant to rule 14" and Constitution rule 14(6) provides that "The secret ballot for the election of office bearers and ordinary members of the committee shall be conducted at the annual general meeting". A way to hold an election of committee members under the Association's Constitution is at an annual general meeting. The Notices of the Meeting confirm that the Association was purporting to call an annual general meeting on 26 April 2009 at which an election was to be held. The defendants undoubtedly were elected at the 26 April 2009 meeting, which was an annual general meeting.

47 *Personnel Changes Since 2009.* There have been changes to the personnel on the 2009 committee in the more than two years since the April 2009 meeting. Some members of the original committee have resigned, some have failed to attend meetings and their positions have fallen vacant under Constitution rule 17 - Casual Vacancies, and some still continue to serve on the 2009 committee. The parties dispute the effect of

these changes. The evidence and my findings about the current membership of the 2009 committee follow.

48 I agree with the plaintiffs' evidence that the following persons are still currently members of the committee elected in 2009: Ms Kit Gin Lowe; Ms Daphne Lowe; Mr Bai Lian Woo; Ms Kwun Day Ng; Mr Yan Kun Chan; Mr Cheuk Biu Wong and Mr Wayn Chew. The following persons, who are respectively plaintiffs and defendants underwent the following changes from the committee. The list here shows they are either current or their position is vacant for an identified reason.

- (a) Chan Poy Yee - President - Resigned as president;
- (b) Daphne Lowe - English Secretary - Replacement president - current;
- (c) Ng Bei Lian - Vice President - current
- (d) Huang Hong Chu - Vice President - vacant - failed to attend;
- (d) Wong Cheuk Biu - Treasurer - current;
- (e) Chan Foon Ping - Ordinary member - vacant - failed to attend;
- (f) Chan Sak Tim - Ordinary member - resigned 14.6.09 - replaced by Wayn Chew;
- (g) Li Gar Ying - Ordinary member - vacant - failed to attend;
- (h) Lowe Geek Yin - Ordinary member - current;
- (i) Ng Kwun Day - Ordinary member - current;
- (j) Shen Yang Kun - Ordinary member - current;
- (k) Wong Cheong (Percy Wong) - Ordinary member - vacant - failed to attend;
- (l) Wong Gun Hing - Ordinary member - vacant - failed to attend;
- (m) Wayn Chew - Ordinary member - Appointed 14.6.09 to replace Chan Sak Tim - current.

***(b) Did the 2009 Committee continue in office after 31 December 2009?***

49 The plaintiffs submit that once elected on 26 April 2009: that the members of the 2009 committee held office for a term, expiring at the next annual general meeting; and, that the Association's Constitution required that next annual general meeting to be held within the same calendar year, by 31

December 2009. But, the plaintiffs say, it was not held by that date, and as a result, the positions of the 2009 committee became automatically vacant on 31 December 2009. In answer the defendants say that the members of the 2009 committee who have not resigned or vacated their positions are still in office, because the Constitution permits their continuation in office after 31 December 2009.

50 *The Plaintiff's Argument* . The plaintiffs submit that the result for which they contend flows from the combined operation of Constitution rules 13(3), 22(1) and 23(2)(c) and the general law. The plaintiffs' argument follows. Rule 13(3) provides that "each member of the committee shall, subject to these rules, hold office until the conclusion of the annual general meeting following the date of the member's election...". Rule 22(1) requires that the Association "shall, at least once in each calendar year and within 6 months of the expiration of each financial year of the association, convene an annual general meeting of its members". And rule 23(2)(c) requires that "the business of an annual general meeting" shall be "(c) to elect office bearers of the association and ordinary members of the committee *biannually* ." (emphasis added). The plaintiffs say: that the ordinary dictionary meaning of the word "biannually" is "twice a year", so rule 23(2)(c) requires the election of the Association's office bearers and committee twice in each year; as the 26 April annual general meeting was only the first annual general meeting in 2009, another annual general meeting was required by the end of that year; rule 22 requires that the second annual general meeting must take place within 6 months of the end of the Association's financial year, which ended on 30 June 2009; as no annual general meeting took place before 31 December 2009, the last day on which it could be held, based on cases such as *Singh v Singh* [2008] NSWSC 386, rule 13 requires the office of the committee members to fall vacant on 31 December 2009.

51 The plaintiffs further submit that upon acceptance of their argument, giving "biannually" its ordinary meaning, the Association's meeting and electoral processes work as follows: that at each annual general meeting an

election is held for a committee to hold office until the conclusion of the next annual general meeting (rule 13(3)); a committee elected at an annual general meeting in the *first* six months of the calendar year holds office until the earlier of the annual general meeting held in the *second* half of the same year or 31 December that year (rule 22(1)); a committee elected in the second six months of the calendar year holds office until the end of the next annual general meeting, which, to use the plaintiffs' words, "it should convene about 6 months after an election", or if no such annual general meeting is convened by the committee, then the committee holds office until 31 December in the following year (rule 22(1)).

52 The plaintiffs point out that not adopting their construction leads to what they submit are absurd results. For example they put that if their construction of the Constitution were not accepted that rule 23(2)(c) would not itself apply to every annual general meeting but anomalously only to every second annual general meeting.

53 Moreover to those who say that holding committee elections for the Association every six months would be too burdensome, the plaintiffs reply there is no reason to think that the incorporators of the Association sought less frequent than annual accountability to members through election; that it may be that they wanted more frequent accountability; and, that was the reason for the addition of the word "biannually". They say there is nothing inherently more or less practical in a requirement that there be an annual general meeting every six months than a requirement that it be every two years.

54 *Background.* The Association's rules are adopted from the Model Rules provided for under the *1984 Act* with a single notable addition, the word "biannually" at the end of rule 23(2)(c) after the words "(c) to elect office-bearers of the association and ordinary members of the committee".

55 When the Constitution is construed as a whole the addition of the word "biannual" rather than "biennial" seems to be an obvious drafting error.



The Macquarie Dictionary defines "biannually" as "occurring twice a year". "Biennially" is defined as "happening every two years". Confusion between the two words is commonplace. They look and sound similar. The draftsman of the 1995 Constitution appears to have encountered a not uncommon problem in the English language, occasioned by the use of the prefix "bi", which problem the authors of *Fowler's Modern English Usage* (H.W.Fowler, A Dictionary of Modern English Usage, 2nd Edition, Revised by Sir Ernest Gowers, Oxford Clarendon, 1968, p 58) long ago explained thus:-

" **bi** - prefixed to English words of time ( *bi-hourly, bi-weekly, bi-monthly, bi-quarterly, bi-yearly* ) gives words that have no merits and two faults: they are unsightly hybrids, and they are ambiguous. To judge from the OED, the first means only two-hourly; the second and third mean both two-weekly, two-monthly, and half-weekly, half-monthly; and the last two mean only half-quarterly, half-yearly. Under these desperate circumstances we can never know where we are. If it were not for *bicentenary* , which lacks a vernacular equivalent, there would be no reason why all the *bi-* hybrids should not be allowed to perish, and the natural and unambiguous *two-hourly* and *half-hourly* , *fortnightly* and *half-weekly* , *two-monthly* and *half-monthly* , *half-yearly* and *half-quarterly* , *two-yearly* and *half-yearly* , of which several are already common, be used regularly in place of them and the words ( *biennial, bimestrial* ) on which they were fashioned; these latter have now almost become ambiguous themselves from the ambiguity of the misshapen brood sprung of them. They cause confusion in the most surprising places. *An annual bulletin is our first aim; but biennial issues may become possible if the Association enlarges as we hope.* (From a bulletin issued by the International Association of University Professors of English.) *Biannual*, probably invented to stand to *biennial* as *half-yearly* to *two-yearly* , is sometimes confused with and sometimes distinguished from it. *Half-yearly* is the right word."

- 56 *Analysis.* There are many difficulties with the plaintiffs' argument. The defendants' response to it is persuasive. In my view the proper construction of Constitution rule 23(1)(c) is to read "biannual" as "biennial". So read, the clause makes sense in its context with the other provisions of the Constitution. Reading the rule as the plaintiffs' suggest, causes inconsistency with these other provisions. Context is important and a dictionary definition is not definitive on its own of the meaning of a term:

*Singh v Commonwealth of Australia* (2004) 222 CLR 322 at [12]. The plaintiffs' argument fails for the following reasons.

- 57 First, there are many indicators in the Constitution that the Association must hold one not two annual general meetings per year. These start with Constitution rules 22 and 23, which allow for the convening of general meetings described as " *annual* general meetings", predicting an event that occurs on a yearly not on a half yearly cycle.
- 58 Secondly, Constitution rule 23, which is said to be the source of the obligation to hold half yearly elections, declares itself to be "subject to the Act [now read as the *2009 Act* ] and to rule 22". But rule 22 clearly prescribes yearly not half yearly annual general meetings. It does allow for the possibility of more than one annual general meeting being held in a calendar year, "at least once in each calendar year". But this language is permissive, allowing for the practical possibility of an extra annual general meeting within a single calendar year, if required. But rule 22 does not require two such general meetings every calendar year. It would be odd for the subsidiary provision, rule 23, to be the source of an obligation to hold half yearly meetings of the Association's members, when the dominant provision, rule 22, allows yearly meetings.
- 59 Thirdly, reading rule 23(2) as the source of an obligation to hold half yearly general meetings misapprehends its subject matter. Rule 23(2) is about the business conducted at meetings. The rule merely mandates that in addition to the optional business at the meeting, that "the business of an annual general meeting shall be" the identified subject matters, one of which is the election of office bearers and committee members biannually. Rule 23(2) is concerned with the content of meetings, not how frequently the meetings occur. Rule 23(2)(c) is concerned to regulate how frequently a particular subject matter of a general meeting will recur, namely the holding of management elections, within a framework of meeting frequency that is otherwise set by rules 22(1) and 23(1). Rule 23 (2) is not

a source of power to increase the frequency of general meetings. Rather, biannually should be construed to mean happening every two years.

60 Fourthly, if rule 23(2)(c) is read so as to increase annual general meeting frequency it would create far more chaos than the plaintiffs' argument presently acknowledges, especially through the operation of rules 22 and 23. Two examples will suffice. First, rule 23(2) requires the business of an annual general meeting to include the receipt and consideration of the statement "which is required to be submitted to members pursuant to section 26(6) of the Act". That is a reference to the financial statements that the *1984 Act* required (and *2009 Act*, ss 43 and 47 now requires) the committee to produce, giving a true and fair view of, "the income and expenditure of the association during its last financial year". It would be absurd to require an Association to produce annual statements every six months but that is what would have to happen if an annual general meeting were held that often. Second, on the plaintiffs' construction it is curious that one (of the two) annual meetings in a calendar year must be held by 31 December, "within six months after the expiration of each financial year of the association". But the other one has to be held in the same six months in order to comply with rule 22. And there is no requirement for the two meetings to be held, if they are to be useful, about six months apart if the plaintiffs' construction were accepted.

61 Fifthly, there is an answer to the difficulties of construction that the plaintiffs' say arise from treating "biennially" as meaning, "happening every two years". The plaintiffs point to the tension between: (1) rule 13(3), which provides that a committee member holds office "until the annual general meeting following the date of the member's election but is eligible for re-election"; and, (2) a construction of rule 23(2)(c) that requires committee elections to be held once every two years. How can a committee member be required to hold office until the next annual general meeting (and be eligible for re-election) at which meeting no election can be held? The answer to this problem is that the holding of office under rule 13(3), until the "conclusion of the annual general meeting following the date of the

member's election" applies to a committee member "subject to these rules". The operation of rule 13(3) is subordinated to that of rule 23(2)(c), which prevents the holding of an election for office bearers and committee other than every second year. But rule 13(3) also contemplates that the committee member will hold office until a meeting when the member "is eligible for re-election". The tension between rule 13(3) and the defendants construction of 23(2)(c) is resolved by construing "annual general meeting" in rule 13(3) as referring to an annual general meeting at which an election can be held as commanded by rule 23(2)(c). This construction gives proper effect to the dominance of rule 23(2) and avoids a construction that would have the Constitution creating an unfillable temporal gap between the end of a committee member's term of office and the committee member's eligibility for re-election.

- 62 As the defendants submit, this is a matter of construction and does not constitute rectification of the contract as the plaintiffs submit it is. See, for example, *Fitzgerald v Masters* (1956) 95 CLR 420, where the High Court (Dixon CJ and Fullager J) held that "Words may generally be supplied, omitted or corrected, in an instrument, where it is clearly necessary in order to avoid any absurdity or inconsistency". In my view reading "annual general meeting" in rule 13(3) as referring to an annual general meeting at which an election is held required to be held under rule 23(2)(c), and "biannual" as "biennial", can perhaps be seen as an instance of the application of the principle of construction *falsa demonstratio non nocet cum de corpore constat*, which loosely translated means that a wrong description does not vitiate a document if the intent is clear from the whole body of the document: see *Puccini Festival Australia Pty Ltd v Nippon Express (Australia) Pty Ltd and Anor* (2007) 17 VR 36, Cavanough J; *Ford Motor Company of Australia Ltd v Arrowcrest Group Pty Ltd* (2002) FCA 1156, Finkelstein J, *Modern Buildings Wales Ltd v Limmer & Trinidad Co Ltd* [1975] 1 WLR 1281, at 1288 per Buckley LJ and *Adamastos Shipping Co Ltd v Anglo-Saxon Petroleum Co Ltd* [1959] AC 133. In *Arrowcrest* Finkelstein J applied the maxim (at [27]) in order to disregard "what is inaccurate and inapplicable and [proceed] upon that which is appropriate

and intelligible and what are evidently intended to be the governing words".

63 *Past Practice.* The defendants sought in submissions to support their position from evidence of the Association's past practice. Ms Daphne Lowe gave evidence, which I accept, that since the incorporated Association's inception in 1995, the Association's elections had in fact been held every second year, with the result that the 2009 Committee is in fact known as "the Tenth Committee", it being only the tenth committee to be elected since 1995. I infer from this evidence that in past years the practice of the Association has been to hold elections for the Association's committee and office bearers only every two years. This practice appears to provide the Association with the stability and continuity. This material cannot be used as an aid to construction: *Byrne v Macquarie Group Services Australia Pty Limited* [2011] NSWCA 68 at [40] and *Toll (FGCT) Pty Limited v Alphapharm Pty Limited* [2004] HCA 52; 219 CLR 165 at 179 - 181 [40] - [46]. But it shows that past committees of the Association have interpreted the Association's Constitution the way the Court has now shown to be correct.

***(c) When does any committee of the Association validly holding office cease to hold office?***

64 The defendants submit that the 2009 committee holds office until the Association holds an annual general meeting by the end of 2011. I agree with that submission. The 2009 committee will hold office for at least for that long. This follows from my reasoning in answer to question (b). Construing Constitution rules 13(3), 22(1) and 23(2)(c) as I have concluded, an election for a new committee must be held at an annual general meeting no later than 31 December 2011, two calendar years after the election of the committee in 2009. There is ample time to call such a meeting.

- 65 But I do not have to decide whether the committee will hold office after 31 December 2011. Part of the plaintiffs' principal argument on question (b) was that the 2009 committee automatically lost office on 31 December 2009 because that is the last day on which the annual general meeting re-electing them could have been held. The plaintiffs relied on *Singh v Singh; Flora t/as Flora Constructions v Budget Demolition and Excavation Pty Ltd* [2008] NSWSC 386, to argue that the 2009 committee automatically vacated office on 31 December 2009. In that case Barrett J held, "office holders are taken to have vacated office on the last day on which the annual general meeting could have been held; and it makes no difference that no meeting was in fact held" (at [70]).
- 66 But were I called on to decide the merits of the plaintiffs' argument on question (b) on the basis of whether the 2009 committee vacated office through the operation of rule 13(3), I would also have found for the defendants. The defendants argued then that the Association's rules are distinguishable from those of the association in *Singh*. They distinguish *Singh* on the basis that rule 13(3) does not require the members of the committee to retire as does the equivalent provision in *Singh* (at [66]). In such circumstances directors do not automatically vacate office upon the last day an annual general meeting re-electing them could have been held: *Gosford Christian School Ltd v Totonjian* (2006) 201 FLR 424 at [16], [37] and [38], *Re Consolidated Nickel Mines Ltd* [1914] 1 Ch 883 at 888.
- 67 Thus, if the Association's Constitution had required the 2009 committee to face re-election before 31 December 2009, I would not have held they had vacated office because such an election was not held, because there is no compulsory retirement wording in rule 13(3). A similar issue will arise if an annual general meeting is not held before the end of this year.

***(d) Was it necessary to hold a General meeting in January 2010 meeting and was the January 2010 committee validly elected?***

- 68 The plaintiffs submit that it was necessary to call a general meeting to elect a fresh committee of the Association in about January 2010, even if "biannual" in rule 23(2)(c) is construed to mean "biennial", or once every two years. The plaintiffs appear to put this argument two ways: (1) that a special general meeting should have been held in 2010; and, (2) that an annual general meeting should have been held.
- 69 *Requisition of a Special General Meeting.* First, the plaintiffs say they sent to the 2009 committee a valid requisition for a special general meeting and that the 2009 committee failed to convene the requisitioned meeting. The plaintiffs say that under Constitution rule 24(4) such failure permits Mr Percy Wong, one of the persons who requisitioned the meeting, and the public officer, to convene a general meeting of the Association. Rule 24(4) is the authority he claims for convening the special general meeting on 3 January 2010 at which the plaintiffs say the 2010 Committee was elected.
- 70 The defendants dispute these contentions and submit: that Mr Percy Wong had no authority under the Constitution to call the meeting of 3 January 2010; that the requisition for a special general meeting that he made on 12 June 2009 expired on 12 September 2009 (because Constitution rule 24(5) provides the meeting requisitioned is "to be convened no later than 3 months after that date"); and, that therefore any resolution passed on 3 January 2010 cannot claim validity under rule 24, and therefore the meeting did not have authority to elect a committee under rule 13(1).
- 71 But I accept the defendants' argument that rule 24(4) required Mr Percy Wong to convene the special general meeting he requisitioned by lodgement with the secretary on 12 June 2009 by 12 September 2009. The 2009 committee did not convene a special general meeting "1 month after the date on which a requisition of members is lodged with the secretary". Rule 24(4) authorised Mr Wong, or any of the other members requisitioning, to convene a special general meeting "to be held not less than 3 months after that date", namely the date one month after the requisition is *lodged* with the secretary. In this case that would be 12 June

2009. Mr Percy Wong did not convene a meeting within that further three months period which expired on 12 September 2009 and did not hold any such meeting until 3 January 2010. None of this changed in my view because of any conduct of Ms Daphne Lowe in failing to attend committee meetings in December 2009, as is alleged by the plaintiffs.

72 *A 2010 Annual General Meeting.* Secondly, leaving aside the June 2009 requisition of a special general meeting, the plaintiffs also submit that the defendants should have held an annual general meeting of the Association in 2010 prior to 31 December 2010 and that an election of the committee should have been held at that annual general meeting. The Plaintiffs contend that Constitution rule 22(1), which requires the Association to convene an annual general meeting, "at least once in each calendar year" compels this conclusion. Rule 22(1) states "the Association shall, at least once in each calendar year and then six months after the expiration of each financial year of the association convene an annual general meeting of its members". The plaintiffs submit that this rule should be construed so that an annual general meeting must be held before 31 December each calendar year, because the Association's financial year ends on 30 June each calendar year. Both sides accept that the Association's financial year does end on 30 June.

73 I agree with this part of the plaintiffs' analysis. It was necessary for the Association to hold an annual general meeting in 2010 and it has not done so. But the flaw in the plaintiffs' argument is that it was not necessary to elect a committee for the Association at such a meeting either in late 2009 or at any time during 2010. The 2009 committee continued in office and the Constitution did not require it to be replaced by election. The effect of Constitution rule 23(2)(c) is that, were an annual general meeting to have been held prior to 31 December 2010, that the Association need not have held an election for the committee at such a meeting. Rule 23(2) mandated that "business of an annual general meeting shall be" the various sub-rule 23(2)(a), (b) and (d) matters, not the rule 23(2)(c) matter of a committee election, which is only required every two years.



74 *Holding the 2010 Annual General Meeting.* The Association, under the management of the 2009 committee, can lodge an application to extend time to hold an annual general meeting for 2010 pursuant to Constitution rule 22(3). The reference in rule 22(3) to section 26(3) of the *1984 Act* should be treated as a reference to the *2009 Act*, s 37(2)(b) to the extent that an application for extension is still required: *2009 Act*, Schedule 4, Part 2, clause 10.

75 But evidence, which I accept, shows that Ms Daphne Lowe made an application to extend time for the holding of an annual general meeting on 28 December 2009 to the Director General of the Department of fair Trading, which extension I find was given on 11 January 2010. Even if there were a defect in the application for an extension it would not result in the 2009 committee ceasing to hold office as the Association's committee. Any defect can be corrected by the Court under *Corporations Act*, s 1322(4).

***(e) Was the May 2011 election at the May General Meeting valid?***

76 The plaintiffs submit that they sent the Association another valid requisition for a special general meeting at the end of March 2011. But this time, the 2010 committee's members, who were still discharging committee functions, acted in response to the requisitions and called a special general meeting. The plaintiffs say that this action was effective as the 2010 committee were de facto committee members, who should be treated as committee members whether or not they were validly appointed.

77 The plaintiffs put their argument for the validity of the May 2011 election in the following ways.

(a) They were de facto committee members with sufficient authority as such to call the 1 May 2011 general meeting.

(b) The plaintiffs' acts in calling the May 2011 meeting may be validated by the *2009 Act*, s 28(4).

(c) The Association's public officers, Mr Wai Tong and/or Mr Percy Wong had authority to convene the May 2011 meeting.

(d) That the *2009 Act*, s 25(4) allows the May 2011 meeting to be convened.

78 But the defendants' response to these submissions is persuasive. The defendants submit that people who were not members of the Association's only validly elected committee, the 2009 committee, called the 1 May 2011 meeting without authority. These reasons deal with each of the plaintiffs' arguments in turn.

79 The principal difficulty that all the plaintiffs' arguments about the 1 May 2011 meeting seek to overcome is that members of an association can only act through a duly convened meeting or through the concerted action of all of them: *Singh v Singh* [2008] NSWSC 386 at [132] citing *Re Compaction Systems Pty Limited* (1976) 2 NSWLR 477 at 484. The 1 May 2011 meeting was not called by what I have found to be the validly elected committee of the Association, the 2009 committee. Constitution, rule 23(1) requires the annual general meeting to be convened "as the committee thinks fit". The meeting on 1 May 2011 cannot be considered a Special General Meeting under rule 24(1) and (2) for the same reason. An individual member may be able to call a special general meeting under rule 24(4) but that is not satisfied here with respect to the 1 May meeting because no requisition for such a meeting was given to the secretary, Ms Lowe.

80 (a) *A De Facto Committee*. The plaintiffs argue that the 2010 committee has authority as a *de facto* committee to convene the meeting on 1 May 2011. They point out that *1984 Act*, s 3 defined "officer" as including a person occupying or acting in the position of a member of the committee, public officer, secretary, treasurer, executive officer or employee, whether

or not validly appointed to occupy or duly authorised to act in the position. The plaintiffs argue that this definition still applies to the Association's Constitution through the transitional provisions in the *2009 Act*, Schedule 4, clause 4, that provides that the rules of an association made under the *1984 Act* "are taken to be its Constitution under this Act" and until changed "are taken to comply with this Act".

- 81 I agree with the defendants' argument that the *2009 Act* does not provide at all for de facto committee members despite the 1984 Act definition of "officers". The *2009 Act* merely defines "committee member" in s 4 as someone who is elected or appointed under the association's constitution. The *1984 Act* does not apply to give effect to de facto appointments under the rules of an association. The *2009 Act*, Schedule 4 does not state that the *1984 Act* continues to apply to associations incorporated under the *1984 Act*. Rather it says that the *2009 Act* applies to an association's rules.
- 82 The plaintiffs also seek to rely on the principle they say is stated in *Singh v Singh; Flora t/as Flora Constructions v Budget Demolition and Excavation Pty Ltd* [2008] NSWSC 386 that a member may requisition a meeting, as if he were acting as secretary, although not validly appointed to that position (at [123]). But Barrett J did not accept that argument in that case.
- 83 (b) *The 2009 Act*, s 28(4). The plaintiffs also argue that the *2009 Act*, s 28(4) is available to validate their calling of the 1 May 2011 meeting. The *2009 Act*, s 28(4) provides that "a committee member's acts are valid despite any defect in his or her appointment". The plaintiff's submit that the definition of "appointment" is broader than the act of appointing, and extends to the whole of the office, which is performed.
- 84 But provisions such as *2009 Act*, s 28(4) do not operate to validate actions of a person who assumes to act as a director without any purported appointment at all: *Morris v Kanssen* [1946] AC 549. The section and articles in similar terms only relate to a case where a slip has been

made in appointing a director or committee member, not to cases where substantive provisions relating to an appointment have been ignored or overridden: *Grant v John Grant & Sons Pty Ltd* (1950) 82 CLR 1 at 52-53 per Kitto J.

85 (c) *Authority of the Association's Public Officers*. The plaintiffs also submit that Mr Wai Tong Wong and/or Mr Percy Wong, the Association's then public officers properly convened the May 2011 meeting. The *2009 Act*, s 34(3) provides that a public officer does not need to be a committee member and *2009 Act* s 34(4) states the acts of a public officer are valid despite any defects in their appointment.

86 This argument is not successful. The first problem with it is that Mr Wai Tong Wong and/or Mr Percy Wong were not the Association's public officers to convene the May 2011 meeting. The Association's duly appointed public officer, so appointed by the 2009 committee is Ms Daphne Lowe. The only purported appointment of Mr Percy Wong and Mr Wai Tong Wong as public officers was by the 2010 committee, which was itself usurping the proper function of the 2009 committee. Provisions such as the *2009 Act*, s 34(4) cannot be used to validate the acts of a public officer whose "appointment" has resulted from overriding or ignoring this substantive requirements for appointment of the person to such an office: *Grant v John Grant & Sons Pty Ltd* (1950) 82 CLR 1 at 52-53 per Kitto J. Moreover, there is another problem with the argument. The authority of a public officer that the *2009 Act*, s 34 confers, does not include the convening of special meetings for the Association. That function is controlled by Constitution rule 24.

87 (d) *Using the 2009 Act, s 25(4)*. The plaintiffs further submit that if there was no committee, the constitution would operate to prevent the Association from establishing a committee and thereby prevent the Association from functioning. They argue that *2009 Act*, s 25(4) (set out earlier in these reasons) operates in that circumstance to deny effect to Constitution, rule 24(3), and the first two lines of rule 24(4) which require

"the committee" to convene a special general meeting or to receive a requisition for such a meeting in the first instance. On that basis, the plaintiffs say they could properly convene the 1 May 2011 meeting.

- 88 The difficulty with this argument is that Constitution, rule 24 is not any impediment to the proper functioning of the Association. The Association has a validly elected committee, the 2009 committee. It is not necessary to distort the wording of rule 24 to allow a group of persons such as the plaintiffs to call a special general meeting to elect a fresh committee. The Association already has one. In any event, even if the Association were without a committee, members of the Association can and should seek relief under *Corporations Act* 2001, s 1322 for the convening of a meeting, to extend the time for calling any necessary general meetings, to validate past actions of the committee, or to overcome any other procedural irregularity. Given that such relief is available it would be virtually impossible to argue that an inconvenient situation said to result from the operation of rule 24 would somehow "contrary to this....Act" within *2009 Act*, s 25(4).
- 89 The plaintiffs have not established that they have any legal authority to call the 1 May 2011 meeting. Nor have any of their arguments, that their acts can otherwise be validated, met with success. But even if they did, the way that the plaintiffs went about calling the 1 May 2011 meeting, as I now find on the facts, would preclude it from being classified as a special general meeting called under the Association's Constitution. This is so for a number of reasons.
- 90 In order to call a special general meeting anyone purporting under rule 24 to act as the committee calling such a meeting would have to comply with rule 25 and send notice by post to each member in the register of members, a notice specifying the place, date and time of the meeting and the nature of the business proposed to be transacted. All that seems to have happened to convene the 1 May 2011 meeting is that persons who paid a fee to the plaintiffs were invited to attend the meeting. But the

plaintiffs had no authority to collect or receive subscriptions monies under Constitution rule 8. The plaintiffs have not established that they have given notice of the meeting to the 222 members that Ms Lowe's evidence establishes to my satisfaction were members of the Association in 2011.

91 A large number of the votes of the 1 May 2011 meeting were cast by proxy. Votes may be cast by proxy under Constitution rule 31. But a proxy form should be given to the secretary no later than 24 hours before the time of the meeting for which the proxy is appointed: Constitution rule 32(1). The proxies concerned were not given to the secretary of the Association. Nor has it been established that the voters at the meeting were members of the Association who had paid subscription fees to Ms Lowe, the Association's secretary under Constitution rule 8. In my view no valid resolutions appointing the defendants as committee members or office bearers of the Association were passed at the 1 May 2009 meeting.

### **Conclusions and Orders**

92 In the result therefore the Court has found that the committee of management of the Association elected on 26 April 2009 remains now the validly elected committee of the Association and that it will hold that position until 21 December 2011. The actions by the plaintiffs or some of them in seeking to convene a general meeting held on 3 January 2010 and the election of a committee at that meeting did not create a committee of the Association. Nor did those plaintiffs involved in calling the 1 May 2011 meeting actually call a general meeting of the Association that could elect a committee or office bearers of the Association. Neither the 2010 or 2011 elections displaced the validly appointed 2009 committee of the Association.

93 Subject to any argument about their form, the Court is prepared to make the declarations sought by the defendants on the cross-claim. The defendants/cross-claimants have been substantially successful in the

proceedings. Ordinarily costs would follow the event but I will hear argument about any special order for costs that any party seeks.

- 94 Two other matters follow from my conclusions. The first is that the defendants may wish to argue that the solicitors for the plaintiffs have commenced these proceedings without authority at least from the first plaintiff, the Association. There may or may not be cost consequences if that is established. But the issue has not yet been fully argued. If the defendants are to raise that issue it should be raised by a motion served upon the solicitors for the first plaintiff Association, as on this matter their interests and those of the other plaintiffs may diverge.
- 95 My findings also show that the plaintiffs or some of them have been receiving and managing the Association's property without proper authority and have been purporting to conduct the Association's affairs while they were not authorised to do so. That conduct should obviously cease immediately. If consequential injunctive relief is required to ensure that the plaintiffs desist from this conduct, in addition to the making of the declarations sought, then such orders can be made, tailored to the existing circumstances when the matter comes back for the making of final orders within the next seven days. If other orders are required under *Corporations Act*, s 1322 they can also be sought at that time.
- 96 I direct the parties to bring in short minutes of order to give effect to these reasons and to do so by arrangement with my Associate by Friday, 9 September 2011.

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