Court of Appeal
Supreme Court

New South Wales

Case Name:	Community Association DP270447 v ATB Morton Pty Ltd
Medium Neutral Citation:	[2019] NSWCA 83
Hearing Date(s):	18, 19 March 2019
Decision Date:	18 April 2019
Before:	Bell P at [1]; Leeming JA at [2]; Payne JA at [171]
Decision:	In 2018/205877 (the appeal): Appeal dismissed with costs. In 2019/56253 (the application for judicial review): 1. Dismiss paragraph 2 of the amended notice of motion filed on 8 March 2019 seeking an extension of time within which to seek judicial review. 2. Dismiss the summons filed by the Community Association on 20 February 2019. 3. The Community Association to pay the defendants' costs, noting that the costs of the Land and Environment Court are the costs of a submitting appearance.
Catchwords:	JUDICIAL REVIEW – late application to quash orders of Land and Environment Court granting development consent – substantial unexplained delay – weakness of case sought to be advanced – application to extend time refused

PRACTICE – parties – appeal against refusal of development consent – where development contemplated obtaining access across neighbouring land – whether neighbouring landowner a necessary party to appeal – whether Land and Environment Court lacked jurisdiction to impose easement in separate proceedings commenced while appeal was pending – Land and Environment Court Act 1979 (NSW), s 40, considered

PRACTICE – parties – whether lot owners of land subject to Community Land Development Act 1989 (NSW) necessary parties to application for easement over Community Association's land – whether other persons with registered easements over the land sought to be burdened by the proposed easement were necessary or proper parties – effect of non-joinder in circumstances where third parties were informed of application and requested not to be joined – UCPR r 6.23 and Land and Environment Court Act 1979 (NSW), s 40(3), considered

REAL PROPERTY – easements – power of court to impose easement – whether easement reasonably necessary for effective use and development of dominant tenement – whether error of law in formulation or application of test – whether Shi v ABI-K Pty Ltd (2014) 87 NSWLR 568; [2014] NSWCA 293 qualified Moorebank Recyclers Pty Ltd v Tanlane Pty Ltd [2012] NSWCA 445 – whether error of law in imposing condition upon number of daily truck movements – Conveyancing Act 1919 (NSW), s 88K – Land and Environment Court Act 1979 (NSW), s 40

Legislation Cited:

Chancery Amendment Act 1852 (15 & 16 Vict c 86), rr 4, 5, 8
Commonwealth Constitution, Chapter III
Community Land Development Act 1989 (NSW), ss 5, 25, 29, 31, 32, 33, Sch 11
Community Land Management Act 1989 (NSW), s 20
Conveyancing Act 1919 (NSW), s 88K
Electricity Network Assets (Authorised Transactions) Act 2015 (NSW)
Energy Services Corporations Act 1995 (NSW)

Environmental Planning and Assessment Act 1979 (NSW), ss 78A, 97
Environmental Planning and Assessment Regulation 2000 (NSW), Sch 1 Pt 1
Equity Act 1880 (NSW), s 7
Equity Act 1901 (NSW), s 8
Judicature Act 1875 (38 & 39 Vict c 77), s 16, Sch 1 O XVI r 13
Land and Environment Court Act 1979 (NSW), ss 5, 34, 36, 40, 57
Land and Environment Court Amendment Act 2002 (NSW), Sch 1 item 12
Local Government Act 1919 (NSW)
Strata Schemes (Freehold Development) Act 1973 (NSW), ss 20, 24
Supreme Court Act 1970 (NSW), s 122, Sch 4 Pt 8 r 7
Uniform Civil Procedure Rules 2005 (NSW), rr 6.23, 6.24, 51.18, 51.29, 59.3, 59.10

Cases Cited:

117 York Street Pty Ltd v Proprietors of Strata Plan No 16123 (1998) 43 NSWLR 504; 98 LGERA 171
Ainsworth v Criminal Justice Commission (1992) 175 CLR 564; [1992] HCA 10
Al Maha Pty Ltd v Huajun Investments Pty Ltd (2018) 233 LGERA 170; [2018] NSWCA 245
ATB Morton Pty Ltd v Community Association DP270447 (No 2) [2018] NSWLEC 87
ATB Morton Pty Ltd v Newcastle City Council [2016] NSWLEC 1076
Botany Bay City Council v Remath Investments No 6 Pty Ltd (2000) 50 NSWLR 312; [2000] NSWCA 364
Boyd v Thorn (2017) 96 NSWLR 390; [2017] NSWCA 210
Brewster v BMW Australia Ltd [2019] NSWCA 35
Carre v Owners Corporation – Strata Plan 53020 (2003) 58 NSWLR 302; [2003] NSWSC 397
Cranbrook School v Woollahra Municipal Council (2006) 66 NSWLR 379; [2006] NSWCA 155
Currey v Sutherland Shire Council (2003) 129 LGERA 223; [2003] NSWCA 300
EB 9 & 10 Pty Ltd v The Owners Strata Plan 934 [2018] NSWCA 288
Halliday v Nevill (1984) 155 CLR 1; [1984] HCA 80
Hornsby Shire Council v Gosper (1993) 82 LGERA 1

Huntington & Macgillivray v Hurstville City Council (No 2) (2005) 139 LGERA 84; [2005] NSWLEC 155
ING Bank (Australia) Ltd v O'Shea [2010] NSWCA 71
Insurance Australia Ltd t/a NRMA Insurance v Milton [2016] NSWCA 156
International Harvester Co of Australia Pty Ltd v Carrigan's Hazeldene Pastoral Co (1958) 100 CLR 644; [1958] HCA 16
Kennedy v De Trafford [1897] AC 180
Kern Corporation Ltd v Walter Reid Trading Pty Ltd (1987) 163 CLR 164; [1987] HCA 20
Kirk v Industrial Court (NSW) (2010) 239 CLR 531; [2010] HCA 1
Ku-ring-gai Council v Bunnings Properties Pty Ltd [2019] NSWCA 28
Lin v The Owners – Strata Plan No 50276 [2004] NSWSC 88; (2004) 11 BPR 21,463
McElwaine v The Owners Strata Plan 75975 (2017) 18 BPR 37,207; [2017] NSWCA 239
Moorebank Recyclers Pty Ltd v Tanlane Pty Ltd [2012] NSWCA 445
North Sydney Council v Ligon 302 Pty Ltd (1996) 185 CLR 470; [1996] HCA 20
Owners of the Ship "Shin Kobe Maru" v Empire Shipping Co Inc (1994) 181 CLR 404; [1994] HCA 54
Rainbowforce Pty Ltd v Skyton Holdings Pty Ltd (2010) 171 LGERA 286; [2010] NSWLEC 2
Ross v Lane Cove Council (2014) 86 NSWLR 34; [2014] NSWCA 50
Rumble v Liverpool Plains Shire Council (2015) 90 NSWLR 506; [2015] NSWCA 125
Sakha & Sons Pty Ltd v Prime Gordon Pty Ltd [2018] NSWSC 1827
Shi v ABI-K Pty Ltd (2014) 87 NSWLR 568; [2014] NSWCA 293
State of New South Wales v Kable (2013) 252 CLR 118; [2013] HCA 26
Stow v Mineral Holdings (Australia) Pty Ltd (1994) 180 CLR 295; [1979] HCA 30
The Owners – Strata Plan No 43551 v Walter Construction Group Ltd (2004) 62 NSWLR 169; [2004] NSWCA 429
The Owners – Strata Plan 50276 v Thoo [2013]

	NSWCA 270; (2013) 17 BPR 33,789 The Queen v Toohey; Ex parte Meneling Station Pty Ltd (1982) 158 CLR 327; [1982] HCA 69 Tomko v Palasty (No 2) (2007) 71 NSWLR 61; [2007] NSWCA 369 William Brandt's Sons & Co v Dunlop Rubber Company Ltd [1905] AC 454 YZ Finance Company Pty Ltd v Cummings (1964) 109 CLR 395; [1964] HCA 12
Texts Cited:	A J Bradbrook, "Access to Landlocked Land: A Comparative Study of Legal Solutions" (1983) 10 Syd L Rev 39 P Butt, "Compulsory Easements: A New Black Letter Syndrome?" (2015) 89 ALJ 753 English Law Commission, Appurtenant Rights, Working Paper No 36 (1971) R French, "Trusts and Statutes" (2015) 39 MULR 629 P Watts and F M B Reynolds, Bowstead & Reynolds on Agency (21st ed, 2018, Sweet & Maxwell)
Category:	Principal judgment
Parties:	Community Association DP270447 (Appellant/Plaintiff) ATB Morton Pty Ltd (Respondent/First Defendant to Summons) Newcastle City Council (Second Defendant to Summons) Land and Environment Court of New South Wales (Third Defendant to Summons, submitting)
Representation:	Counsel: P Tomasetti SC, A Hemmings (Appellant/Plaintiff) A M Pickles SC, J M McKelvey (Respondent/First Defendant to Summons) F J Berglund (Second Defendant to Summons) Solicitors: O'Hearn Lawyers (Appellant/Plaintiff) DWF (Australia) (Respondent/First Defendant to Summons)
File Number(s):	2018/205877; 2019/56253
Publication Restriction:	Nil

Decision under appeal:

Court or Tribunal:	Land and Environment Court
Jurisdiction:	Class 3
Citation:	[2018] NSWLEC 87
Date of Decision:	07 June 2018
Before:	Robson J
File Number(s):	2016/00153777

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

JUDGMENT

1 **BELL P**: I have had the benefit of reading the reasons for judgment by Leeming JA, and agree with those reasons and his Honour's proposed orders.

2 **LEEMING JA**: The main issues in this litigation concern the parties to and the test to be applied in Land and Environment Court proceedings seeking an order imposing an easement which is said to be reasonably necessary for the effective use or development of the land to be benefitted. Notwithstanding the procedural complexity presented by this appeal and application for judicial review, which were heard concurrently, and the fact that the hearing before the primary judge took some 11 days, the issues arising are relatively concise.

3 The parties are neighbouring landowners of land zoned industrial in Hexham. ATB Morton's land is between the Pacific Highway and the Hunter River, just south of where the highway crosses the river. The Community Association's land is to the south.

4 For present purposes, it suffices to say that ATB Morton applied to the local council for development consent. Access to ATB Morton's land directly from the Pacific Highway is problematic (the details do not matter), and so access to

the public road system is from the north via Old Maitland Road. There is insufficient clearance under the highway as it passes over Old Maitland Road (also known as old Hexham Bridge) for heavy trucks to access ATB Morton's land.

5 The clearance under the highway is depicted in the following image contained in the joint report of the civil engineering experts:

6 There is no existing access to the public road system from the south of ATB Morton's land, although there is an existing private road built on the Community Association's land running generally along the bank of the river, which joins the public road system at Old Punt Rd. ATB Morton proposed obtaining access over that existing private road. The Community Association opposed ATB Morton's application for development consent, and the local council refused it, citing the lack of access for heavy vehicles. ATB Morton exercised its right of appeal, in Class 1 proceedings pursuant to (former) s 97 of the *Environmental Planning and Assessment Act 1979* (NSW) (see now s 8.7). Following agreement reached at a conciliation conference on 17 February 2016, the Land and Environment Court, constituted by a Commissioner, issued a development consent in favour of ATB Morton pursuant to s 34(3) of the *Land and Environment Court Act 1979* (NSW). A condition of that consent was that,

within two years, ATB Morton obtain an easement over neighbouring land owned by the Community Association so as to enable access by heavy trucks.

7 On 25 September 2015, while the Class 1 proceedings were pending, ATB Morton sought by separate proceedings in Class 3 of the jurisdiction of the Land and Environment Court pursuant to s 40(2) of the *Land and Environment Court Act 1979* (NSW) an easement over the Community Association's land. The Community Association was the sole respondent. Those proceedings were heard by the primary judge over 11 days, resulting in orders granting an easement on 31 August 2018: *ATB Morton Pty Ltd v Community Association DP270447 (No 2)* [2018] NSWLEC 87. However, by then, the 2016 consent had lapsed. Of course, that does not prevent ATB Morton from applying once again for development consent, and this time with the benefit of the court-ordered easement in its favour.

8 The Community Association appeals from the orders granting an easement over its land. The appeal is as of right, but is confined by s 57 of the *Land and Environment Court Act* to a question of law. The large majority of the evidence before the primary judge is beyond the scope of the appeal, and need not be summarised in this judgment.

9 More recently, by summons filed on 20 February 2019, the Community Association seeks relief in the nature of certiorari and a declaration to the effect that the development consent which issued from the Court on 17 February 2016 is void. The Community Association maintains that the consent is void because it had not been joined as a party to the Class 1 proceedings.

10 The first suite of issues concerns the jurisdiction of the Land and Environment Court to make orders under s 40 of the Act. The Community Association says that the February 2016 development consent was void *ab initio* because the Community Association had not given owner's consent with the result that the Court lacked jurisdiction to make an order under s 40 (ground 1A), or alternatively, that the Court lacked jurisdiction to make orders under s 40 because the consent had lapsed (ground 1B).

11 Secondly, there are the issues arising on the Community Association's summons, which maintains that the 2016 development consent is void and

should be quashed. That is related to the first suite of issues, but has included within it further issues concerning discretion, utility and delay.

12 Thirdly, there is a further question of parties, this time based on the terms of s 40 of the *Land and Environment Court Act*, in that the Community Association contends that (a) Ausgrid, (b) Reliance Hexham Pty Ltd, and (c) the lot owners of lots 2-6 under the Community Scheme were necessary parties to the Class 3 proceedings (grounds 1, 2 and 4). ATB Morton accepts that Ausgrid and Reliance Hexham, which had the benefit of registered easements over the land affected by the proposed easement, were proper parties, but submits that they did not need to be joined, in circumstances where both indicated that they did not wish to be joined. ATB Morton disputes that the other lot owners were necessary or proper parties.

13 Fourthly, the Community Association contends that the primary judge applied an incorrect and unduly relaxed test in determining whether the proposed easement was reasonably necessary for the effective use of ATB Morton's land (grounds 3 and 5).

14 Finally, there is a discrete point relating to the maximum number of truck movements permitted under the easement granted by the Court, which was 50. The Community Association says there was no evidence supporting that condition or that it could be enforceable. This is sufficient, so it is said, to warrant setting aside the entire easement (ground 6).

15 Given the limited scope of the issues in this Court, it will not be necessary to summarise most of the evidence before the primary judge, just as no party made any reference in written or oral submissions to the large majority of some 2769 pages of documentary evidence reproduced in the appeal books. Indeed, no page in volumes 2 or 3 of the six volumes of appeal books was mentioned in the parties' written submissions or during the course of a two day hearing. Volumes 4 and 5 were almost untouched (the Court was taken to precisely three documents in volumes 4 and 5). When one bears in mind that in excess of two thousand pages needlessly included in appeal books were themselves photocopied multiple times in order to provide multiple copies to the Court, the

respondent and the Community Association's own lawyers, something of the scale of the waste becomes apparent.

16 The obligation upon an appellant when preparing the blue books is to include all documents before the court below which are "relevant and necessary for the hearing and determination": UCPR, r 51.29(1)(b). Where, as here, the appeal is confined to a question of law, it is to be expected that less — perhaps, considerably less — than all of the evidentiary record will be relevant and necessary. If I had formed the view that the appeal was to be allowed, I would have favoured a special costs order in relation to the costs of preparing the appeal books, as occurred in *Insurance Australia Ltd t/a NRMA Insurance v Milton* [2016] NSWCA 156.

17 The most convenient course is to address each issue in turn, dealing with the relevant evidentiary and procedural background and the parties' submissions while doing so.

First issue: Jurisdiction to make orders under s 40

18 The Community Association's notice of appeal was amended, a week before the appeal was heard, by adding grounds 1A and 1B. The new grounds were:

> "1A. The Court had no jurisdiction to determine to make any orders under s 40 of the *Land and Environment Court Act 1979* in the absence of a valid relevant development consent pursuant to s 40(1). The development consent granted by Land and Environment Court in *ATB Morton Pty Ltd v Newcastle City Council* [2016] NSWLEC 1076 was *void ab initio* as the development related to the appellant's land and the appellant had not given owners consent to the making of the development application over its land by the Respondent as explained in *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 24 [85]-[175].
>
> 1B. In the alternative, if the development consent granted by Land and Environment Court in *ATB Morton Pty Ltd v Newcastle City Council* [2016] NSWLEC 1076 was not *void ab initio*, the Court had no jurisdiction to determine to make any orders under s 40 of the *Land and Environment Court Act* 1979 as the development consent had lapsed prior to the decision of the primary judge."

19 It will be seen that both of these grounds contend that the jurisdictional pre-requisites for the making of orders under s 40 of the *Land and Environment Court Act* were not satisfied. They reflect points which had not been made at first instance. However, they are pure questions of law, and this appeal is by

way of rehearing. There was no opposition to the Community Association's late amendment save insofar as it was doomed to fail on its merits.

The text of s 40

20 The starting point is the nature of the statutory authority conferred on the Land and Environment Court to order an easement. Section 40 provides:

> "**40 Additional powers of Court—provision of easements**
>
> (1) This section applies if:
>
> (a) the Court has determined to grant or modify a development consent pursuant to proceedings on an appeal under the *Environmental Planning and Assessment Act 1979*, or
>
> (b) proceedings on an appeal under the *Environmental Planning and Assessment Act 1979* with respect to the granting or modification of a development consent are pending before the Court (whether constituted by a Judge or by one or more Commissioners).
>
> (2) The appellant may make an application to the Court for an order imposing an easement over land.
>
> (3) The parties to an application under this section include the owner of the land to be burdened by the easement, and each other person having an estate or interest in the land, as evidenced by an instrument registered in the General Register of Deeds or the Register kept under the *Real Property Act 1900*.
>
> (4) In dealing with an application under this section, the Court may exercise the jurisdiction of the Supreme Court under section 88K of the *Conveyancing Act 1919* and, in that event, section 88K of the *Conveyancing Act 1919* applies to the Court's exercise of that jurisdiction in the same way as it applies to the exercise of that jurisdiction by the Supreme Court."

21 That section is to be read with s 88K of the *Conveyancing Act*. Subsection 88K(1) confers power as follows:

> "The Court may make an order imposing an easement over land if the easement is reasonably necessary for the effective use or development of other land that will have the benefit of the easement."

22 Subsections (2), (3), (4) and (5) of s 88K impose restrictions and qualifications upon the exercise of the power. Subsections (6), (7), (8) and (9) make provision for the effect of such an easement, and how it may be released or modified or extinguished. These parts of s 88K may be passed over for present purposes.

23 It will be seen that s 40 picks up the "jurisdiction" of the Supreme Court under s 88K and authorises the Land and Environment Court to exercise that jurisdiction. The need to do so arises, at least in part, from the fact that s 88K

only empowers the “Court” to impose an easement, while “Court” is defined to be the Supreme Court.

24 In light of the Community Association’s submissions, it is worthwhile examining the subsections of s 40 in more detail. Subsection (1) is central to grounds 1A and 1B. It is the application provision. It has two limbs: either the Court has determined to grant or modify a development consent on an appeal, or alternatively, there are pending proceedings in the nature of an appeal under the *Environmental Planning and Assessment Act 1979* with respect to the granting or modification of a development consent. In other words, s 40(1) will be satisfied and thus the section will apply if either there is a determined or else a pending appeal. Any such appeal will have been brought by the applicant for development consent against the consent authority.

25 Subsection (2) authorises the appellant — the party seeking the granting or modification of the development consent — to make an application for an order imposing an easement.

26 Subsection (3) deals with parties. It is central to the third set of issues, relating to the failure to join Ausgrid, Reliance Hexham and the other lot owners to the Class 3 proceedings. Subsection (3) stands in contrast with s 88K, which is silent as to parties. That reflects the fact that almost inevitably there will be additional persons directly affected by the grant of an easement who are not parties to the appeal to which subsection (1) refers.

27 Subsection (4) authorises the Land and Environment Court to exercise the jurisdiction conferred under s 88K of the *Conveyancing Act*, which section applies in the same way as it applies to the exercise of jurisdiction by the Supreme Court, subject to such additional effect as subsections (2) and (3) have, and subject further to the fact that there are real differences between the proceedings in the Land and Environment Court and in the Supreme Court, one of which is presently relevant. An appeal from the Land and Environment Court from orders made in the exercise of Class 3 of its jurisdiction lies as of right, but is confined to questions of law. The same easement made by the Supreme Court might be subject to an appeal by leave (if the amount in issue did not exceed $100,000) but there is no constraint to questions of law.

28 There may be a close relationship between a development application and an application for an easement which is reasonably necessary for that development. The development may only be viable with the easement. While the planning considerations pertinent to the determination of the development are distinct from the statutory considerations bearing upon the easement, they are closely related and much of the same evidence may be relevant. It is easy to see why there may be a benefit in adding to the powers of the specialist superior court of record which has exclusive jurisdiction to determine Class 1 appeals the s 88K power to impose an easement which was conferred on the Supreme Court. That is borne out by the legislative history.

Background to s 88K and s 40

29 In 1995, s 88K was inserted into the *Conveyancing Act 1919* (NSW), empowering the Supreme Court to make an order imposing an easement over land if the easement is "reasonably necessary for the effective use or development of other land that will have the benefit of the easement". Cognate legislation was first enacted in around 1978 in Queensland and Tasmania, in turn following (unimplemented) recommendations of the English Law Commission (*Appurtenant Rights*, Working Paper No 36 (1971)), as discussed in A J Bradbrook, "Access to Landlocked Land: A Comparative Study of Legal Solutions" (1983) 10 *Syd L Rev* 39. A substantial body of law has developed both in this jurisdiction and elsewhere in relation to the exercise of this statutorily conferred discretion.

30 However, the power in relation to the creation of easements in s 40 of the *Land and Environment Court Act 1979* (NSW) substantially predates the enactment of s 88K, although s 40 in its earliest form was confined to drainage easements. As initially enacted, s 40 authorised the Land and Environment Court when determining an appeal to require the applicant to pay for a drainage easement from the council, if the Court was "satisfied that it is necessary for the drainage of the land to which the appeal relates or the disposal of that drainage". However, the section in its original form did not confer power to direct the council to acquire a drainage easement over private land: *Hornsby Shire Council v Gosper* (1993) 82 LGERA 1. In that decision, Sheller JA discussed at 9-11 the earlier history of the provision, whose original

precursor was a provision of the *Local Government Act 1919* (NSW) enacted in 1969 for drainage easements when there was a pending appeal to the Board of Subdivision Appeals and, later, the Local Government Appeals Tribunal.

31 The restriction to drainage easements was removed when the section was recast in 2002 (by item 12 of Schedule 1 of the *Land and Environment Court Amendment Act 2002* (NSW)), which, broadly speaking, re-enacted a provision with similar wording to that found in s 88K of the *Conveyancing Act.* At the same time, the requirement that the easement be "necessary" was diluted to a requirement of reasonable necessity.

32 A narrower point may also be mentioned, in light of the Community Association's submissions on the applicability of s 40. Subsection (1) of s 40 is a legislative response to judicial criticisms of an earlier, narrower form. Originally, the subsection applied only if the Court had determined to grant development consent on an appeal. Its amendment in 2008 followed a series of decisions criticising the limited scope of the earlier provision, including the discussion by Pain J of the impracticalities in the operation of the legislation in the form it then took in *Huntington & Macgillivray v Hurstville City Council (No 2)* (2005) 139 LGERA 84; [2005] NSWLEC 155 at [10]-[13] and [22]-[33], concluding at [33] that "the scope and operation of s 40 needs to be considered as the current drafting and operation does not appear to be efficient".

33 The evident legislative purpose of the expansion of s 40(1) was to expand the cases to which the section applied, in order to permit a greater degree of flexibility.

Ground 1A

34 ATB Morton's application for development consent was refused by the Local Council, and it exercised its right of appeal in June 2015. As it happens, that appeal was successful, and in February 2016, the Court granted development consent over ATB Morton's land. Beforehand, in September 2015, ATB Morton made its application under s 40.

35 The Community Association submits that consent should never have been granted, because ATB Morton had failed to obtain owner's consent of all of the land to which its application related. For the reasons given dealing with the

summons (second issue below), that submission is not sound. But even if development consent could not validly be granted because of the failure to obtain owner's consent of all land owners, it would not avail the Community Association. That is because:

(1) obtaining owner's consent is *not* a matter which need be done at the time at which the application is made; rather, it is necessary that there be consent of the owners of all land to which the consent relates at the time development consent is granted; and

(2) the power under s 40(1)(b) is available even if proceedings on an appeal are merely pending.

36 Each aspect is elaborated below. It will be seen that ground 1A also contends that the 2016 development consent was *void ab initio*. That contention is problematic. However, it is hard to see how that proposition is relevant to this ground, although it is squarely relevant to the Community Association's summons, which is where I shall deal with it.

The requirement of owner's consent

37 A development application is to be in accordance with the Regulations (see (former) s 78A(1) and (current) s 4.12(1) of the *Environmental Planning and Assessment Act*). The Environmental Planning and Assessment Regulation 2000 specified in Part 1 of Schedule 1 provides that a development application must contain, inter alia:

> "(i) evidence that the owner of the land on which the development is to be carried out consents to the application, but only if the application is made by a person other than the owner and the owner's consent is required by this Regulation".

38 In *North Sydney Council v Ligon 302 Pty Ltd* (1996) 185 CLR 470 at 476-477; [1996] HCA 20, the High Court confirmed that the owner whose consent is required is the owner of the land on which the development which is the subject of the development application is to be carried out.

39 The development application must also contain "a description of the development to be carried out" and "the address, and formal particulars of title, of the land on which the development is to be carried out": cl 1(1)(b) and (c) of Schedule 1 of the Regulations.

40 Those provisions notwithstanding, it is well settled that what matters is whether, *at the time consent is granted*, that the owners of all land to which the consent relates have provided consent. As Spigelman CJ said in *Currey v Sutherland Shire Council* (2003) 129 LGERA 223; [2003] NSWCA 300 at [35], there is "very little, if any, scope in this legislative scheme for the concept of a 'valid' application". Rather, the obligation to obtain owners' consent is a prohibition upon the granting of consent. Thus, it is clear that the absence of owners' consent to a development application can be cured at any time up until its determination: see *Botany Bay City Council v Remath Investments No 6 Pty Ltd* (2000) 50 NSWLR 312; [2000] NSWCA 364 at [5]-[7] and *Al Maha Pty Ltd v Huajun Investments Pty Ltd* (2018) 233 LGERA 170; [2018] NSWCA 245 at [98].

41 It follows that on 25 September 2015 when ATB Morton applied for an easement pursuant to s 40(2) of the *Land and Environment Court Act*, there were proceedings on an appeal with respect to the granting of a development consent pending before the Court within the meaning of s 40(1)(b). That is to say, there is no reason to impose a narrowing gloss on the words:

> "proceedings on an appeal ... are pending before the Court"

in s 40(1)(b) so that they are construed as meaning:

> "proceedings on an appeal, **in respect of which all owners of land to which the application relates have provided their consent in writing,** ... are pending before the Court".

42 Any such construction would collide with the basic rule of statutory interpretation that a power conferred on a court, such as s 40, "should not be read as subject to some implied restriction or limitation": see *Owners of the Ship "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404 at 421; [1994] HCA 54:

> "It is quite inappropriate to read provisions conferring jurisdiction or granting powers to a court by making implications or imposing limitations which are not found in the express words." (Citations omitted)

Authorities applying that principle, and describing it as a "basic rule of statutory interpretation", are collected in *Brewster v BMW Australia Ltd* [2019] NSWCA 35 at [56]-[57].

43 Of course, the fact that an appeal against the refusal of development consent is deficient on its face might inform the exercise of discretion under s 40. It might also tell against the appropriateness of hearing the application in advance of the determination of the appeal. But those matters do not go to the threshold or "jurisdictional" question whether the power is available to be exercised.

44 Finally, in addition to what has been said above, there is a further difficulty with the Community Association's submissions. The Community Association contends that the development consent was a nullity. But if the consent granted by the Court in February 2016 was a nullity, then there would remain an undetermined appeal from Council's refusal to grant consent: see *Al Maha* at [282]. Even so, the jurisdictional precondition in s 40(1)(b) would be satisfied, for on this hypothesis, "proceedings on an appeal ... are pending."

Ground 1B is not made out

45 Ground 1B must also be dismissed. It is true that the development consent had lapsed in February 2018 (at which time the primary judge had reserved his decision following an 11 day case that had concluded the previous December). But it is not to the point that the consent had lapsed *by the time the easement was ordered.* The relevant jurisdictional prerequisite was whether an appeal was pending *at the time the s 40 application was made*. That prerequisite was satisfied.

46 The application under s 40 was made in September 2015, when ATB Morton's appeal against the refusal of development consent was pending. As noted above, there is no reason whatsoever to read a provision conferring jurisdiction on a superior court of record narrowly or subject to some unexpressed condition (for example, that the consent has not lapsed).

47 Further, it is to be borne in mind that ATB Morton could at any time (including before the development application had been lodged, while it was pending with the Court, and after it had been granted but had lapsed) apply to the Supreme Court under s 88K. To the extent that the breadth of the power conferred on the Land and Environment Court might seem overly broad, it is to be borne in mind that essentially the same jurisdiction as the Supreme Court possesses is

conferred on that court, and the jurisdiction of the Supreme Court contains no such limitation.

Second issue: Judicial review of 2016 development consent

48 By summons belatedly filed on 20 February 2019, the Community Association sought orders quashing the decision and orders of the Land and Environment Court made on 17 February 2016, a declaration that the consent was "void and of no effect" and an injunction preventing ATB Morton from taking any steps "in pursuance of or in reliance upon" the consent. The summons joined the Land and Environment Court as the first defendant, contrary to UCPR r 59.3(4), which requires an active defendant to be named as the first defendant, and which was corrected by the Registrar of this Court at a directions hearing. The active defendants were ATB Morton and the Council. The active parties cooperated, sensibly, to achieve a concurrent hearing of the summons and the appeal.

49 The Council pointed to the possibility of unintended practical consequences of an injunction in the form which had been sought, directing attention to the potential ambiguity and breadth of "in pursuance of". These points need not be elaborated, because there is no evidence of any threat by ATB Morton or anyone else to carry out any development relying upon the (now lapsed) development consent and, no differently from the case in *Al Maha Pty Ltd v Huajun Investments Pty Ltd* at [284], there is no occasion for making such an order.

50 In *Al Maha*, orders issued from the Court quashing the Council's grant of development consent and declaring that it was invalid, in circumstances where the objector owned land to which the development application related, and had itself applied for relief in this Court's supervisory jurisdiction in a timely fashion. The Community Association objected to ATB Morton's application for development consent, but there the similarity ends. In the present case, just over a year after the consent had concededly lapsed, the Community Association applied for similar relief, although the declaration it sought was that the consent was "void and of no effect", rather than "invalid".

51 The threshold question is whether there should be an extension of time for the Community Association to bring the proceeding in this Court's supervisory jurisdiction. It is necessary to have regard to the length of and reason for the delay, whether the Community Association has a fairly arguable case, and the extent of any prejudice: *Tomko v Palasty (No 2)* (2007) 71 NSWLR 61; [2007] NSWCA 369 at [55].

Unexplained substantial delay

52 The delay exceeds three years, which is some 2¾ years more than the rules prescribe (see UCPR r 59.10). The summons was supported by a solicitor's affidavit, which pointed to this Court's decision of *Al Maha Pty Ltd v Huajun Investments Pty Ltd*, delivered on 26 October 2018. However, the deponent did *not* state that it was only as a result of that decision that the Community Association appreciated that its consent was necessary before development consent was granted. Indeed, the affidavit gives no explanation for this point not having been raised before the primary judge (indeed, it may well have been drafted quite carefully so as to provide no express or implied insight into the Community Association's reasons, with a view to maintaining privilege).

53 The upshot is that there is no evidence *at all* explaining the delay by the Community Association in bringing this application. That is best regarded as a deliberate forensic decision, in circumstances where it is evidently well-resourced. Even if the decision in *Al Maha* (in which Mr Tomasetti SC, who with Ms Hemmings appeared for the Community Association in these proceedings, appeared) was the catalyst for the summons, there would still be an unexplained delay of four months between that decision and the filing of the summons.

Weakness of the Community Association's case

54 It is also necessary to have regard to the strength of the case sought to be propounded. The substantive relief which is sought is declaratory, and so an important question is whether the declaration "will produce no foreseeable consequences for the parties": *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 582; [1992] HCA 10. It is also necessary to have regard

to the underlying strength of the case advanced in support of the declaration. Each is addressed in turn.

55 It is, with respect, difficult to see any utility in the substantive relief which has belatedly been sought, except insofar as, perhaps, such relief might have an impact upon the Class 3 proceedings (or the appeal) seeking the easement over the Community Association's land. Indeed, Mr Tomasetti confirmed that what was sought was an order retrospectively quashing the consent so that it was taken never to have been granted. But that is not how the relief which is sought by the Community Association operates, at least, not in any typical case. Further, despite what was contended in ground 1A of the Community Association's appeal, and maintained albeit with some diffidence orally, it is difficult to accept that the development consent granted by the Land and Environment Court in *ATB Morton Pty Ltd v Newcastle City Council* [2016] NSWLEC 1076 was *void ab initio*.

56 The development consent was embodied in an order of the Land and Environment Court. That Court is constituted as a superior court of record: *Land and Environment Court Act*, s 5(1). Orders of superior courts, such as the Land and Environment Court, are valid until set aside: see *State of New South Wales v Kable* (2013) 252 CLR 118; [2013] HCA 26 at [38]-[39], and, in the context of the Land and Environment Court itself, *Ross v Lane Cove Council* (2014) 86 NSWLR 34; [2014] NSWCA 50 at [17]; *Rumble v Liverpool Plains Shire Council* (2015) 90 NSWLR 506; [2015] NSWCA 125 at [60]-[61] and [114]-[118]. They are not *void ab initio*. The fact that the order was made consensually, pursuant to the regime prescribed by s 34 of the *Land and Environment Court Act*, seems unlikely to make any difference. The Commissioner's decision "is taken to be the decision of the Court": s 34(8).

57 In further submissions made on the second day of the hearing, Mr Tomasetti contended that this Court's recent decision of *Ku-ring-gai Council v Bunnings Properties Pty Ltd* [2019] NSWCA 28 was authority for the proposition that the consent made without the Community Association's consent was void. His submissions were confined to paragraphs in the judgment of Preston CJ of LEC at [175]-[190]. It was said that a Commissioner of the Court does not

constitute the Court, although the Chief Judge might delegate to a Commissioner the function to exercise the Court's jurisdiction to hear and dispose of proceedings in certain classes, including Class 1, of the Court's jurisdiction. It was also said that Commissioners are not judicial officers and did not have the same protections as judicial officers, and in particular, that the determination of an appeal under s 97 of the *Environmental Planning and Assessment Act* was administrative rather than judicial in character.

58 The fact that the Commissioner was exercising an administrative function does not deny the fact that the order is an order of a superior court of record. (The separation of powers found in Chapter III of the Commonwealth Constitution does not apply to a State: *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531; [2010] HCA 1 at [69].) Further, by (either or both of) s 34(8) and s 36(3) of the *Land and Environment Court Act*, the Commissioner's decision is deemed to be the decision of the Court. There is nothing in *Al Maha* to detract from the familiar technical legal meaning of the statute which gives the status of orders of a "superior court of record" to the orders made by the Land and Environment Court constituted by a Commissioner.

59 That said, it is not entirely clear that this Court enjoyed the benefit of full argument on a point which might in some other case be of importance. It is sufficient for present purposes to observe that in this respect the Community Association has failed to make out anything like a strong case for relief.

60 Turning to whether there was any entitlement to relief on the basis that the development for which consent was sought was to be carried out on Association property, Mr Tomasetti invited the Court to have regard to the references in the documents accompanying the development application to truck movements along the Community Association's public access road. There is no doubt that the application proceeded on the basis that heavy vehicle access would be through the Community Association's land. This was because of the height of old Hexham bridge, and limited access from the Pacific Highway. There were some statements in the application which might be read as seeking approval *at that time* for access to and improvements upon the road passing through the Community Association land. For example,

page 22 of the Statement of Environmental Effects accompanying the application said that "this application seeks to formalise a new route for heavy vehicle access". Page 25 showed a picture of the location of the "access road" and said that it was described as an "access way" in the Community Plan Management Statement and "has a length of approximately 368 metres and a width of around 10 metres and would connect the subject site with old Maitland Road to the east of Lot 1, DP 270447." Page 50 referred to the findings of a traffic impact assessment report, which included a traffic impact of 22 vehicles per day or 5 vehicles in the peak hour which were heavy vehicle movements and then stated:

> "Heavy vehicle access to the site can only be obtained via Old Maitland Road to the south of the site due to the low clearance under the old Hexham bridge to the north of the site. This will require heavy vehicles to travel over the private access road south of the site for which a suitable legal easement will need to be negotiated with the owners of the private road."

61 To similar effect, the traffic impact assessment included the following paragraph:

> "This proposal however seeks approval to utilise the unnamed public access road off Maitland Road and the existing private road through the 'Wearx' site to Old Maitland Road near Old Punt Road for access to a single combined entry/exit access. Heavy vehicle traffic will use the existing private road, for which a suitable right of access will need to be established, and Old Maitland Road south east of the site for access while light vehicles will utilise the existing unnamed public road access connection to the north east of the site for access from Maitland Road. An Internal roadway within the site will provide access to a number of car parking and manoeuvring areas within the site."

62 True it is that occasionally there is reference to the application being made then and there for approval for traffic to use to Community Association land. However, even where that occurs, it is in a context where it is made clear that a separate right to access the Community Association land will need to be obtained.

63 The development which was to be carried out was the demolition of the existing structures, and the construction and use of four new buildings on ATB Morton's land. No actual physical work was approved to be carried out on any land other than ATB Morton's land.

64 Those circumstances make the present application one which is readily distinguished from the facts in *Al Maha*. In *Al Maha*, approval was granted for

actual physical works, including a ramp from the underground carpark to the public road system which was contained on Al Maha's land and the use of that ramp in order to obtain access to the carpark from Hilts Road. The detail is summarised by Preston CJ of LEC at [151]-[172]. His Honour concluded at [171]-[172]:

> "Accordingly, these conditions of consent, agreed to by the parties and imposed by the Commissioner in granting consent, approve the construction of the driveway connection to Hilts Road as part of the development for which consent was sought and granted.
>
> The land on which the driveway connection to Hilts Road is to be carried out includes the land at 36 Leicester Avenue owned by Al Maha. Al Maha's land is 'land on which the development is to be carried out' (see cl 1(1)(i) of Sch 1 of the Regulation). Huajun sought and the Court granted leave to amend its application for development consent to carry out the driveway connection to Hilts Road on Al Maha's land. Al Maha's land is, therefore, 'land to which the development application relates' (cl 49(1) of the Regulation)."

65 In the present case, a fair reading of the consent does not support any suggestion of the Council granting consent for any work to be carried out on the Community Association land. As much is reflected in the terms of the consent granted by the Court in February 2016, which refers in terms to the need to obtain subsequent consent for road works if required over both the public and private roads, as well as the need to obtain an easement.

66 A small point advanced in oral submissions was that the condition contemplated access onto the Community Association's land for the purposes of investigating whether the existing road required upgrading. But that does not detract from the fact that separate consent would be required for any physical works on either the public road or the private road, and that access to the latter was to be the subject of separate agreement. The consent did not itself authorise ATB Morton or its contractors to commit a trespass on the Community Association's land, still less does it authorise work to be carried out. The evidence did not explore to what extent the features of the land supported an implied licence in accordance with what was said in *Halliday v Nevill* (1984) 155 CLR 1; [1984] HCA 80 (I have in mind the facts that (a) there seems to have been a cafe and internal parking on land to which access was only available via the road on the Community Association's land, and (b) it is

far from clear at the junction where the private road joins Old Punt Road that the former is not a public road).

67 On one view it is not necessary in the circumstances of this case to reach a concluded view on whether the Community Association was a land owner whose consent was required before development consent was granted. Enough has been said to show that the case is, at best, one that is weak. In circumstances where there is significant unexplained delay, and no real prospect of obtaining any useful declaratory relief, it would be inappropriate to grant leave to extend the time by some three years to seek to challenge the 2016 consent. That is sufficient to warrant the conclusion that the summons filed on 20 February 2019 be dismissed.

68 However, I am conscious that a further application for development consent may be made in the future. The history of this litigation suggests that there is merit in preventing argument on legal issues which have been the subject of full submissions in this Court. I would conclude that there was no failure to join the Community Association as a person whose consent was required for the development application.

Third issue: Parties to the Class 3 proceedings

69 Three of the Community Association's grounds of appeal sought to set aside the easement ordered by the Court on the basis of parties. Ground 1 was based on the failure to join Ausgrid and Reliance Hexham. Grounds 2 and 4 relied on the failure to join the members of the Community Association, who owned the five community development lots in the scheme. It will be convenient first to deal with the complaint based on the failure to join the members of the Community Association, and then to turn to the non-joinder of Ausgrid and Reliance Hexham.

The failure to join the lot owners

70 Grounds 2 and 4 of the amended notice of appeal were as follows

> "2 The Court erred in failing to make a finding that the lot owners of Community Association DP270447 ought to have been joined to proceedings pursuant to r 6.24 UCPR.

> 4 The Court erred in finding that the lot owners of Community Association DP270447 do not have an estate or interest in the land pursuant to s 88K(2)(b) Conveyancing Act."

71 The primary judge dealt with this very concisely, at [182]-[183]:

> "ATB Morton submits that the Court would not be satisfied that there has been an impact upon [the other lots] which would warrant compensation being paid, but that even if there had been such an impact, the Court would find they only had an equitable interest and not an 'estate or interest' in the CA land for the purposes of s 88K(2)(b).
>
> I accept that submission. In order to have a compensable interest in the CA land, the lot owners of the CA estate would need to demonstrate 'an estate or interest in that land that is evidenced by an instrument registered in the General Register of Deeds or the Register kept under the Real Property Act 1900'. This is not an ambiguous requirement, and it is not met by any of the individual lot owners."

72 The way in which his Honour addressed this issue appears to reflect the fact that at trial, the Community Association positively contended that one reason that an easement should be refused was that the Court could not be satisfied that the lot owners could be adequately compensated, within the meaning of s 88K(2)(b). It was put in opening and closing written submissions that "the statutory scheme by 88K(2)(b) does not permit the individual lot owners to claim compensation for the decrease in the value of their lot by reason of the grant of the easement".

73 ATB Morton submitted that the Community Association ought not to be permitted to advance this ground of appeal, given the way its case had been run at first instance. It said that had the Community Association (or any lot owner) actually said that the owner's joinder was necessary, "ATB may well have joined them out of abundant caution". In response, the Community Association pointed to parts of its submissions which, on one view, do suggest that its members should have been joined.

74 On any view, there was much less emphasis at first instance by the Community Association on the failure to join lot owners which, as will be seen, were fully aware of the litigation and freely participated in it, not merely in their role as members of the Community Association, but also as witnesses called by it. It is understandable that the primary judge, determining litigation where there was no shortage of legal and evidential controversy, addressed this issue very concisely. Considerably greater emphasis was given to the point on appeal.

However, the better course is to deal with this point on its merits. In order to do so, it is necessary to identify the way in which land subject to the *Community Land Development Act 1989* (NSW) is held.

75 The registration of the Community Plan in 2004 created the appellant: *Community Land Development Act*, s 25(1), as well as creating the five community development lots owned by the other lot owners. Those owners were the four companies which owned lots 2, 4, 5 and 6 (Jesdan Engineering Pty Ltd, P&R Slattery Pty Ltd, Banek Holdings Pty Ltd and Alloy Steels Pty Ltd) and the three co-owners of lot 3 (Mr Ernest Gavin, Ms Margaret Harvey and Ms Susanne Staunton). They appear to have operated businesses on their lots, access to which was provided by the road on Lot 1. Representatives of each gave evidence which was adduced by the Community Association, and some were cross-examined by ATB Morton.

76 The community plan which is lodged must include, as a sheet of the plan, "an initial schedule of unit entitlements": s 5(2)(d). The unit entitlements affect the rights and obligations of members amongst themselves. For example, speaking generally, levies are assessed rateably, according to a member's unit entitlement (*Community Land Management Act 1989* (NSW), s 20(3)).

77 At the same time as the Community Association was created, s 31(1) vested the Association property (lot 1) in it. Subsection 31(2) provides that "land vests under this section for the estate or interest evidenced by the folio for the land". Subsection 31(4) provides:

> "(4) The estate or interest of an association in its association property is held by it:
>
> (a) if it has only 1 member—as agent for the member, or
>
> (b) if it has more than 1 member—as agent for all the members as tenants in common in the shares prescribed by section 32."

78 Section 32(1) provides that the "share" of a lot proprietor in the community property is a proportionate share reflecting that proprietor's unit entitlement. It will be seen that subsections (2) and (4) of s 31 both refer to the "estate or interest" of a Community Association and provide that it is held as "agent" for the members. The collocation of those terms is problematic.

79 “Agent” and “agency” are of course commonly used in general senses which are divorced from their legal sense. “No word is more commonly and constantly abused than the word ‘agent’”, as Lord Herschell said in *Kennedy v De Trafford* [1897] AC 180 at 188. Agency in its legal sense primarily connotes an authority or capacity in one person to create legal relations between a person occupying the position of principal and third parties: see *International Harvester Co of Australia Pty Ltd v Carrigan’s Hazeldene Pastoral Co* (1958) 100 CLR 644 at 652; [1958] HCA 16. Agency may also fairly be used when describing the rules by which the knowledge of one person is imputed to another, and sometimes when dealing with accessory liability. But the legal uses of agency involve relationships between two persons. Agency in its legal sense does not ordinarily address the different ways in which property is held. The law has a range of relationship involving the holding of property by one person for another: property may be held as bailee, or pledgee, or mortgagee, or stakeholder, or trustee. It is far from clear what is means, as a matter of law, to say that a person holds property as an agent for another. It is not without significance that the authors of *Bowstead & Reynolds on Agency* (21st ed, 2018, Sweet & Maxwell) state (at [6-082]) that:

> “If an agent who agrees to acquire, to assist in the acquisition of, land or another asset on behalf of his principal acquires it in his own name or on his own behalf he becomes a trustee of it for his principal.”

80 Nonetheless, statute forces courts to give some meaning to the language that a community association holds association property as agent for its members. The problem is not dissimilar from cases where statute requires a trust to be treated as a legal person: see R French, “Trusts and Statutes” (2015) 39 *MULR* 629 at 645-646. There is a deal of law on identical provisions which appeared in a similar context in the *Strata Schemes (Freehold Development) Act 1973* (NSW). Under that statute, the “body corporate” or “owners corporation” performed a similar role to the Community Association. The common property was vested in it upon registration of a strata plan. Section 20 provided that it held the common property as agent for the proprietors in proportion to their unit entitlements, very similarly to s 31, but s 24 introduced the notion of “beneficial interest” which is not found in the *Community Land*

Development Act. It is as well to compare the two sections. Section 24 provided:

> "(1) In any dealing or caveat relating to a lot, a reference to that lot includes a reference to any estate or interest in common property which is vested in the body corporate as agent for the proprietor of that lot without express reference to the common property and without that dealing or caveat being recorded in the folio of the Register comprising the common property;
>
> (2) The beneficial interests of a proprietor of a lot in the estate or interest in the common property, if any, held by the body corporate as agent for that proprietor shall not be capable of being severed from, or dealt with except in conjunction with, the lot."

81 A series of judgments has criticised the juxtaposition of the statutory notions of agency and beneficial interest, concluding that despite the oddness of the statutory "agency", the references to beneficial interest make it plain that the lot owners hold an equitable interest in the common property. See *Carre v Owners Corporation – Strata Plan 53020* (2003) 58 NSWLR 302; [2003] NSWSC 397 at [28], *Lin v The Owners – Strata Plan No 50276* [2004] NSWSC 88; (2004) 11 BPR 21,463 at [7] and *The Owners – Strata Plan No 43551 v Walter Construction Group Ltd* (2004) 62 NSWLR 169; [2004] NSWCA 429 at [43]-[45] (these references are not intended to be exhaustive). The result that was reached in relation to that legislative regime was that lot owners enjoyed an equitable interest in the common property. In *EB 9 & 10 Pty Ltd v The Owners Strata Plan 934* [2018] NSWCA 288 at [31], Barrett AJA with the agreement of Meagher and Gleeson JJA endorsed what had been said by White JA in *McElwaine v The Owners Strata Plan 75975* (2017) 18 BPR 37,207; [2017] NSWCA 239 at [37]:

> "The interest of a lot owner in the common property is an equitable interest as a tenant in common with other lot owners. The relationship between the owners corporation as legal owner of the common property and the lot owners as beneficial tenants in common is that of trustee and beneficiary or analogous thereto."

82 That is important background if reference is made to Tobias AJA's judgment in *The Owners – Strata Plan 50276 v Thoo* [2013] NSWCA 270; (2013) 17 BPR 33,789, which mentions this point at [135]:

> "The interest of a lot owner as an equitable tenant in common is a product of the statutory provisions concerning the relationship of the owners corporation to the common property. Because it holds the common property as 'agent' in the manner specified in s 20(b) of the 1973 Act, the owners corporation holds

> it upon trust for the several lot owners from time to time in proportion to their unit entitlements – albeit on the footing that a lot owner's equitable interest cannot be dealt with except in conjunction with the lot: s 24(2)."

83 As presently advised, I would regard what Tobias AJA there said as proceeding on the (unstated) basis that the statute referred not merely to "agency" but also to the beneficial interests of the lot owners in the common property.

84 A question which may not be free from difficulty arises in applying those principles to the somewhat different regime established by the *Community Land Development Act*. That Act, which draws upon the language and concepts from the strata titles legislation, may be thought to be relevantly different, insofar as the counterpart to s 24 is s 33, which relevantly provides:

> "**33 Dealings with association property**
>
> (1) The estate or interest of an association in association property may be dealt with only in accordance with this Act and the *Community Land Management Act 1989*.
>
> (2) The estate or interest in community property held by the community association as agent for the proprietor of a community development lot may be dealt with in conjunction with the lot.
>
> ...
>
> (6) A reference in a dealing or caveat:
>
> (a) to a lot that is a community development lot, or is a neighbourhood lot or strata lot that forms part of a community scheme—includes (without being expressly stated) a reference to the estate or interest in the community property held by the community association as agent for its members, or
>
> ..."

85 Subsection 33(2) arguably entails that the owner of a community development lot has an estate or interest in the community property held by the community association; the fact that it "may be dealt with" at the same time as the community development lot is sold suggests that the lot owner has such an estate or interest. However, it is also a striking thing that s 33 of the *Community Land Development Act* does not refer to the beneficial interest of the owners of the community development lots, even while s 31 preserves the problematic statutory agency. I do not wish to be taken to have expressed a view as to whether what has been held as to the ownership of the common property in a strata development applies in relation to the ownership of association property under the *Community Land Development Act.* The precise way in which the

Community Association holds association property may be of some significance in a wide range of cases, and should not be determined in this appeal, where I do not regard there to have been full argument and where the point ultimately does not matter.

86 The Community Association did not rely on any of the authorities mentioned above. Nor did it rely on s 33. Rather, the Community Association submitted that the owners of lots 2-6 have an estate or interest in the Community Association's land by virtue of its agency for them as created by s 31(4). It pointed to the unit entitlement numbers which were registered, in accordance with s 29 of the *Community Land Development Act* and Schedule 11, and submitted that merely because the entitlements of the owners of lots 2-6 were recorded on the register, that gave them an "interest" in the association property. The emphasis was on "interest" rather than "estate", although Mr Tomasetti maintained that he did *not* say that each lot owner did *not* have an estate in the Community Association land. It was submitted that "interest" was a broader term, and that each lot owner had an interest in the association property commensurate with its unit entitlement. It was said:

> "LEEMING JA: But there's only one estate or interest; is that right?
>
> TOMASETTI: No, I think there's more than one estate or interest. There's the interest of the individual stakeholders in accordance with their unit entitlements. The community property can only be effectively managed and maintained through the individuals as they vote to control."

87 It was not said that the owners of lots 2-6 were necessary or proper parties *by virtue of their ownership of lots 2-6*. No doubt that was for the good reason that the easement sought by ATB Morton did not burden any of those lots.

88 Let it be assumed, favourably to the Community Association, that the owners of lots 2-6 each enjoyed some estate or interest in Lot 1 (as would be the case if they were proprietors of private lots in a strata scheme and if the Community Association was an owners corporation). It remains necessary in order to engage s 40(3) for the Community Association to establish that the estate or interest in association property is *evidenced by a registered instrument*.

89 Those words do real work in restricting the class of persons who are identified by the subsection. Thus, for example, the undoubted estate or interest of a sole

beneficiary under a fixed trust, or the sole next of kin where the land is owned by an intestate deceased person's personal representative, or an equitable mortgagee, would not satisfy the second branch of s 40(3). Although the beneficiary or next of kin or equitable mortgagee has a familiar estate or interest in the land, because that estate or interest is not evidenced by a registered instrument, those persons do not fall within s 40(3).

90 Another familiar example of an interest or estate in land is that of a purchaser under an uncompleted contract for sale of land (although the nature of that estate or interest is controversial, at least prior to the payment of the purchase price, as indicated for example by Deane J in *Kern Corporation Ltd v Walter Reid Trading Pty Ltd* (1987) 163 CLR 164 at 191-192; [1987] HCA 20). Sackar J considered whether a purchaser, which had lodged a caveat, had an interest which was evidenced by a registered instrument within the meaning of s 88K(2)(b) in *Sakha & Sons Pty Ltd v Prime Gordon Pty Ltd* [2018] NSWSC 1827. His Honour stated at [9]-[10]:

> "In my view the equitable interest created by the purchase agreement is insufficient for the purposes of s 88K(2)(b).
>
> In addition, the mere fact that a caveat has been lodged which, upon examination, does no more than refer back to this contract in a rather ambiguous fashion and does not itself qualify as an 'instrument' registered accordingly. A caveat does not fall within s 88K(2)(b) in my view because a caveat is in my view correctly characterised as simply a mechanism for devising the protection of rights pending proper determination: *Barry v Heider* (1914) 19 CLR 197; [1914] HCA 79."

91 The registration of a series of numbers, identifying the unit entitlements of members of the Community Association, (which is what the Community Association relied upon for the purposes of satisfying s 40(3)) does not evidence any estate or interest in the land. Rather it identifies the rights and liabilities enjoyed by the lot owners as between each other in terms of voting and bearing of costs.

92 True it is, as Mr Tomasetti appeared to submit, that the members have an "interest" in the land, insofar as they are entitled to vote at members meetings. But that is an interest in the same way that a shareholder has an "interest" in the company insofar as the shareholder may participate in votes at members meetings and participate in distribution of the company's assets in winding up.

It does not mean that the shareholder has an interest in, say, real property owned by the company. In any event, there is no occasion to slip from the precise and familiar conveyancing notion of "estate or interest" where those words appear in s 88K and s 40 into an informal notion of "interest". The expression "estate or interest" ordinarily has a proprietary connotation: *Stow v Mineral Holdings (Australia) Pty Ltd* (1994) 180 CLR 295 at 311; [1979] HCA 30, *The Queen v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 342; [1982] HCA 69. As Mason J said in the latter case (at 342), "[n]o one who has a merely personal right in relation to land can be said to have an 'estate or interest' in that land."

93 The primary judge correctly proceeded on the basis that the lot owners did not have an estate or interest evidenced in the register for the purposes of s 40(3) of the *Land and Environment Court Act*.

The failure to join Ausgrid and Reliance Hexham

94 Ground 1 of the appeal is:

> "The Court erred in finding that the joinder of Ausgrid and/or Reliance Hexham to the proceedings is not necessary or proper pursuant to r 6.24 of the Uniform Civil Procedure Rules 2005 (UCPR)."

95 At the outset of the hearing before the primary judge, the Community Association had submitted that it was necessary also for ATB Morton to join two other parties: Ausgrid and Reliance Hexham, both of which enjoyed registered easements over part of the land over which the compulsory easement was sought.

96 Ausgrid was a statutory State owned corporation under the *Energy Services Corporations Act 1995* (NSW) which was the successor to EnergyAustralia and which was itself the subject of a privatisation transaction around late 2016 pursuant to the *Electricity Network Assets (Authorised Transactions) Act 2015* (NSW). Reliance Hexham was a private company.

97 By letters dated 28 April and 1 May 2017, ATB Morton wrote to each of Ausgrid and Reliance Hexham, stating that it was the applicant in Class 3 proceedings which were presently part-heard in the Land and Environment Court, to which the Community Association was the respondent. It advised that it was seeking heavy vehicle access by way of an easement over the Community

Association's land, and provided plans for two versions of that easement. The letter to Reliance Hexham stated that after it had acquired the property, changes had been made to the Pacific Highway which prevented access to the land, save under old Hexham bridge, which only had a 3m clearance.

98 In both cases, ATB Morton advised that it was its view that Ausgrid and Reliance Hexham did not need to be a party to the Court proceedings, but asked whether each company wished to be a party. In the case of Reliance Hexham, the letter attached copies of s 40 of the *Land and Environment Court Act 1979* and s 88K of the *Conveyancing Act*, and it also stated ATB Morton's view that compensation would only be granted to the registered owner of the land burdened by the easement that it sought.

99 There appears to have been no response from Reliance Hexham, which led to an email from ATB Morton's in-house counsel dated 31 October 2017, some three weeks before the resumption of the hearing. That email stated as follows:

> "Attached is a folder of the latest plans (which haven't changed very much since last providing, excepting they now show a boom gate installed on the ATB Morton [land] to allow only heavy vehicles to use the access way).
>
> ATB Morton is still seeking access over the existing road access (and over the same access that Reliance has an easement).
>
> ATB Morton is proposing that no light vehicles from the ATB Morton site will be permitted to use the access way and this will be controlled by a gate that ATB Morton will construct on the ATB Morton land that will be height and weight controlled. This is to prevent cars 'rat running' along the access way. This was a concern raised by the owners of the road. ATB Morton will also be contributing to maintenance of the road. ATB Morton will accept any conditions imposed by the Court of course and must, like all users of the easement, not interfere with any other user of the easement.
>
> I understand this is not your priority but if you are considering providing a letter, I will need shortly, otherwise I will have to join Reliance as a party to the Court proceedings so you have sufficient time to prepare for the court hearing.
>
> Again, happy to discuss further with you if required."

100 That email elicited a response as follows:

> "Thank you for your contact and consultation regarding the Land & Environment Court proceedings for ATB Morton easement access off Old Maitland Road Hexham.
>
> It is understood that workshops and offices are proposed for the site zoned as DP90824 and ATB Morton require truck only access via the shared existing easement. Reliance Hexham has reviewed the documentation provided by ATB Morton, including two access alternatives.

> Plans for a boom gate (ref drawing 1129-DWG-204-00009) to be installed at the southern end of the easement access road is not acceptable to Reliance Hexham and therefore request for the removal of this from the proposal.
>
> Based on all other information provided, and subject to qualification of the boom gate removal, Reliance Hexham does not oppose the proposed access or easements. Furthermore it shall be qualified that Reliance Hexham rights and access are not adversely affected. Therefore Reliance Hexham does not consider it necessary to be party to the Class 3 court proceedings."

101 The boom gate proposal did not proceed.

102 The communications between ATB Morton and Ausgrid followed a similar course. On 13 July 2017, there was a further telephone call by the in-house counsel to an Ausgrid officer, followed by her email attaching the two proposed access routes. She followed that email with a further email on 5 October 2017, and, so it appears, a telephone conversation on or around 1 November 2017 with a man described as Ausgrid's "Manager Property Portfolio". Her email said that she had followed up her original letter to Ausgrid dated 28 April 2017 "on numerous occasions". (This may have been when the sale effecting the privatisation of Ausgrid was being completed.) She sought confirmation from Ausgrid "as to whether they wish to be a party to the Land and Environment Court proceedings" and stated that the matter was returning for hearing on 21 November 2017.

103 Ausgrid's response was as follows:

> "I refer to your letter dated 28 April 2017 (received by Ausgrid on 13 July 2017) and your telephone discussion on 13 July 2017 with our Russell Murdoch.
>
> Ausgrid has considered the documentation provided in your email below showing the two different access routes, the DP Plans and aerial photographs. Based on the information provided, Ausgrid has not identified any concerns with the proposed heavy vehicle access way adjacent to or over our existing assets or easements. In these circumstances, Ausgrid does not consider it necessary to be a party to the Class 3 Court proceedings at this time.
>
> However, should any of the information that has informed our assessment change, we will require immediate notification so the impact of that change can be assessed."

104 Before the primary judge, ATB Morton's valuer gave evidence that there would be nil or nominal diminution in the value of the interests of Ausgrid and Reliance Hexham. The Community Association's valuer appears to have accepted that much in the case of the Ausgrid interest, but maintained that

there could be some diminution in value to Reliance Hexham's interest if there were some operational impact.

105 The primary judge reached a conclusion at [180]-[181], on the basis of that evidence, that:

> "I am satisfied that if any effect was suffered by Ausgrid or Reliance Hexham, it would be capable of being compensated. Moreover, whilst there was some difference between the valuers in relation to possible diminution, I prefer the evidence of Mr Lunney. This is because I take into account that as things stand, that is absent the Proposed Easement, Reliance Hexham presently enjoys access over the CA land, and my view is that any possible 'operational impact' which was raised by Mr Tew, but not fully explored, does not alter this primary position. I find that neither Ausgrid's or Reliance Hexham's interests in the CA land will suffer as a result of the imposition of the Proposed Easement.
>
> Moreover, the correspondence from each of Ausgrid and Reliance Hexham satisfies me that each has been appropriately informed in relation to the matter that is before the Court and has chosen not to participate for the reasons noted above in correspondence received from each. As such, I do not consider that the joinder of Ausgrid and/or Reliance Hexham is necessary or proper pursuant to r 6.24 of the UCPR and that, in any event, each has been given the opportunity to participate."

106 The Community Association did not seek, in this appeal confined to questions of law, to challenge the exercises of evaluative judgment in that passage. Rather, it submitted that s 40(3) *required* the joinder of both Ausgrid and Reliance Hexham, in default of which the proceedings had to be dismissed. ATB Morton submitted that the section "ring fenced" the issue of parties, delineating the persons who might, but need not, be joined. This latter submission was said to flow from the meaning of "include". Mr Pickles SC, who appeared with Ms McKelvey for ATB Morton, invoked what had been said in *YZ Finance Company Pty Ltd v Cummings* (1964) 109 CLR 395 at 403-404; [1964] HCA 12 and *Cranbrook School v Woollahra Municipal Council* (2006) 66 NSWLR 379; [2006] NSWCA 155 at [42]-[45], and put the point as follows:

> "if the provision is exclusive, and, therefore, 'includes' can be taken as 'means', it lends support to the proposition that it is not intending to say that the parties must be, but rather it's saying that the parties to this class include, or mean, those contained within that ring fence definition for the purposes of 88K(2), those with interests registered on the title. In other words, it's intending to set those as the maximum outlier of proper parties rather than those who must be included."

107 I would not accept the submission of either party.

108 Contrary to ATB Morton's submission, "include" bears its ordinary meaning of a non-exhaustive statement of who is to be a party to an application. There is a familiar line of authority where the verb "includes" is used in a quite different sense when a statute defines a term, in which circumstances sometimes it means "means and includes" and amounts to an exhaustive definition. But in s 40(3), the verb is not used in a definition.

109 Further, as Mr Pickles fairly conceded, in every single case, the owner of the land to be burdened by the easement sought by the applicant will need to be joined. It is plain that "include", insofar as it applies to the owner of the burdened land, is mandatory. The word "include" must bear the same meaning in its application to the balance of the subsection.

110 I do not accept that "include" in s 40(3) operates as a "ring fence" to delineate the outer limits of those parties who may be joined, but mandating that none need be joined. To the contrary, it bears its ordinary meaning: the necessary parties to an application under s 40 include (but need not be limited to) those parties which have registered interests in the land sought to be burdened by the applicant.

111 Nonetheless, I do not accept the Community Association's submission either. It is one thing for a section to provide that certain persons are necessary parties. It is another thing entirely for non-compliance with that requirement to be fatal to the proceedings. This collides with more than a century's procedural reform.

112 It will be seen that ground 1 of the appeal explicitly accepted that UCPR r 6.24 applied. It was common ground that r 6.23 likewise applied to the proceedings in Class 3 of the jurisdiction of the Land and Environment Court. That rule provides as follows:

> "**6.23 Effect of misjoinder or non-joinder of parties**
>
> Proceedings are not defeated merely because of the misjoinder or non-joinder of any person as a party to the proceedings."

113 That rule has a long history. As was pointed out during the hearing, when Lord Macnaghten said in *William Brandt's Sons & Co v Dunlop Rubber Company Ltd* [1905] AC 454 at 462 that "no action is now dismissed for want of parties", his Lordship was referring to the well-known reforms effected by the Judicature

legislation of 1873. Rule 6.23 is simply the modern incarnation of the basal nineteenth century reform. There is no reason to construe s 40(3) as a return to the days of the unreformed court of chancery whereby misjoinder *automatically* led to a suit's being dismissed: see *Boyd v Thorn* (2017) 96 NSWLR 390; [2017] NSWCA 210 at [94]-[102].

114 The *Chancery Amendment Act 1852* (15 & 16 Vict c 86) had relaxed the approach in chancery to misjoinder and non-joinder, permitting amongst other things any beneficiary to obtain a decree for execution of the trusts arising under a deed or instrument without serving the other beneficiaries (r 4) and providing that "in all cases in the nature of waste, one person may sue on behalf of himself and all persons having the same interest" (r 5). Thus there was a list of special cases where the strict chancery rules as to joinder did not apply. In such cases, r 8 provided that:

> "In all the above cases the persons who, according to the present practice of the Court, would be necessary parties to the suit, shall be served with notice of the decree, and after such notice they shall be bound by the proceedings in the same manner as if they had been originally made parties to the suit, and they may, by an order of course, have liberty to attend the proceedings under the decree; and any party so served may, within such time as shall in that behalf be prescribed by the general order of the Lord Chancellor, apply to the Court to add to the decree."

115 Those remedial rules were expressly preserved by the new 1875 Judicature Rules, which also had statutory force (see *Judicature Act 1875*, s 16). Rule 13 of Order XVI, which was one of the rules in the Schedule of the 1875 Act, provided that:

> "No action shall be defeated by reason of the misjoinder of parties, and the Court may in every action deal with the matter in controversy so far as regards the rights and interest of the parties actually before it."

116 Section 7 of the *Equity Act 1880* (NSW), which later became s 8 of the *Equity Act 1901* (NSW), enacted similar reforms to those seen in the *Chancery Amendment Act 1852*. Until 1972, there was no provision equivalent to the judicature provision in Order XVI rule 13. That was enacted in New South Wales by the rules in the Fourth Schedule to the *Supreme Court Act 1970* (NSW), Pt 8 r 7, given force of statute by s 122 of the Act.

117 As it happens, the course of notification to possible parties adopted by ATB Morton corresponds to what was authorised a century and a half ago in the mid nineteenth century chancery reforms.

118 True it is that persons directly affected by an order should ordinarily be joined to litigation. Joinder is the default position, and the obligation to join necessary parties is ordinarily a matter of obligation, not discretion, as Mr Tomasetti emphasised, by reference to what was said in *Ross v Lane Cove Council* at [54] and [57]. However, the passage in *Ross* was not unqualified, and continued at [61]-[62] as follows:

> "All of that said, because the underlying concern is (as McHugh J said in *Victoria v Sutton*) natural justice, joinder is not always necessary. That reflects a very old approach. Although the common law knew nothing of the joinder of a party merely for the purpose of having that party bound by the judgment, equity was not so strict. Where no prejudice would be suffered by a party not being joined, his or her presence could be dispensed with: see for example *Smith v Brooksbank* (1834) 7 Sim 18; 58 ER 743, where the non-joinder of the executors who were alleged to have assented to the bequest was held not to be fatal. The direct ancestor of the rules in the UCPR governing joinder of parties is the rule of procedure contained in O XVI r 13 in the First Schedule to the *Supreme Court of Judicature Act 1875* (UK). That in turn reflected chancery practice. In particular, and relevantly for present purposes, UCPR r 6.23 'Proceedings are not defeated merely because of the misjoinder or non-joinder of any person as a party to the proceedings' is merely a modern formulation of the chancery practice.
>
> The positive assent to an order by the executors who were not joined in *Smith v Brooksbank* has its modern counterpart in the course adopted by Preston CJ in *Woollahra Municipal Council v Sahade*. His Honour, recognising that the owners corporation was directly affected by the proposed demolition of a staircase which extended onto the common property, proceeded on the basis that the practical impact was low and its attitude to the orders was abundantly clear (the owners corporation was notified of the proposed order, and informed the Court through the applicant local council that it wished neither to be joined nor heard, but had passed a resolution supporting the orders proposed)."

119 There is no reason why s 40(3) should be read so as to displace this body of authority. No such submission was made, and indeed the Community Association's appeal explicitly proceeded on the basis that rr 6.23 and 6.24 applied. This is inconsistent with s 40(3) having the *per se* effect of requiring the proceedings to be dismissed. Rather, there is a discretion. There was an overwhelming case for the primary judge proceeding as he did, where Ausgrid and Reliance Hexham were informed of the proceedings and their entitlement to be joined and chose in an informed way not to participate.

120 These grounds are not made out.

Fourth issue: The test applied by the primary judge

121 Grounds 3 and 5 are as follows:

> "3. The Court erred in finding that the proposed easement is reasonably necessary for the effective use of the Respondent's land for the purposes of s 88K(1) *Conveyancing Act 1919* (**Conveyancing Act**).
>
> 5. The Court erred in misdirecting itself by asking the wrong questions and/or applying the wrong test to the opinions of satisfaction that the Court was required to form under s 88(2)(b) of the Conveyancing Act."

122 Two preliminary points should be made. First, and in contrast with grounds 1A and 1B, which "briefly, but specifically" formulate the grounds of appeal (in accordance with UCPR r 51.18(1)(e)), ground 3 leaves unexpressed the basis for challenge. Section 88K(1) confers a discretion, and so it is necessary to identify appellable error in accordance with the principles in *House v The King.* It is desirable to articulate more precisely, in the ground of appeal, how it is said that the exercise of discretion has miscarried. It is especially desirable that that occur in a case such as this, given that the appeal is confined of questions of law.

123 Secondly, no separate submissions were made in support of ground 5 (which evidently is intended to invoke s 88K(2)(b)). That ground was not addressed orally at all. In writing, the submissions in support of it were collected with those as to the need to join the lot owners. This has been dealt with above.

124 The primary judge addressed the test of reasonable necessity required by s 88K at [80]-[164]. His Honour's reasons fell into two halves.

125 First, the primary judge addressed the appropriate legal test, by reference to familiar first instance authorities regularly invoked in this area, the decisions of Hodgson CJ in Eq in *117 York Street Pty Ltd v Proprietors of Strata Plan No 16123* (1998) 43 NSWLR 504; 98 LGERA 171 and Preston CJ of LEC in *Rainbowforce Pty Ltd v Skyton Holdings Pty Ltd* (2010) 171 LGERA 286; [2010] NSWLEC 2 at [67]-[83], and a series of more recent decisions of this Court, of which for present purposes the most relevant are *Moorebank Recyclers Pty Ltd v Tanlane Pty Ltd* [2012] NSWCA 445 at [155] and *Shi v ABI-K Pty Ltd* (2014) 87 NSWLR 568; [2014] NSWCA 293 at [15]. It was said

that the primary judge had misstated a concession, and further erred in proceeding on the basis that the ATB Morton consent was a reasonable use of its land. Both submissions were encapsulated orally as follows:

> "The starting position: is it reasonably necessary, and the latest statement of this Court is you have to look at all the circumstances. It's wrong to say, look, I've got a consent here; it's been acknowledged by the Community Association this is a reasonable use. We didn't; we said it's an effective, one effective use. He says once you get that concession, it's a reasonable use; all I've got to do is ask whether or not the use is preferable with or without the easement. That's the wrong test."

126 The Community Association also submitted that the reasons of the primary judge disclosed further legal error insofar as his Honour applied *Moorebank Recyclers* which had been, so it was said, qualified by the later decision of *Shi*. The passages in both judgments, and the way they were treated by the primary judge, will be set out below.

127 Secondly, the primary judge recognised that the test of reasonable necessity also required consideration of the impact upon the servient tenement (at [123]-[125]) and then turned to address various potential impacts which substantially accorded with matters raised by the Community Association: the impact on the marina proposal; the impact of heavy vehicle traffic on operational matters, parking, and pedestrian movements; and the impact on security: at [126]. His Honour addressed each, by reference to the evidence. The Community Association disputed that reasoning in writing, and in some detail at paragraphs 53-56 of its written submissions in chief and paragraphs 49-57 of its written submissions in reply. For example, it was said that the primary judge "erred in finding that the posited marina on the CA land is unlikely to receive approval"; this was said to disclose that the primary judge "asks and answers the wrong question". It was said that the primary judge made "a finding unsupported by the evidence in relation to the security concerns of the individual lot owners and the Community Association that the provision of the northern gate subject to proper management of any keys considered below as sufficient to address the concerns raised". And it was said that "[t]he primary judge erred by asking whether the increase in truck movements per day by an additional 70-80 truck movements per day was not a saturation of the existing access way ..." because, so it was said, "[s]aturation of the access way cannot

possibly be the test of unreasonableness in terms of interference with proprietary rights".

128 The second half of these submissions was only developed orally to a limited extent, and for good reason. Whether or not the primary judge was satisfied that the proposed easement was reasonably necessary for the effective use or development of ATB Morton's land, bearing in mind the particular limitations imposed upon the easement and the particular evidence going to the marina proposal and the likely increase in traffic including heavy trucks is, as ATB Morton said succinctly and accurately, very much a question of fact. The application of a legal test to facts, whether they be agreed or disputed, is unlikely to give rise to a question of law (I should not be understood as implying there was some error of fact in the approach taken by the primary judge).

129 I turn accordingly to the ways in which the Community Association maintained there was legal error in how the primary judge framed its concession, and the test in the authorities.

The Community Association's concession

130 The primary judge addressed the Community Association's concession in two parts of his reasons. At [40], when summarising ATB Morton's submissions, his Honour said that:

> "ATB Morton notes that CA concedes that the development authorised by the Consent is an effective use and development of the ATB Morton site within the meaning of s 88K(1). ATB Morton submits that CA's submission that, notwithstanding this concession, the fact that there are uses permissible on the CA land that do not require heavy vehicle access to operate means that the Court should conclude that the Proposed Easement is not 'reasonably necessary' should be rejected."

131 At [86], the primary judge said:

> "It is conceded by CA that the Consent is a reasonable use of the land. I agree with the position of both parties and find that there can be little doubt that the Consent, having been approved by order of this Court (albeit without contested hearing), is appropriate to the area and an economically rational use of the ATB Morton site."

132 The Community Association submitted that the latter was erroneous, and that all that it had conceded was that the land with the benefit of the consent was "***an***" effective use and development of the ATB Morton site within the meaning of s 88K(1) itself (italics, bold and underlining in original).

133 The Community Association's concession was made in writing. It was made in paragraph 24 of its "Skeleton Opening Submissions":

> "The Respondent accepts that the use of the ATB Morton Site for development for the purposes of the Consent is an effective use and development of the ATB Morton Site within the meaning of s 88K(1). It is 'at least reasonable as compared with the possible alternative uses and developments' [footnoting *117 York Street Developments*.] However, that does not mean that the Proposed Easement is reasonably necessary."

134 In the Community Association's closing submissions, the point was somewhat altered:

> "The Respondent accepts that the use of the ATB Morton Site for development for the purposes of the Consent is **an** (1) effective use and development of the ATB Morton Site within the meaning of s 88K(1), due to the existence of the Consent. However, it is the Respondent's case that that factor **of and by itself** would not satisfy the Court that the Proposed Further Amended Easement is 'reasonably necessary' for the purposes of s 88K ...".

135 I regard this aspect of the Community Association's submissions as little more than a verbal quibble. There is very little difference between a concession that a consent is an effective use and a concession that a consent is a reasonable use. The primary judge appears to have used both formulations interchangeably. But in any event the second sentence of [86], which finds in substance that the use was appropriate to the area and an economically rational use of the site, restates the substance of the concession. There was no error, let alone an error of law, in the way in which the primary judge addressed the Community Association's concession.

136 The remaining aspects of the Community Association's submissions were that it was wrong to ask whether or not the use was preferable with or without the easement, and that *Shi* qualified the test stated in *Moorebank Recyclers*, contrary to the approach taken by the primary judge.

137 In order to consider whether the reasons of the primary judge disclose error of law in dealing with the authorities, it is convenient to reproduce his Honour's analysis of those and other authorities at some length. The same submission advanced in this Court as to the effect of *Shi* upon *Moorebank Recyclers* was made to the primary judge.

138 His Honour commenced with reference to what had been said in *ING Bank (Australia) Ltd v O'Shea* [2010] NSWCA 71 as to the test of reasonable

necessity. After turning to passages from the reasons for judgment of Giles JA and Young JA, his Honour said (at [93]):

> "It is clear that reasonable necessity is not a low bar, but it is also clear from subsequent consideration by the Court of Appeal that the effect of *O'Shea* was not to move away from the approach of Hodgson J in *117 York Street*, but rather to emphasise that his Honour provides guidelines which should not be mistaken for the statutory test."

139 His Honour then turned to *Moorebank Recyclers* (at [94]-[95]):

> "In *Moorebank*, at [155], the Court commented that:
>
> > … To the extent that Preston CJ [in *Rainbowforce* at [72]] was suggesting that subject to the other matters which he stated required consideration, an easement would be reasonably necessary for the effective use and development of the land if it was required for *any* proposed development, regardless of the development's desirability or economic effect, the proposition, with respect, is too wide… it is sufficient in our opinion to show that the proposed development is one which is appropriate to the area in which the land is situated and is at least an economically rational use of the land. That in our opinion is consistent with what was said by Hodgson J in *117 York Street*… (emphasis added).
>
> As the Court went on to explain at [156], a finding that such a use is substantially preferable with the easement is not sufficient on its own to demonstrate reasonable necessity:
>
> > That is not to say that an easement will always be granted in these circumstances. As we have indicated the authorities have established that the concept of reasonable necessity requires consideration of the effect of the grant of the easement on the servient tenement. Further, it is correct in our opinion, that the greater the burden on the servient tenement, the stronger the case needed to justify a finding of reasonable necessity (citations omitted)."

140 His Honour then reproduced what had been said in *Moorebank Recyclers* at [163]-[164] as to "substantially preferable" and stated (at [97]):

> "It is difficult to reconcile the submission of CA that the Proposed Easement cannot be said to be reasonably necessary because uses which do not require heavy vehicle access remain available in the zone with the approach of the Court in *Moorebank*. The effect of that approach is that once the use is accepted as being appropriate to the area and an economically rational use of the land, the comparison required by s 88K is between the use with and without the easement, not between that use and other permissible uses."

141 His Honour then turned to *Shi* and the submission which the Community Association has repeated in this Court (at [98]):

> "However, CA submits that the approach of the Court in *Moorebank* was criticised by the Court of Appeal in *Shi v ABI-K Pty Ltd* (2014) 87 NSWLR 568;

[2014] NSWCA 293 ('*Shi*'). At [15], Basten JA, with whom Barrett and Ward JJA agreed, said:

> … [T]he test of a proposed development being required to be appropriate to the area and an economically rational use of the land was said to be consistent with the passage extracted from Hodgson CJ in Eq in *117 York Street*. Accepting that to be so, the tests of 'appropriate to the area' and 'an economically rational use of the land' might appear to lower the hurdle somewhat, as they are tests which will be readily satisfied in the present case. Thus, it would be difficult to accept that a use which had been approved by a local council was not 'appropriate to the area in which the land is situated'. Further, it would be difficult to accept that a use which had been proposed by a commercial developer was not 'at least an economically rational use of the land' (emphasis added).

CA says that the Court of Appeal implicitly criticised the lowering of the hurdle in *Shi*. Even if that submission were to be accepted, it would not alter the fact that *Moorebank* is binding authority. However, I do not consider that the Court in *Shi* criticised the test in *Moorebank*. The fact that the Court at [75] approved of the primary judge's finding (as a result of applying the *Moorebank* test) that the development was 'economically rational' in that case lends comfort to that view.

It follows therefore, that the Consent with the Proposed Easement must be compared to a similar development without the Proposed Easement to determine whether it is '(at least) substantially preferable'. Contrary to the submission of ATB Morton, I do not consider this to be a *fait accompli* because of the requirement of heavy vehicle access for use in accordance with the Consent. It is true that the Consent requires heavy vehicle access to the ATB Morton site, but three alternative options were proposed in these proceedings by CA which would allow heavy vehicle access to the ATB Morton site without the imposition of the Proposed Easement: access via the Pacific Highway; access via Old Maitland Road/the unnamed road with excavation works to lower the road under the Old Hexham Bridge; and access via an alternative easement. The Proposed Easement must be found to be substantially preferable to each of these alternatives."

142 The primary judge then considered each of the alternatives, and concluded that the easement over the Community Association land was substantially preferable to them. His Honour concluded at [121]-[122]:

> "For those reasons, I find that the Proposed Easement satisfies the test of being substantially preferable to the alternatives.
>
> Put another way and simply stated without the nomenclature employed in *117 York Street*, I find that there is no reasonably possible method of access for large trucks to the ATB Morton site absent the Proposed Easement. Having regard to the fact that large trucks are required for the majority of permissible uses, although not all permissible uses, on the ATB Morton site, I find that large truck access is reasonably necessary."

143 His Honour then qualified that conclusion by stating that "However, reasonable necessity also requires consideration of the impact on the servient tenement"

and then addressed the impacts as mentioned above, ultimately concluding at [164] that the proposed easement was reasonably necessary.

Consideration

144 It may be helpful to return to first principle. Section 88K confers a broad discretion. The breadth of the discretion operates on a number of levels. The precondition in s 88K(1) is that the easement be "reasonably necessary" for the "effective use or development" of the dominant tenement. Those words "reasonably necessary" and "effective use or development" are themselves evaluative. Even if that precondition be satisfied, the remainder of the section imposes a series of further conditions, notably those in s 88K(2):

> "(2) Such an order may be made only if the Court is satisfied that:
>
> (a) use of the land having the benefit of the easement will not be inconsistent with the public interest, and
>
> (b) the owner of the land to be burdened by the easement and each other person having an estate or interest in that land that is evidenced by an instrument registered in the General Register of Deeds or the Register kept under the *Real Property Act 1900* can be adequately compensated for any loss or other disadvantage that will arise from imposition of the easement, and
>
> (c) all reasonable attempts have been made by the applicant for the order to obtain the easement or an easement having the same effect but have been unsuccessful."

145 It will be seen that the concepts of "use ... not be inconsistent with the public interest", "can be adequately compensated" and "all reasonable attempts" are themselves evaluative and contestable.

146 Further, the statutory power is not exercised in a vacuum. The purpose of the section, and the inevitable outcome of the exercise of the discretion, is the compulsive burdening of a person's land with an easement. This is at least part of the explanation for the decisions which emphasise the need to consider the extent to which the servient land will be burdened and its link with "reasonable necessity".

147 Finally, it is clear that even if all of the expressed preconditions are satisfied, the Court nonetheless has a discretion, as to whether to impose an easement at all, and if so as to the conditions (including, not least, the particular amount of compensation) upon which it should be imposed.

148 Faced with such a discretion, it is understandable that courts have sought to identify principles or (to use the term of the primary judge at [93]) "guidelines" in order to regulate its exercise and to achieve a measure of predictability and consistency.

149 Those principles or guidelines are sometimes called "tests". Such language is apt if it connotes an inquiry to test that all aspects of the evaluative analysis have been taken into account. The language is inapt, however, if it suggests a criterion which is a substitute for the statutory language.

150 I do not accept that his Honour applied any of the principles or guidelines inflexibly, as if they mandated a particular outcome of the discretion his Honour was called upon to exercise. His Honour was conscious of what Giles JA had said in *O'Shea* (at [53]) that "reasonable necessity can not be reduced to substantial preference", and added that the Court of Appeal had there emphasised that the guidelines proposed in *117 York St* should not be mistaken for the statutory test. His Honour went on to apply, expressly, the statutory test.

151 Similarly, turning to the passage in *Moorebank* at [155]:

> "it is sufficient in our opinion to show that the proposed development is one which is appropriate to the area in which the land is situated and is at least an economically rational use of the land."

152 That should not be taken on any fair reading of the judgment as a whole to encapsulate a sufficient test to govern the exercise of the entirety of the discretion. In the very next paragraph of the Court's reasons, their Honours proceed to say:

> "That is not to say that an easement will always be granted in these circumstances."

153 Perhaps it was unfortunate for the passage at [155] to use the words "it is sufficient in our opinion". However, when the two paragraphs are read together, there can be no doubt that this Court in *Moorebank* was *not* stating a test of what was sufficient to exercise the statutory discretion. There is no reason to think that the primary judge applied an erroneous understanding of the passage. The primary judge reproduced *both* passages in full.

154 Read in that light, what was subsequently said in *Shi* about the language in *Moorebank* is unexceptional. It appears to have been directed to a submission recorded at [74] and addressed at [75] as follows:

> "[G]round 4 stated:
>
> > '4 The primary judge erred in holding that the fact of council consent is a basis for concluding that the proposed development is appropriate and/or an economically rational use of the appellant's land….'
>
> It is true that the primary judge accepted that the development was an appropriate one, referring to the standard fixed by *Moorebank Recyclers* at [155], on the basis that the council had given its consent: at [11]. Section 88K(1) requires that the easement be reasonably necessary 'for the effective use or development of' the developer's land. The kind of factors which may indicate that a particular proposal will not give rise to an effective use or development of land would need to have regard to planning standards, development controls and similar considerations. The fact that a responsible consent authority had considered and approved the proposal was a legitimate fact to be taken into account in making that assessment. There was nothing before the primary judge which cast doubt upon that basis of satisfaction."

155 Although the detail of the submission made in *Shi* is not otherwise disclosed, it appears that counsel for the appellant was complaining that [155] of *Moorebank* had been applied out of context. If so, that may explain what was said at the outset in [15]. Once it is appreciated that *Moorebank* did not, on a reading of the judgment as a whole, and in particular of [155] and [156] together, purport to impose a sufficient test, then it is clear that *Shi* did not alter the law or qualify the effect of *Moorebank*, and the primary judge did not err in law in failing to proceed on that basis.

156 That is sufficient to resolve this ground of appeal. However, there is a more general response too, which is that it may be doubted that disagreement with the formulation of or weight to be given to the principles and guidelines which have evolved to shape the exercise of a wide discretion, such as that conferred by s 88K, will ordinarily amount to an error of law. There will commonly be more than one formulation of the principle or guideline. And the principle or guideline will ordinarily be but one component in the exercise of discretion. As presently advised, the fact that the principles or guidelines have been formulated by courts responding to a highly discretionary statutory power does not make it easier to engage the limited appeal right conferred by s 57 of the *Land and Environment Court Act*.

157 I have derived assistance from the writing of Professor Butt on this issue. In "Compulsory Easements: A New Black Letter Syndrome?" (2015) 89 *ALJ* 753 he said (at 753), of s 88K and its Queensland counterpart, that:

> "One issue with the exercise of such powers is that courts, being constrained by precedent, feel the need to develop principles to govern their exercise. In turn, these principles, despite being forged in the facts of a particular case, tend to become hardened rules to be applied across the board."

158 The tendency of which Professor Butt warned is implicit in some of the Community Association's submissions. It is to be resisted.

159 This ground is not made out.

Fifth issue: Easement limited to 50 truck movements (ground 6)

160 The easement proposed by ATB Morton included mechanisms for limiting the number of truck movements by boom gates, either placed at the entrance to its land, or alternatively at the southern entrance to the Community Association's land.

161 If heavy trucks accessing the easement were regulated by boom gates, then it would be possible to measure and limit truck movements. However, as noted above, this was opposed by Reliance Hexham, and was not found in the orders made by the primary judge. The terms of the easement embodied in the Court's order limited the use of the easement to:

> "a. use by heavy vehicles which exceed a height of 3.0 metres; and
>
> b. a maximum of 50 truck movements per day."

162 The Community Association challenged that aspect of the order in two ways. First, it said that there was no evidence to support a finding that truck movements should be limited to 50. Secondly, it said that there was no evidence that such a limit was capable of being controlled or enforced. In either event, the ground being based on no evidence, it was said that it gave rise to a question of law.

163 The primary judge addressed this aspect of the order at [219]-[220], as follows:

> "I find that a limit in the number of relevant truck movements is warranted and, doing the best I can, I find that 50 is an appropriate number which I consider balances the respective interests of the parties as well as lot holders who may be affected.

> To the extent that there may be some concern about the ability of this term to be policed, I am confident that ATB Morton or any future owner of the dominant tenement will have the capacity to control the number of heavy vehicles which access the ATB Morton site as such vehicles are not likely to arrive unplanned."

164 The gravamen of the first aspect of the Community Association's submission was that there was no evidence of 50 truck movements at all, while the experts proceeded on the common basis that there would be 22 truck movements anticipated from the development. That latter number was the consequence of a crude estimate derived from an RMS publication "Guide to Traffic Generating Developments". (By "crude", the materials suggest the estimate was based on a multiple of the gross floor area of office space and a different multiple of the gross floor area of industrial space; the materials are not based on any actual use of the land such as the actual number of employees working in a factory and the actual number of bulky deliveries.)

165 It was unavoidably necessary to translate the crudeness of an estimate into the precision of an upper limit, if there were to be a cap on heavy vehicle movements in the easement. There is no error at all, let alone some error of law, in imposing an upper limit which exceeds the estimation. It is entirely understandable to have regard to the fact that there will be variation from day to day and that the estimate is an *average*. For example, there are some office environments where Friday vehicle movements are much less than those in the rest of the week, and others where Friday might be expected to be the busiest day of the week. There is no reason to think that the same would not be true of at least some industrial space. It is true that 50 is, in some measure, an arbitrary figure. But the primary judge was entitled to bring to bear his familiarity with traffic generating developments, and common sense, and to impose some limit greater than 22.

166 Another way of explaining my rejection of the Community Association's submission is this. It would be wrong in fact to impose a limit of 22 truck movements per day if a development was expected to generate an *average* of 22 truck movements a day, because such a restriction would disregard the inevitable variation above and below the average. It follows that there is no error at all, let alone an error in point of law, in imposing a limit greater than 22.

A limit of 50 is arbitrary, but allows for the fact that the estimate is crude, and in any event is an estimate of an average, and there may be days which are twice as busy as the average. I see no error, let alone any error of law, in the judge selecting 50.

167 Nor do I accept the Community Association's submission that there was no evidence that such a limit was capable of being controlled or enforced. Every such truck must enter the road system by passing through the Community Association's land. There is no difficulty in the Community Association counting such vehicles at the entrance. That may be done by a natural person (ideally, someone who is not easily bored), and there is no reason to doubt that it could also be done with equipment (for example, a surveillance camera capturing vehicle movements through the entrance). If there is evidence that the limit is being exceeded, the Community Association could apply for an injunction (or indeed, damages under *Lord Cairns' Act* in lieu of or in addition to an injunction), a submission made by ATB Morton to the primary judge and recorded in his judgment at [132].

168 Finally, if I were wrong about the above, and there were error in relation to the condition of 50 truck movements, I think it is most unlikely that the result would be to set aside *the entirety* of the orders. The reasons which, on that hypothesis, disclosed the error would also in all likelihood permit this Court to re-exercise the discretion and impose a different condition as to truck movements.

Orders

169 It follows that both proceedings brought by the Community Association should be dismissed. The summons was filed (despite the effluxion of time), so a formal order should be made dismissing it, so that the Court's record is clear.

170 I propose these orders:

In 2018/205877 (the appeal):

Appeal dismissed with costs.

In 2019/56253 (the application for judicial review):

1. Dismiss paragraph 2 of the amended notice of motion filed on 8 March 2019 seeking an extension of time within which to seek judicial review.

2. Dismiss the summons filed by the Community Association on 20 February 2019.

3. The Community Association to pay the defendants' costs, noting that the costs of the Land and Environment Court are the costs of a submitting appearance.

171 **PAYNE JA**: I agree with Leeming JA.

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Amendments

18 April 2019 - Hearing dates inserted.