

AUSTRALIA / JUDGMENT

Keay v The Owners - Strata Plan 3132

[2026] NSWSC 1150**COURT**

Supreme Court

DECIDED

23 September 2026

BEFORE

Pike J

CASE / FILE NUMBER

2025/00341978

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Supreme Court**New South Wales****Amendment notes****Medium Neutral Citation:** Keay v The Owners - Strata Plan 3132 [2026] NSWSC 1150**Hearing dates:** 5 August 2026**Date of orders:** 23 September 2026**Decision date:** 23 September 2026**Jurisdiction:** Equity - Real Property List**Before:** Pike J**Decision:** See paragraph [113]

Catchwords: STRATA TITLES — by-laws — common property rights by-laws — exclusive use of parking spaces and storeroom — agreed errors in registered consolidated by-laws — whether lot owner entitled to declarations concerning rights under original by-laws — where owners corporation does not dispute lot owner's underlying rights — whether sufficient controversy and utility to support declaratory relief — owners corporation possess an interest in opposing relief — declarations made

REAL PROPERTY — correction of Register — powers of Supreme Court under s 138 of the Real Property Act 1900 (NSW) — distinction between a dealing and a recording in a folio of the Register — whether power to order amendment of a recording in a folio extends to orders requiring correction and lodgement of a set of consolidated by-laws — instrument “needed” to give effect to Court's determination — power extends to orders concerning instrument and underlying recording — ancillary orders made

Legislation Cited:	Conveyancing (Strata Titles) Act 1961 (NSW) Interpretation Act 1987 (NSW), ss 33, 35 Real Property Act 1900 (NSW), ss 3, 12, 31, 31B, 32, 74F, 74J, 74O, 121, 122, 138 Strata Schemes Development Act 2015 (NSW), ss 8, 29, 31 Strata Schemes Management Act 1996 (NSW) Strata Schemes Management Act 2015 (NSW), ss 134, 141, 143 Strata Schemes Management Regulation 2016 (NSW), r 35 Strata Titles Act 1973 (NSW), s 58
Cases Cited:	4nature Incorporated v Centennial Springvale Pty Ltd [2017] NSWCA 191 Australian Competition and Consumer Commission v MSY Technology & Ors (2012) 201 FCR 378; [2012] FCAFC 56 Botterill v Botterill (2000) 10 BPR 18,787; [2000] NSWSC 1152 CIC Insurance Ltd v Bankstown Football Club Ltd (1997) 187 CLR 384; [1997] HCA 2 City of Canada Bay Council v F&D Bonaccorso Pty Ltd (2007) 71 NSWLR 424; [2007] NSWCA 351 Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation (1981) 147 CLR 297; [1981] HCA 26 Darren v MacMahon [2012] NSWSC 760 Darren v MacMahon [2012] NSWSC 761 Kyabram Property Investments Pty Ltd v Murray [2006] NSWSC 54 Lank v Lank (1973) 21 FLR 384 Mogo Local Aboriginal Land Council v Eurobodalla Shire Council (2002) 54 NSWLR 15; [2002] NSWCA 12 Oil Basins Ltd v Commonwealth (1993) 178 CLR 643; [1993] HCA 60 Project Blue Sky v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28 White v Betalli (2007) 71 NSWLR 381; [2007] NSWCA 243
Texts Cited:	Nil
Category:	Principal judgment
Parties:	Warwick Laing Keay (Plaintiff) The Owners – Strata Plan No 3132 (Defendant)
Representation:	
Counsel:	D Meyerowitz-Katz (Plaintiff) B Haines and W Dawes (Defendant)
Solicitors:	WKA Legal Pty Ltd (Plaintiff) JS Mueller & Co Strata Lawyers (Defendant)
File Number(s):	2025/00341978
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JUDGMENT

Introduction

These proceedings boil down to a narrow dispute as to how two agreed errors in the by-laws of a Strata Scheme, may be corrected.

On the one side, is the plaintiff, Warwick Keay (Mr Keay) a lot owner. On the other side is the defendant, the Owners Corporation in relation to the scheme (Owners Corporation). There is no dispute between the parties that the by-laws contain two errors concerning Mr Keay's rights in relation to a car parking space, and a storeroom, both of which are located on common property. There are a limited number of lot owners in the same position as Mr Keay, although they do not appear to have pursued the issue with the same degree of disputation.

Given that there is no dispute about the errors, it is surprising, and deeply regrettable, that the parties were not able to resolve the issue without commencing and conducting proceedings in the Supreme Court. I have the strong sense that the present dispute is merely one aspect of a much broader dispute between the competing factions occupying the property.

Mr Keay seeks declaratory relief as to his rights in relation to the car parking space and storeroom, an order under s 138(2) and (3)(b) of the Real Property Act 1900 (NSW) (RPA) that the Registrar-General make amendments to the relevant folio to give effect to those rights, or alternatively a mandatory injunction requiring the Owners Corporation to register with the Registrar-General a change of by-laws correcting the errors.

The Registrar-General was not a party to the proceedings but was given notice of them and indicated that participation as a party was unnecessary.

The proceedings were heard on 5 August 2026. Mr D Meyerowitz-Katz appeared for Mr Keay. Mr B Haines appeared for the Owners Corporation.

For the reasons set out below, I am satisfied that it is appropriate to make orders to give effect to the substantive relief sought by Mr Keay, save for those concerning a caveat in paragraphs 1 and 2 of the further amended summons. The parties should confer as to the appropriate orders to give effect to these reasons. I will determine any remaining disputes on the papers.

The relevant facts

Mr Keay owns Lot X in Strata Plan X (Scheme). The Scheme was registered on or about 19 January 1968 pursuant to the Conveyancing (Strata Titles) Act 1961 (NSW), as then in force. The Scheme concerns a property located at Wallis Parade, North Bondi.

There are 51 lots in the Scheme, with a total unit entitlement of 1,000 units. Lot X has a unit entitlement of 22. Mr Keay became the registered proprietor of Lot X on or about 18 January 2002.

On or about 12 April 1984, by registered dealing number X, a new by-law 44 was registered for the Scheme pursuant to s 58 of the former Strata Titles Act 1973 (NSW) (1973 Act). The registered form stated that the by-law was made pursuant to unanimous resolution passed on 23 February 1984. It was a common property rights by-law that granted various lots in the Scheme with exclusive use and enjoyment of specified parking spaces and storerooms forming part of the common property of the Scheme.

The by-law provided as follows:

By operation of by-law 44, Lot X had exclusive use of car parking spaces 39 and 40.

On or about 5 August 1997, by registered dealing number X, a new by-law 46 was registered for the Scheme pursuant to the Strata Schemes Management Act 1996 (NSW) (1996 Act), which commenced operation on 1 July 1997.

The by-law was stated on the registered form to have been made pursuant to a unanimous resolution passed on 31 August 1994 under s 58(1) of the 1973 Act, as then in force. Again, the by-law was a common property rights by-law providing various lots in the Scheme with the exclusive use and enjoyment of specified storerooms forming part of the common property of the Scheme.

The form of the by-law was as follows:

Under the Table referred to in the by-law, Lot X was assigned storeroom number 61.

Notwithstanding what was said in the body of the by-law, it appears to be common ground that there was no “plan” attached to it.

The Strata Schemes Management Act 2015 (NSW) (SSMA), came into effect on 30 November 2016 (putting to one side some provisions that are not presently relevant).

It was not in dispute that, because the Scheme was registered before the commencement of the 1996 Act, the by-laws in force for the Scheme are, pursuant to s 134(3) of the SSMA, those set out in the Regulations, including any changes to the by-laws made in accordance with a previous law, or in accordance with the SSMA. Regulation 35 of the Strata Schemes Management Regulation 2016 (NSW), provides that the by-laws are those set out in the schedule of the Regulations. Those by-laws mirror the prescribed by-laws under the 1973 Act.

By-laws 44 and 46, were changes to the by-laws of the Scheme made in accordance with the applicable previous laws (being s 58 of the 1973 Act) and thus form part of the Scheme’s by-laws pursuant to s 134(3) of the SSMA.

I did not understand it to be contended that by-laws 44 and 46 were not valid.

Clause 4(1) in Schedule 3 of the SSMA, required the Owners Corporation to review the by-laws for the Scheme no later than 12 months after the commencement of s 134 (that is, before 30 November 2017).

On 7 December 2017, the Owners Corporation registered a set of consolidated by-laws said to have been adopted by special resolution on 24 October 2017 (Consolidated By-Laws).

Mr Keay contends that the lodgement and consolidation of the by-laws were irregular and contrary to statute. He relies on s 143(1) of the SSMA, which provides that the consent of each owner on whom a by-law confers rights or special privileges is required. He also contends that the presumption of validity in s 143(4) has no application to amendments to common property rights by-laws. Mr Keay did not consent to any amendment. This omission is relied on in relation to the injunctive relief sought by Mr Keay.

It appears to be common ground, and indeed is apparent on the face of the Consolidated By-Laws, that it was not intended to repeal any existing by-laws, but rather to add a new special by-law 9.

By-laws 44 and 46, as set out in the Consolidated By-Laws, are in the following terms:

It is immediately apparent that by-law 44 as reproduced in the Consolidated By-Laws, ends with “which all persons” and omits the following words appearing on page 2 of the original by-law as passed: “entitled to exercise the powers of voting conferred by or under the 1973 Act are at present personally or by proxy at the time of the motion.”

In by-law 46, as it appears in the Consolidated By-Laws, the Table from the by-law as originally enacted has been omitted altogether.

These are the two admitted errors.

At a general meeting of the Owners Corporation held on 7 June 2023 a resolution was put to amend by-law 46. The resolution went beyond fixing the identified error. Mr Keay and some other lot owners voted against the resolution, and it was defeated. Further resolutions were also put to the annual general meetings held on 27 September 2023 and 26 September 2024. Each resolution was defeated.

A new by-law 45 was proposed at a general meeting to be held on 20 March 2025 in relation to storerooms which did not include Mr Keay’s storeroom. Mr Keay voted against the by-law. This action caused Mr Keay to lodge a caveat on title, as I describe below, which led to the commencement of these proceedings.

Reference should also be made to an email from Mr Keay to Mr Sargent and others dated 23 March 2026 which stated, in part:

SUMMARY

A. It is a complete waste of owners' money and time for the Owner Corporation to seek to uphold the Committee or Mr Sargent's Lapsing Notice and to continue the Supreme Court proceedings concerning whether or not I own storeroom 61. More precisely whether I am the owner of the exclusive use rights to storeroom 61 as granted to the owner of Lot 19 from time to time by unanimous resolution of the Owners Corporation on 31 August 1994.

B. The Committee and/or Mr Sargent should never have issued the Lapsing Notice which was issued with respect to my Caveat which claims that I am the owner of Storeroom 61 in the absence of any registered record of that ownership brought about by By Law 46 being registered as part of a defective consolidation without the ownership Table, which is part of that By Law 46.

OFFER TO WITHDRAW CAVEAT IF REGISTERED DEFECTIVE BY LAWS IMMEDIATELY FIXED

C. For the reasons set out below, I will withdraw the Caveat I lodged on the title to the common property in support of my ownership of storeroom numbered 61 as identified in By Law 46 as originally registered and as identified in Waverley Council Building Application numbered BA018/9 (Storeroom 61) within seven days of the correct consolidation all the Schemes By Laws (Correct Consolidation) being registered on the title to the common property in place of the defective consolidation of By laws (Defective Consolidation) which is presently registered on the title to the common property under land dealing number AM983817J registered on 20 December 2017.

D. So there is no doubt about this, the Defective Consolidation omits the Table of Storeroom ownerships (storerooms 56 - 61) which was part of the By Law as originally passed by unanimous resolution and remained registered until the Defective Consolidation was registered.

E. As a result, there is no registered record of which lots own Storerooms 56 -61 and as none of the Storerooms have ever been assigned there is no record of the ownership of Storerooms 56-61 in the Register of Exclusive Use Rights Allocations and Assignments maintained by the Scheme under By Laws 44 and 46.

F. The Registrar General's Guidelines (RG Guidelines) provide for an administrative procedure to correct defective consolidations of by laws lodged by strata schemes. As above, as occurred in this Scheme in December 2017.

G. The RG Guidelines are attached. Relevantly they provide:

NOTE: If a strata by-law was omitted from the consolidated version due to a clerical error, then a Request form 11R should be lodged to correct the consolidated by-laws pursuant to section 12(1) (d) Real Property Act 1900, accompanied by a statutory declaration explaining how the error occurred and a new consolidated version of the by-laws.

(Emphasis in original.)

There was no response to this email.

The Proceedings

On 25 March 2025, Mr Keay lodged a caveat on the title of the common property of the Scheme (Caveat) pursuant to s 74F of the RPA. The estate or interest claimed in the caveat was an “Estate in Fee Simple by virtue of: Agreement dated 31/08/1994”. The details supporting the claim stated:

Proprietary and/or equitable interest in so much of the common property which comprises Storeroom 61 pursuant to exclusive rights By-Law No 46 made in favour of the proprietor of Lot 19 on 31 August 1994.

On or about 20 August 2025, the Owners Corporation served a lapsing notice with respect to the Caveat pursuant to s 74J of the RPA. These proceedings were then commenced by Mr Keay on 9 September 2025, seeking to extend the Caveat. Orders were made by consent extending the Caveat. A subsequent order extended the Caveat until further order. However, because a copy of that order was not lodged with the Registrar-General within the required period, the Caveat lapsed.

The relief claimed

The relief ultimately sought by Mr Keay in the proceedings is set out in a further amended summons, filed by consent at the conclusion of the hearing on 5 August 2026.

The relief claimed in the further amended summons is in the following terms:

1 Pursuant to section 74K of the Real Property Act, 1900 (NSW), an order that the operation of the Caveat registered under dealing number X on the title to the land contained in Torrens Title Reference Folio Identifier X/X by Warwick Laing Keay be extended until such time as the Registrar-General makes the amendment referred to in prayer 3 below.

2 Alternatively, an order pursuant to s 74O(2)(a) of the Real Property Act 1900 granting leave to the plaintiff to lodge a further caveat in respect of the interest in land the subject of dealing number X.

3 A declaration that, pursuant to By-Law 46 of Strata Plan No. X (Scheme), as adopted on 31 August 1994 by unanimous resolution (Resolution) of the Owners of the Scheme, which Resolution was registered under land dealing number X, the plaintiff, as the owner of Lot X in the Scheme, was granted all right, title and interest in the exclusive use rights, to the exclusion of all other proprietors, and has the right to exclusive use and enjoyment, free of any occupation charge, to so much of the common property of the Scheme as is contained in storeroom number 61 in the Scheme, together with the right to transfer and assign the benefit of such right to another proprietor.

3A A declaration that, pursuant to By-Law 44 of the Scheme, as adopted on 23 February 1984 by unanimous resolution of the Owners of the Scheme, which resolution was registered under land dealing number X, the plaintiff, as the owner of Lot X in the Scheme, was granted all right, title and interest in the exclusive use rights, to the exclusion of all other proprietors, and has the right to exclusive use and enjoyment, free of any occupation charge, to so much of the common property of the Scheme as is contained in car parking space number 39 in the Scheme, together with the right to transfer and assign the benefit of such right to another proprietor.

4 An order under s 138 (2) and (3)(b) of the Real Property Act 1900 that the Registrar-General amend folio CP/SP3132 by:

- (a) inserting into dealing number X, beneath by-law 46, the “Table” recorded in previously registered dealing X as part of that by-law, specifying which lot owners were granted exclusive use rights to the storerooms numbered 56 to 61, and
- (b) correcting such other clerical errors and omissions which the Court determines have been made in the folio X/X by reason of the reiteration of the By Laws of the Scheme when those By Law were consolidated into dealing number X.
- (b) inserting into dealing number X, at the end of the final sentence of by-law 44, the words “entitled to exercise the powers of voting conferred by or under the Strata Titles Act 1973 are at present personally or by proxy at the time of the motion”.

5 Alternatively, an order in the nature of a mandatory injunction requiring the defendant to register with the Registrar-General a Form 15CH (Consolidation/Change of By-laws) dealing which reproduces dealing X with the corrections in 4(a) and (b) above.

6 Such other ancillary orders under s 138 of the Real Property Act 1900 as may be considered necessary.

7 Any further order that the Court deems fit.

8 Costs.

The underlining reflects the changes introduced on the day of the hearing.

An overview of the competing positions

During the course of argument on 5 August 2026, counsel for Mr Keay handed up a proposed form of a new caveat that leave to lodge was sought under s 74O of the RPA.

That new caveat described the particulars of the estate or interest claimed in the following terms:

Exclusive use or enjoyment of so much of the common property as comprises the storeroom numbered 61.

The 30 August 1994 by-law was referred to. The following facts were also stated:

By-law number 46 in the form comprising previously registered dealing number X was never repealed or amended and confers on the caveator, as the proprietor of lot X in strata plan X, exclusive use and enjoyment of storeroom number 61.

Debate then ensued as to whether this new caveat enlivened the requirement to obtain leave under s 74O of the RPA.

The Owners Corporation ultimately agreed that, subject to any question of costs, it would not object to Mr Keay lodging the new caveat over the title, and would not serve a lapsing notice in respect of that new caveat pending my judgment in these proceedings. I granted the parties liberty to apply should anything emerge between the hearing and the giving of my judgment in relation to the new caveat.

There is therefore no occasion to further consider the claims for relief in paragraphs 1 and 2 of the further amended summons.

In relation to paragraphs 3 and 3A of the further amended summons, counsel for the Owners Corporation made it clear that there was no dispute concerning Mr Keay's underlying rights under by-laws 44 and 46. Nor was there any dispute that those rights were accurately set out in the proposed declarations.

It was contended that, in those circumstances, there was no controversy between the parties in respect of those matters, that the Owners Corporation was not a contradictor, and that neither declaration should therefore be made.

Alternatively, the Owners Corporation contended that there was no utility in making either declaration because the Court had no power under s 138 of the RPA to make any further ancillary orders.

Mr Keay contended that the declarations in paragraphs 3 and 3A should be made and, if they were, they would enliven the power of the Court under s 138(3) of the RPA to make the orders sought in paragraph 4 of the further amended summons. It was contended that the power in s 138(3)(b) was broad enough to make the amendments sought by Mr Keay.

Counsel for the Owners Corporation contended that the power in s 138(3) was not as broad as contended for by Mr Keay. What Mr Keay was seeking to do was amend a dealing, not a recording in a folio of the Register.

Overview of the relevant statutory provisions

Section 31B of the RPA provides that the Registrar-General shall cause a Register to be maintained for the purposes of the RPA.

Section 31B(2) provides:

31B The Register

...

- (2) The Register shall be comprised of—
 - (a) folios,
 - (b) dealings registered therein under this or any other Act,
 - (c) the record required to be kept pursuant to section 32 (7),
 - (d) instruments of a prescribed class, and
 - (e) records required by the regulations to be kept as part of the Register.

...

Section 32(1) of the RPA sets out how the Registrar-General creates a folio of the Register for land. Section 32(2), however, provides that subsection (1) does not apply in respect of a folio of the Register constituted under ss 29 or 31 of the Strata Schemes Development Act 2015 (NSW) (SSDA).

Section 31 of the SSDA provides:

31 Requirement for folio if there is common property

- (1) In a folio for common property, it is sufficient that the land comprised in the common property is described as the common property in a designated strata plan without defining its area or dimensions.
- (2) A folio for common property is taken to certify title to the common property, other than common property the subject of an accepted lease or sublease, in the strata scheme as the common property may exist from time to time.
- (3) The Registrar-General must, in the way the Registrar-General considers appropriate, record the following in a folio for common property in a strata scheme—
 - (a) the name of the owners corporation,
 - (b) the address for service of notices on the owners corporation,
 - (c) the schedule of unit entitlement for the scheme,
 - (d) any easement benefiting or burdening the parcel and any restriction on the use of land or positive covenant burdening the parcel,
 - (e) particulars of the by-laws specified in the strata plan for the scheme, and any change in the by-laws, notification of which has been lodged under section 141 of the Strata Schemes Management Act 2015,
 - (f) any other matter that, by or under this Act or another Act, the Registrar-General is required or authorised to make in the folio.

Section 8 of the SSDA is also relevant. It provides that the SSDA is to be interpreted as though it were part of the RPA.

I deal below with the distinction between folios and dealings, which the Owners Corporation contends is important to the resolution of the present dispute.

Mr Keay relies on s 138 of the RPA, which provides:

138 Court may direct cancellation of folios and other actions related to folios

- (1) A court may, in proceedings for the recovery of any land, estate or interest from the person registered as proprietor of the land, make ancillary orders of the kind set out in subsection (3), if the court is of the opinion that the circumstances of the case require any such order to be made.
- (2) A court may, in proceedings in which the court makes a determination as to an estate or interest in land, make ancillary orders of the kind set out in subsection (3) if in the court's opinion the order is needed to give effect to the court's determination.
- (3) A court may order the Registrar-General to do one or more of the following—
 - (a) cancel or amend a folio of the Register,
 - (b) cancel, amend or make a recording in a folio of the Register,
 - (c) create a new folio of the Register,
 - (c1) create a new edition of a computer folio.
 - (d) (Repealed)
- (3A) If a court makes an order under subsection (3) (c), the Registrar-General may require a person to lodge with the Registrar-General a plan (being, where the Registrar-General so specifies, a plan of survey) of the relevant land, together with such number of copies of the plan, if any, as the Registrar-General may specify.
- (4) The Registrar-General must give effect to any such order.
- (5) A court that makes an order under this section may order that a person deliver an instrument to the Registrar-General for the purpose of giving effect to any such order.

...

The power of the Registrar-General to correct errors and omissions is also relevant. Section 12(1) (d) provides that the "Registrar-General may, subject to this section, and upon such evidence as appears to the Registrar-General sufficient, correct errors and omissions in the Register".

Register is defined in s 3 as the Register required to be maintained by s 31B(1).

Under s 121 of the RPA, a person aggrieved by a decision of the Registrar-General, to which that section applies (such as s 12), may apply to the Registrar-General for review of the decision. Further, under s 122(1), a person dissatisfied with the result of a review under s 121, may apply to the Supreme Court for a review of the Registrar-General's decision.

I have set out these additional provisions because they are relevant to determining the proper avenue by which the identified problems may be addressed.

Determination

The first issue to determine, in the logical sequence of the arguments raised, is whether the declarations set out in paragraphs 3 and 3A of the further amended summons should be made.

For the reasons set out below, I am satisfied that they should.

As set out above, the Owners Corporation did not dispute that Mr Keay was granted the rights set out in paragraphs 3 and 3A. Indeed, it was the very fact that they did not dispute these matters, that was the basis for at least one of the arguments put forward as to why the declarations should not be made.

The fact that the Owners Corporation agrees with the substance of the declarations does not, in my view, provide a basis for the Court to decline to make them.

The Owners Corporation contended that because it did not dispute Mr Keay's rights as set out in the proposed declarations, it was not a contradictor and the declarations thus should not be made. I do not accept this.

In *Australian Competition and Consumer Commission v MSY Technology & Ors* (2012) 201 FCR 378; [2012] FCAFC 56, the Court (Greenwood, Logan and Yates JJ) stated at [14]:

In the passage from the speech of Lord Dunedin in *Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd*, set out above in the quote from the judgment of Gibbs J in *Forster v Jododex*, His Lordship explained that a proper contradictor was "some one presently existing who has a true interest to oppose the declaration sought". There is a difference between having an interest to oppose the granting of declaratory relief and, having that interest, choosing whether or not to oppose the granting of that relief. The ACCC submitted that only the former, not the existence of actual opposition by a person having an interest to oppose, is a necessary prerequisite for the granting of declaratory relief.

(Emphasis added.)

At [16] the Court referred, with approval, to certain statements made by Dawson J, sitting at first instance in *Oil Basins Ltd v Commonwealth* (1993) 178 CLR 643 at 648-650; [1993] HCA 60:

Be that as it may, it is plain that the plaintiff has a real interest in obtaining a declaration that it is not liable to pay P.R.R.T. ...

The question raised by the plaintiff is neither abstract nor hypothetical and the answer to that question will clearly produce consequences for the parties. In those circumstances I would, for my own part, doubt whether the failure on the part of the Commissioner to indicate whether or not he disputes the plaintiff's claim could preclude the plaintiff from seeking against him the relief which it does. The most that could be urged is that there is no proper contradictor, but I

doubt whether that is so when the Commissioner's participation in the action is likely to force him to abandon his present stand of neutrality. Even if he were to maintain that stand, I doubt whether that would prevent him from being a proper contradictor. He clearly has a true interest in the plaintiff's claim and, if he were to choose not to oppose it and to abide by any order which the Court might make, that might perhaps amount to no more than the performance of his role as a contradictor in a particular manner.

(Emphasis in original; footnote references omitted.)

Reference should also be made to what was said by the Full Court at [30]:

Subject to one qualification, we agree with the observation made by the primary judge. The qualification is that we would not, with respect, describe the joint judgment of Keely and Beaumont JJ in BMI as "analytically opaque". Nonetheless, to the extent that the statement in the joint judgment of Keely and Beaumont JJ suggests that the absence of opposition by an interested party to the declaratory relief sought means that there is no proper contradictor and that this disentitles an applicant to a grant of declaratory relief, it evidences a misunderstanding of the explanation given by Lord Dunedin in his speech in *Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd*, adopted by Gibbs J in *Forster v Jododex*. The correct position is as opined by Dawson J in *Oil Basins* and by French J in *IMF (Australia) Ltd v Sons of Gwalia* in the passages quoted above. In this case, the MSY parties had an interest to oppose the declaratory relief sought. That was sufficient to make them a proper contradictor. There was no want of power to grant declaratory relief. Rather, the question was whether, in light of the events which had transpired, which relevantly included a lack of any continued opposition to the declaratory relief sought, that relief ought still to be granted as a matter of discretion. BMI should be understood as a case where, because the question of the invalidity had become academic, that discretion had been exercised so as to refuse the declaratory relief sought. As the passage from their Honours' joint judgment reveals, that was an additional basis upon which Keely and Beaumont JJ refused the application for declaratory relief.

(Emphasis added.)

The distinction made clear in these passages is that whether a person is a contradictor in this area of law is determined not by whether that person actually opposes the declaratory relief sought, but by whether that person has an interest in opposing it.

In the present case, the Owners Corporation clearly had an interest to oppose the relief sought, relating as it did to Mr Keay's rights in respect of the common property. The fact that it chose not to oppose the relief sought, other than to contend that the declarations should not be made for reasons of utility, not substance, does not mean that there is no contradictor. There clearly is. Whether the declarations should still be made, given there is no substantive opposition, is a matter of discretion, to which I now turn.

This depends on whether there is any utility in making the declarations. The Owners Corporation contend that there is no utility because the Court still has no power under s 138(3) of the RPA to make the ancillary orders sought by Mr Keay.

I deal with the scope of s 138(3) below.

Putting to one side s 138(3), the declarations sought by Mr Keay still have utility and should therefore be made. They will declare once and for all, the rights that Mr Keay has under the relevant by-laws. This is against a background where the parties appear to have a more than healthy appetite for disputation. If, Mr Keay, or the Owners Corporation for that matter, applied to the Registrar-General under s 12(1)(d) of the RPA to correct an error or omission in the by-laws, the Registrar-General would be considering the issue against the background of the declarations having been made, and thus there being no dispute between, at the least, Mr Keay and the Owners Corporation in relation to Mr Keay's rights. It would not be open to the Owners Corporation before the Registrar-General, to contend that Mr Keay did not have those rights by virtue of the two by-laws.

I turn now to deal with s 138 of the RPA.

It was not in dispute that if I was to make the declarations in paragraphs 3 and 3A of the further amended summons, that sub-section (2) of s 138 would be satisfied, in the sense that the present proceedings are proceedings in which the Court makes a determination as to an estate or interest in land.

The argument advanced by the Owners Corporation purely related to the scope of s 138(3). The simple point made by the Owners Corporation is that if I was to make the orders sought in paragraph 4 of the further amended summons, I would not be, in the words of s 138(3)(b), amending or making a recording in a folio of the Register, but rather, I would be amending a dealing. The simple contention is that s 138(3) does not permit the Court to order the Registrar-General to amend a dealing, as opposed to a recording in a folio of the Register. The contention was based on a textual analysis of the words of s 138(3), contrasted with other provisions of the RPA. Mr Keay contended that s 138(3) was not so confined.

Neither party was able to direct me to any authority which has directly considered the present problem.

Cases which have considered s 138 of the RPA have held that the power is to make ancillary orders. It is not a standalone head of power. Its function is to help implement orders made under some ground of substantive relief – to “tidy up” the Register where the Court has already determined rights: *City of Canada Bay Council v F&D Bonaccorso Pty Ltd* (2007) 71 NSWLR 424; [2007] NSWCA 351 (Bonaccorso) at [94]. At [97] in Bonaccorso, the Court of Appeal rejected the trial judge's observation that the principle requiring a statutory grant of power to a Court to be construed with full amplitude, applied to s 138.

Examples where orders have been made include:

where the Registrar-General had erroneously recorded land as Crown Land: *Mogo Local Aboriginal Land Council v Eurobodalla Shire Council* (2002) 54 NSWLR 15; [2002] NSWCA 12; and to issue new certificates of title: *Darren v MacMahon* [2012] NSWSC 760 and *Darren v MacMahon* [2012] NSWSC 761.

In *Kyabram Property Investments Pty Ltd v Murray* [2006] NSWSC 54, Campbell J stated at [11]:

While in terms section 138(3) gives a wide discretion on the Court, it is appropriate to bear in mind, in exercising that discretion, practical difficulties which might arise from there being in existence two duplicate certificates of title relating to the same parcel of land. It is also a wise practical guideline that the power under section 138 should usually be exercised only if there is no other way of solving the particular problem which has presented itself.

A number of the earlier decisions under s 138 which have expressed some caution as to the ambit of the orders to be made under s 138 have been concerned to ensure that there are not duplicates of cancelled folios circulating in the community: see *Lank v Lank* (1973) 21 FLR 384 at 387 per Allen J; *Botterill v Botterill* (2000) 10 BPR 18,787; [2000] NSWSC 1152. Such concerns are of less relevance in the context of a computer folio.

These authorities are of background relevance only to the resolution of the present dispute. The answer to the present dispute is to be found in my view, by application of the ordinary principles of statutory construction.

The task of statutory construction begins and ends with the statutory text. The meaning of that text is to be determined by considering its ordinary and grammatical meaning in context and in light of the statutory purpose. Context is considered from the outset and in its widest sense, including the structure of the statute, the existing state of the law and the mischief that the provision was intended to address: *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; [1997] HCA 2; *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28 (*Project Blue Sky*) at [78]; *4nature Incorporated v Centennial Springvale Pty Ltd* [2017] NSWCA 191 at [51].

Section 33 of the Interpretation Act 1987 (NSW) (Interpretation Act) requires a construction that promotes the purpose or object underlying an Act to be preferred to one that does not. That principle does not, however, permit a Court to disregard the statutory text in pursuit of a purpose expressed at an impermissibly high level of generality. The statute must be read as a whole, and a construction that gives operation to all its provisions is ordinarily to be preferred: *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 320; [1981] HCA 26; approved in *Project Blue Sky* at [69].

Headings may also bear upon the construction of a provision. Section 35(1) of the Interpretation Act provides that headings to Chapters, Parts, Divisions, Subdivisions and Schedules form part of the relevant Act or instrument. Conversely, under s 35(2), a heading to an individual provision does not form part of the Act or instrument. A heading that forms part of an Act may therefore be considered as part of the statutory context. A heading that does not form part of the Act may have

more limited use as an interpretive aid, but it cannot govern or displace the meaning conveyed in the operative words.

The section is headed “Court may direct cancellation of folios and other actions related to folios”. Section 138(3)(a) is an order to the Registrar-General to cancel or amend “a folio of the Register”; s 138(3)(b) is an order to cancel, amend or make “a recording in a folio of the Register.”

I deal first with the textual arguments advanced by the Owners Corporation which sought to distinguish, for the purposes of s 138(3), between amending a “dealing” and amending a recording in a folio of the Register.

As set out above, s 31B requires the Registrar-General to maintain a Register. The Register is comprised of a number of things, including “folios” (s 31B(2)(a)) and “dealings registered therein” (s 31B(2)(c)).

Dealing is defined in s 3 of the RPA relevantly to be any “instrument other than a grant, caveat or priority notice”. Instrument is in turn defined as “any other document in writing or electronic form... evidencing title to land.”

Section 32(1) specifies how the Registrar-General is to create a folio. That provision does not, however, relevantly apply to common property in relation to a strata scheme. Section 31(3)(e) of the SSDA provides that the Registrar-General must record in a folio for common property in a strata scheme “particulars of the by-laws specified in the strata plan for the scheme, and any change in the by-laws, notification of which has been lodged under s 141 of the” SSMA.

Section 141(2) of the SSMA provides that any change to the by-laws made by an owners corporation under s 141(1), has no effect until the owners corporation lodges a notice in the approved form with the Registrar-General and the Registrar-General makes an appropriate recording of the notice in the folio of the Register for the common property for the Scheme. The approved form is a Form 15CH which attaches the new consolidated version of the by-laws.

Section 8(1) of the SSDA provides that the SSDA is to be read and interpreted with the RPA as if it formed part of the RPA, and the RPA applies to lots and common property in the same way as it applies to other land.

A document recording a by-law, when lodged with the Registrar-General, is a “dealing”: *White v Betalli* (2007) 71 NSWLR 381; [2007] NSWCA 243 at [69] per Santow J.

The relevant recording in the folio in the present case is: X X Consolidation of Registered BY-LAWS.

The preceding analysis simply confirms that any change to the consolidated by-laws would constitute a “dealing” which would need to be lodged with the Registrar-General together with the requisite notice in Form 15CH. Once lodged, the recording in the folio for the common property would be updated (amended) to refer to the new dealing.

Whilst it is clear that the RPA draws a distinction between folios and dealings, and that s 138(3) does not refer expressly to dealings, I do not accept that this means that s 138(3) does not extend to amending a dealing if necessary.

Having made a determination as to an estate or interest in land, s 138(2) permits the Court to “make ancillary orders of the kind set out in subsection (3) if in the Court’s opinion the order is needed to give effect to the Court’s determination”.

The orders that can be made are “of the kind” set out in subsection (3). The only constraint is that the orders are, in the Court’s opinion, “needed to give effect to the Court’s determination.” The authorities set out above make it clear that the section confers a wide discretion.

Of particular significance, in my view, on the breadth of the power, are the words of s 138(5), which provides that the Court, may order that a person “deliver an instrument to the Registrar-General for the purpose of giving effect to any such order”.

The subsection, in my view, is a strong textual indicator against the argument advanced by the Owners Corporation. The power is not confined purely to recording in a folio but extends to orders relating to instruments for the purpose of giving effect to any such order under s 138(3). The construction propounded by the Owners Corporation would significantly reduce the types of orders that can be made under s 138. On the construction propounded it would mean that notwithstanding that proceedings have been properly commenced and the Court has made a determination as to an estate or interest in land, the ancillary orders that can be made to ‘tidy up’ the Register having regard to the determination of the Court are quite limited, and only extend to the actual recording – the folio. There is no reason to adopt such a narrow construction.

An amended set of consolidated by-laws correcting the two agreed errors would, in my view, be an instrument squarely falling within s 138(5).

The only potential issue would be whether the instrument was “needed” to give effect to the Court’s determination. No suggestion was made in the present case that a new set of consolidated by-laws, correcting the two errors, was not “needed” to give effect to the admitted errors. The contrary was at least implicit in the contention of the Owners Corporation that the appropriate avenue to remedy the admitted errors was through an application to the Registrar-General under s 12 of the RPA.

The fact that an application may be made to the Registrar-General under s 12 does not mean that there is no power to make orders under s 138 to bring about the same result.

The availability of an alternate means of achieving that result is simply relevant to whether the order under s 138(3) is “needed”.

In the present case, given the extent of disputation between the parties, and the fact that neither party has to date made any application under s 12, it seems to me that the Court should assist the parties in bringing the present dispute to an end. Once the declarations are made, further orders to bring the dispute to an end are “needed” in the relevant sense. An amended set of consolidated by-laws is clearly needed to give effect to the Court’s determination.

This is best done in the circumstances of the present case by directing the Owners Corporation to prepare a revised set of consolidated by-laws correcting the two admitted errors, and, once it is agreed, to deliver that instrument to the Registrar-General together with the requisite Form 15CH. The Registrar-General should then be directed to record the new consolidated by-laws in place of the existing recording.

Although not necessary, I now deal with the claim for a mandatory injunction requiring the Owners Corporation to register with the Registrar-General a Consolidation/Change of By-laws correcting the errors.

The contention can be dealt with briefly.

An injunction is a remedy, it is not a cause of action. A party seeking an injunction must have a cause of action entitling the party to substantive relief.

In the present case, no such cause of action against the Owners Corporation was identified. I do not regard the fact that Mr Keay did not consent to the 2017 consolidated by-laws as a cause of action justifying such relief.

Conclusion

It follows that the claims for substantive relief, as opposed to relief in relation to the caveat, are upheld.

The parties should seek to agree orders to give effect to these reasons, including as to costs. The orders should include the declarations sought by Mr Keay, provide for a period of time for the Owners Corporation to prepare amended consolidated by-laws correcting the two admitted errors, to provide the draft to Mr Keay for his agreement, and for the agreed document to be provided to the Registrar-General with an order for the Registrar-General to amend the recording in the folio accordingly. The orders should also include liberty to apply should any issue arise in giving effect to the orders. If there is any dispute as to these orders, I will determine it on the papers.

I will also give the parties an opportunity to agree costs, failing which I will receive submissions and determine the issue of costs on the papers.

The Court orders that:

The parties confer to seek to agree orders to give effect to these reasons.

Any agreed orders are to be provided to my Associate by 4pm on 30 September 2026 and, failing agreement, each party is to provide to my Associate by 4pm on 30 September 2026 the orders for which it contends together with any material and submissions in support of those orders, such submissions not to exceed 5 pages.

Any submissions in reply of no more than 3 pages are to be provided to my Associate by no later than 4pm on 7 October 2026, whereupon I will determine the appropriate orders on the papers.

Amendments

23 September 2026

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Amendment to appearances on coversheet

28 September 2026

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Amendment to appearance details

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Decision last updated:

28 September 2026

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Prepared on 28 October 2026 · Esheria