Supreme Court

New South Wales

Case Name:	EB 9 & 10 Pty Ltd v The Owners SP 934
Medium Neutral Citation:	[2018] NSWSC 464
Hearing Date(s):	11 April 2018
Decision Date:	12 April 2018
Jurisdiction:	Equity
Before:	Kunc J
Decision:	Declarations to be made
Catchwords:	LAND LAW — Strata title — Common property — Whether owners corporation could develop common property in a way which would impede owner's reasonable access to lot used as car space — Strata Schemes Development Act 2015 (NSW) s 28 — Strata Schemes Management Act 2015 (NSW) ss 106 and 153 LAND LAW — Declarations — Utility — Whether sufficiently defined dispute
Legislation Cited:	Strata Schemes Development Act 2015 (NSW) Strata Schemes Management Act 2015 (NSW)
Cases Cited:	Bondi Beach Astra Retirement Village Pty Ltd v Gora [2010] NSWSC 81 Commonwealth of Australia v BIS Cleanaway Limited [2007] NSWSC 1075 Frankel v Paterson [2015] NSWSC 1307 Lin & Anor v The Owners – Strata Plan No. 50276 [2004] NSWSC 88 McElwaine v The Owners – Strata Plan 75975 [2017] NSWCA 239 Noon v The Owners – Strata Plan No. 22422 [2014] NSWSC 1260 The Owners Strata Plan 50276 v Thoo [2013] NSWCA 270; 17 BPR 33789 The Owners-Strata Plan No 43551 v Walter Construction Group Limited (2004) 62 NSWLR 169; [2004] NSWCA 429

	Walsh v Owners Corporation SP No 10349 [2017] NSWCATAP 230
Category:	Principal judgment
Parties:	EB 9 & 10 Pty Limited ACN 140 310 729 (Plaintiff) The Owners — Strata Plan No. 934 (Defendant)
Representation:	Counsel: Dr E Peden (Plaintiff) M R Pesman SC (Defendant) Solicitors: Clarke Kann Lawyers (Plaintiff) Chambers Russell Lawyers (Defendant)
File Number(s):	2016/16782
Publication Restriction:	No

EX TEMPORE JUDGMENT

Summary

1 The plaintiff, EB 9 &10 Pty Ltd, is the registered proprietor of Lot 89 in an apartment block comprising a strata plan in which the defendant is the owners corporation. Lot 89 is a car space in the apartment block's car park. It was purchased by the plaintiff as an investment and is not attached to any dwelling in the building. A sketch plan of the relevant area is annexure A to these reasons.

2 Lot 89's southern boundary divides Lot 89 from an area of common property (the "Area"). The present problem arises because space in the car park is "tight" and to park, what might be loosely termed a "standard size car", in Lot 89 and to drive it out of Lot 89 requires some limited passage over the Area.

3 The defendant currently has two proposals for the use of the Area.

4 First, on 20 July 2016, the Strata Plan specially resolved in favour of "the making of an application for a pre-DA meeting with City of Sydney for the construction of a new building on the common property," (including the Area). In accordance with a nominated plan (the "Building Proposal"), that plan shows a wall being built parallel to the boundary of Lot 89, with a distance of 575 millimetres between the wall and the boundary.

5 Second, on 10 November 2016, a special resolution of the strata plan was passed resolving to alter the use of the Area by creating a communal recreation area and

garden (the “Garden Proposal”). The plan for the Garden Proposal shows a distance of 300 millimetres between the boundary of Lot 89 and the proposed garden area.

6 The plaintiff ultimately sought the following relief:

(1) A declaration that the plaintiff is entitled to access the common property of Strata Plan 934 (the “Common Property”) located on the land identified as Folio Identifier CP/SP 934, located at 45–53 Macleay Street, Potts Point in the State of New South Wales, including for the purposes of parking vehicles in its Lot 89 being a car park space in Strata Plan 934.

(2) A declaration that the defendant is not entitled to restrict or impede the plaintiff’s access to and use of its Lot 89 in Strata Plan 934 via the Common Property in the way identified by Mr Demlakian on Court Book page 47J.

(3) The defendant pay the plaintiff’s costs of the proceedings.

7 Mr Ken Demlakian was the plaintiff’s engineering expert. No objection was taken to his evidence and he was not required for cross-examination. The defendant did not read any expert evidence of its own. Mr Demlakian’s plan referred to in paragraph 2 of the orders sought by the plaintiff, is the last of the four of his scenarios attached as Annexure B to these reasons. His uncontradicted expert evidence was that, what I am loosely referring to as a “standard size car,” had to make an incursion over some (but not the entirety) of the Area on the boundary of Lot 89 of between 700 millimetres and 1,610 millimetres to get in and out of Lot 89, depending on the manoeuvre required.

8 The plaintiff (represented by Dr E Peden of Counsel) submitted that each of the Building Proposal and the Garden Proposal represented an impermissible incursion on the plaintiff’s right of access over the Area to get a car into and out of Lot 89. The defendant (represented by Mr M R Pesman SC) submitted that the declarations sought by the plaintiff should not be made for three main reasons. First, there was no controversy to be quelled. If and when any proposal actually came to fruition, the plaintiff would have ample opportunity to assert whatever rights it might have in the New South Wales Civil and Administrative Tribunal (NCAT). Second, in any event, the plaintiff was not entitled to any such declarations because it was not entitled to assert a right of a particular kind over a particular piece of common property. Third, the Court ought not make bare declarations which would simply become invitations to return to Court to argue about their application.

9 The Court accepts the plaintiff’s submission that it has a right of access over the Area to enable a car to move in and out of Lot 89. That right must be exercised reasonably. At least in relation to the Garden Proposal, there is a live controversy to be quelled. In any event, it is inevitable that if the defendant prosecutes the Building Proposal, the Garden Proposal (or, anything else that might infringe on the plaintiff’s right of access),

the plaintiff will assert precisely the right which it asserts in these proceedings. There is, therefore, utility in the declarations sought by the plaintiff. The Court otherwise does not accept the submissions put on behalf of the defendant, and will make declarations generally in the form sought by the plaintiff, providing for what might be called a "cordon sanitaire", being a strip of 870 millimetres between the southern boundary of Lot 89 into the Area to prevent that strip being used in a way that might interfere with the plaintiff's right of reasonable access to Lot 89.

The facts

10 The facts were not in dispute.

11 The property consists of 27 car park lots, 80 residential apartments and common property. Lot 89 is one of 27 car spaces.

12 The plaintiff became the registered proprietor of Lot 89 on about 9 July 2015. The plaintiff does not own any other lots in the strata scheme. Its unit entitlement is one of 659.

13 The plan (which is annexure A to these reasons) is based on a plan which was part of Mr Demlakian's report. This paragraph should be read with annexure A. It will be seen that Lot 89 runs the width of the car park, as do the adjacent Lots 90 to 93. A vehicle entering the car park from McDonald Lane would turn right over Lots 90 and 91 (pursuant to a right of way over those lots, in favour of Lot 89), and then turn left to park in Lot 89. The southern boundary of Lot 89 adjoins the Area of common property which I refer to in these reasons as "the Area."

14 The defendant created three car parking spaces on the Area and, sometime in 2015, entered into contracts in order to allow third parties to use those spaces for parking. In order to reach those spaces, the third parties had to pass over Lot 89.

15 The plaintiff objected to the third parties passing over Lot 89. It was not possible to access the Area without doing so. At the hearing, the defendant accepted that the plaintiff was entitled to take the objection.

16 The defendant terminated its agreements with the third parties and erected a chain along the boundary between Lot 89 and the Area to prevent access by cars to the Area. On or around 10 November 2015, Dr J Pollak (the sole director of the plaintiff) loosened one of the rings of the chain so that the chain could be removed. He complained to the defendant that the metal chain prevented him from getting his car into Lot 89 due to the turning circle that was required (the "chain incident").

17 The plaintiff commenced these proceedings by summons filed on 18 January 2016, which, in addition to orders similar to those set out in paragraph [6] above, sought an order that the defendant permanently remove the metal chain. In the events which happened, the defendant removed the chain and later removed the eyelets which held the chain in place on 3 June 2016. The chain is no longer affixed and there is no evidence that the defendant intends to reinstall the chain. The Court infers from the evidence of the defendant's strata manager that, as at the date of these reasons, the defendant does not intend to reinstall the chain.

18 On 20 July 2016, at the annual general meeting of the defendant, this special resolution was passed for the Building Proposal:

> "that the Owners — Strata Plan 934 authorise the making of an application for a pre-DA meeting with City of Sydney for the construction of a new building on the common property in accordance with the plans of KVMZV Architecture Revision 03 dated 30 May 2016."

19 The plans referred to in that resolution include the building of a wall parallel to the southern boundary of Lot 89, with a gap of 575 millimetres between that boundary and the proposed wall. No application pursuant to that resolution for a pre-DA meeting with the Sydney City Council has been made, pending the resolution of these proceedings.

20 On 1 September 2016, the plaintiff filed an amended summons, adding a prayer for an additional order that, "the Defendant not develop that part of the common property on the south side of Lot 89 within a distance of 1610 mm." This was the maximum required distance according to Mr Demlakian's evidence (see paragraph [7] above).

21 On 10 November 2016, at an extraordinary general meeting of the defendant, this special resolution was passed for the Garden Proposal:

> "Specially resolved that in accordance with section 65(a), the Owners – Strata Plan 934 alter the use of the common property, defined by the shaded area on the extract of Registered Strata Plan (attached to the agenda of this meeting), by:
>
> - removing the two gates underneath the ramp to create clear, unobstructed access;
> - using the area as designated bicycle storage by utilising the existing bicycle racks installed and purchasing any additional required and affixing them to the common property; and
> - using the area for a communal recreation area/communal garden by purchasing any plants, garden materials and recreation items required."

22 The plan for the Garden Proposal with the shaded area is Annexure C to these reasons. It shows a gap of 300 millimetres between the southern boundary of Lot 89 and the proposed garden area.

23 The minutes of that meeting also record, “Nil against the motion. Lot 89 not a financial member.” Although not ultimately relevant to the disposition of these proceedings, I record that the plaintiff disputes the description just quoted and says that it had not received notice of the relevant levy. No steps have been taken to implement the Garden Proposal pending the outcome of these proceedings.

24 On 18 November 2016, the plaintiff filed a statement of claim in support of the relief sought in the amended summons referred to in paragraph [20] above. The relief that was ultimately sought is that which I have set out in paragraph [6] above. The passage of time rendered the injunction for the removal of the chain otiose and an order in terms of the injunction set out in paragraph [17] above was not pressed at the hearing.

The uncontested expert evidence

25 The plaintiff relied on expert reports from Mr Demlakian, an experienced civil and structural engineer. Mr Demlakian’s main report was obtained at a time when the chain was still in place. His evidence was that:

> “After multiple attempts utilising both the forward in and reverse in manoeuvre, I determined that it was not physically possible to position Dr Pollak’s vehicle in [Lot 89] without making significant contact with the chain or causing damage to the vehicle by displacing the chain substantially.”

26 He was only able to park Dr Pollak’s car in Lot 89 if the chain was pulled out of the way. Mr Demlakian’s uncontradicted expert evidence was that to get in and out of Lot 89, what I have referred to as a “standard size car” had to make an incursion into the Area over some (but not the entirety) of the length of the boundary of between 700 millimetres and 1610 millimetres.

27 More relevantly for present purposes, Mr Demlakian also undertook a desktop review. It is convenient to extract from his report the method he followed and the results. The four illustrations of the scenarios referred to in what follows are set out in annexure B to these reasons:

> ““2.2. DESKTOP TURNING PATH ANALYSIS
>
> Suitably qualified engineers from my firm attended the site on 4th December 2015 under my instruction to accurately measure and map out the layout of the carpark for the purpose of assessing and proving the extent to which it is necessary for users of Lot 89 vehicles to cross over into the chained off common area when manoeuvring their car in and out of Lot 89 (Refer to SK 00 Rev 0).
>
> Given my understanding that users of Lot 89 are entitled to park vehicles in any position or direction within Lot 89, provided that the entire car is within the boundary of this space, I documented and analysed two “Situations” where Dr Pollak’s car could be located and two entry/exit scenarios within each of these.
>
> a) SITUATION 1

The first situation assumes that the vehicle is positioned at the most eastern end of the car space, referred to Situation 1 with 2 scenarios as detailed below.

■ Scenario 1 - detailed in SK 01 indicates both the turning paths required for a forward in / reverse out manoeuvre, respectively.

■ Scenario 2 - detailed in SK02 indicates both the turning paths required when performing a reverse in / forward out manoeuvre, respectively.

b) SITUATION 2

The second situation assumes that the eastern end of the lot is occupied by storage and the vehicle is to be manoeuvred into the western end of the space, referred to as Situation 2, also with 2 scenarios as detailed below.

■ Scenario 1 - detailed in SK 03 indicates the turning paths required when performing a reverse in / forward exit manoeuvre, respectively.

■ Scenario 2 - details in SK 04 indicates both the turning paths required when performing a forward in / reverse exit manoeuvre, respectively.

Our analysis of the above is based on the requirements specified by AS2890.1 which is the Australian Standard for Parking Facilities - Part 1: Off-street car parking.

In accordance with the standard, our analysis complies with the vehicle class B85, which is a motor vehicle "whose physical dimensions represent the 85thpercentile class of all cars and light vans on the road" (cl 1.3.6 AS2890.1). Furthermore and in accordance with B3.2, AS2890.1, we have allowed for 300mm of clearance either side of the vehicle during manoeuvring.

Review of the turning paths in Situation 1 - Scenario 1 (SK01) indicate that the vehicle is required to cross Grid Line B by 870mm into the common area in order to perform a forward in manoeuvre and 1175mm to perform a reverse exit manoeuvre.

Further, review of the turning paths in Situation 1 - Scenario 2 (SK02) indicate that the vehicle is required to cross Grid Line B by 700mm into the common area in order to perform a forward in manoeuvre and 870mm to perform a reverse exit manoeuvre.

Situation 1 is an accurate representation of the position Dr Pollak would attempt to manoeuvre his car into and therefore clearly defines the restrictions caused by the newly installed chain.

Review of the turning paths in Situation 2 - Scenario 1 (SK03) the drawings indicate that the vehicle is required to cross Grid Line B by 700mm into the common area in order to perform a reverse in manoeuvre and 815mm to perform a forward exit manoeuvre.

Further, review of the turning paths in Situation 2 - Scenario 2 (SK04) indicate that the vehicle is required to cross Grid Line B by 1400mm into the common area in order to perform a forward in manoeuvre and 1610mm to perform a reverse exit manoeuvre."

The plaintiff's submissions

28 With no disrespect to the detailed submissions made by Ms Peden, the plaintiff's argument may be summarised as:

(1) Noting s 28 of the *Strata Schemes Development Act 2015* (NSW) (the "*Development Act*"), see paragraph [30] below, the common property of a strata scheme is managed by an owners corporation for the benefit of the lot owners,

who are seen as equitable tenants in common in the property: *The Owners-Strata Plan No 43551 v Walter Construction Group Limited* (2004) 62 NSWLR 169; [2004] NSWCA 429 at [42] – [45] per Spigelman CJ (Ipp and McColl JJA agreeing) ("*Walter Construction"*); *Lin & Anor v The Owners – Strata Plan No. 50276* [2004] NSWSC 88 at [8]–[9] per Gzell J ("*Lin*").

(2) An owners corporation can be compared to a trustee: *Walter Construction* at [45]–[48]; *McElwaine v The Owners – Strata Plan 75975* [2017] NSWCA 239 at [37]; *The Owners Strata Plan 50276 v Thoo* [2013] NSWCA 270 at [20]-[21] per Barrett JA and [135]–[147] per Tobias AJA; Barrett JA and Preston CJ of LEC agreeing ("*Thoo*").

(3) It follows that the defendant holds the common property for the benefit of all owners and cannot derogate from its fiduciary duties by acting in any way contrary to its role as agent or trustee or fiduciary, for example, by excluding the plaintiff from the Area.

(4) Lot owners have "implied rights" over the common property to use it in an appropriate way: *Noon v The Owners – Strata Plan No. 22422* [2014] NSWSC 1260 at [47].

(5) An owners corporation cannot use its power of management and control to override the property right that a lot owner has in the common property. The doctrine of fraud on the minority can also apply to prevent expropriation of minority rights to a shared use of part of the common property: *Lin* at [27]; *Thoo* at [112]; *Frankel v Paterson* [2015] NSWSC 1307 at [96].

(6) A fundamental (if not the fundamental) use of common property is to provide access to lots. The right reasonably to use the common property for that purpose cannot be taken away. This has its clearest expression in what Ms Peden fairly accepted was an obiter dictum of Bryson AJ in *Bondi Beach Astra Retirement Village Pty Ltd v Gora* [2010] NSWSC 81 at [13] (emphasis added):

> "If Clause 3(i) has effect it operates to create a contractual convention, as a basis of the Occupancy Agreement, that the body corporate had the right asserted. It is not clear to me that the convention established is actually correct; although the terms of s 58(7) are very wide it seems doubtful to me that the body corporate could adopt, even unanimously, a by-law which granted exclusive use and possession of the Communal Areas to the proprietor of one Lot; *this is repugnant to the ownership by proprietors of their Lots as they would not be entitled to use the Common Areas to have access to their Lots, and the bounds of the power in s 58(7) may well have been exceeded; the purposes for which that power was conferred could not be attained by a by-law which prevented Lot owners from having access to their units, residential units in nature, unless they obtained the leave and licence of somebody else."*

(7) There is a dispute between the parties evidenced by the chain incident, the Building Proposal, and the Garden Proposal. NCAT could not make a declaration, whereas this Court can, citing the well-known passage in the judgment of Brereton J in *Commonwealth of Australia v BIS Cleanaway Limited* [2007] NSWSC 1075 ("*BIS Cleanaway*"):

> "24 (NSW) *Supreme Court Act* 1970, s 75, which substantially re-enacts (NSW) *Equity Act* 1901, s10, provides as follows:

> 75 No proceedings shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby and the Court may make binding declarations of right whether any consequential ruling is or could be claimed or not.

25 Parliament plainly intended that the Court be able to make declarations without consequential relief, and any approach to the exercise of the discretion to decline declaratory relief that began from the proposition that it was inappropriate to make declaratory orders without consequential relief would be inconsistent with s 75, since Parliament has plainly intended that the Court be empowered to make declarations of right without granting consequential relief. In *Commonwealth v Sterling Nicholas Duty Free Pty Ltd* (1972) 126 CLR 297, Barwick CJ emphasised the extent and utility of that power (at 305):

> The jurisdiction to make a declaratory order without consequential relief is a large and most useful jurisdiction. In my opinion the present was an apt case for its exercise. The respondent undoubtedly desired and intended to do as he asked the court to declare he lawfully could do. The matter, in my opinion, was in no sense hypothetical, but in any case not hypothetical in a sense relevant to the exercise of this jurisdiction. Of its nature, the jurisdiction includes the power to declare that conduct which has not yet taken place will not be in breach of a contract or a law. Indeed, it is that capacity which contributes enormously to the utility of the jurisdiction.
>
> Here the respondent was in business carrying out in relation both to ships and airports activities of the general kind proposed in this case. No doubt, duty free goods not desired to be personally carried by a departing passenger purchaser, or too large to be admitted to the cabin of an aircraft were being delivered by the respondent to the airport prior and at the date of the commencement of this suit. Further, there had been actual opposition by the Customs Department to the course which the respondent desired and intended to take. In my opinion the Supreme Court was right to entertain the respondent's suit in relation to both the declarations sought.

26 Nonetheless there are established categories of case in which the Court will generally decline, as a matter of discretion, to exercise its undoubted power to make a declaration. The importance of the established categories is that they facilitate a consistent and principled approach to the exercise of the discretion.

27 One such category is where the issue involved is "purely theoretical" [*Re Clay, Clay v Booth* [1919] 1 Ch 66 (declaration that plaintiff not liable under guarantee declined where no claim under guarantee had been made against plaintiff); *Mellstrom v Garner* [1970] 2 All ER 9 (declaration as to construction of covenant against canvassing customers declined where plaintiff had no intention of doing so); *Sanderson Pty Ltd v Urica Liberty Systems BV* (1998) 44 NSWLR 73 (no declaration should be made as to right to terminate an agreement in the absence of any election to terminate);*Rosesin v Attorney-General* (1918) 34 TLR 417 (declaration that plaintiff not liable to be called-up for military service not appropriate where he had not yet been called-up); *Howard v Pickford Tool Co Ltd*[1951] 1 KB 417 (declaration that defendants had repudiated contract not appropriate where plaintiff had plainly elected to affirm contract); and see generally Meagher, Gummow and Lehane's *Equity Doctrines and Remedies*, 4th ed, [19-115]]. However, even though the issue is theoretical, the court has jurisdiction and may, exceptionally, exercise it [*Thorne v Motor Trade Association* [1937] AC 797(declaration granted as to validity of rule of association notwithstanding absence of any dispute); *Ku-ring-gai Municipal Council v Suburban Centres Pty Ltd* [1971] 2 NSWLR 335 (declaration granted that

correspondence between the parties did not constitute a contract, but the defendants were apparently asserting that there was a contract, so that the question was not merely hypothetical (at341)); *Dinari Ltd v Hancock Prospecting Pty Ltd* [1972] 2 NSWLR 385 (declaration granted that dispositions not invalidated by statutory prohibition on accumulation of income); see generally Meagher, Gummow and Lehane, [19-120]]. Each of these cases had the feature that the declaration would at least quell a future potential dispute.

28 Another, related, category is where no good purpose would be served by granting declaratory relief [*Buck v Attorney-General* [1965] Ch 745; *Blackburn v Attorney-General* [1971] 2 All ER 1380;*Gardner v Dairy Industry Authority* (declaration if otherwise appropriate would have been declined where it had no foreseeable consequences, not leading to damages or other consequential relief but at best somehow prompting possible administrative or legislative action that that might improve the position of the appellants and others in their position); *Rivers v Bondi Junction-Waverley RSL Sub-Branch Ltd* [1986] 5 NSWLR 362 (declaration that election of directors involved irregularities refused where they did not affect the result)]. In this respect, it is generally inappropriate to grant declaratory relief if it will be inconclusive, in the sense that the proposed declaration would leave unresolved issues, with the parties still in dispute as to the consequences so that further litigation would be required to resolve the controversy [*Smart v Allen* (1970) 91 WN(NSW) 241; *Integrated Lighting & Ceilings Pty Ltd v Phillips Electrical Pty Ltd* (1969) 90 WN (Pt 1) (NSW) 693, 702]."

(8) Here, the uncontested evidence was that a standard ("B85") vehicle could not get in and out of Lot 89 without passing over some of the Area. By reason of the authorities referred to above, it was clear that the defendant could not lawfully use its powers to deprive the plaintiff of access to parts of the common property which were needed to gain access to Lot 89 to use it for its intended purpose as a car space. That conclusion should be given effect by the making of the declarations sought.

The defendant's submissions

29 The defendant's submissions may be summarised as:

(1) There was no impending threat to do anything and no controversy to be quelled. The chain was no longer an issue. The Building Proposal was at an early stage and the Garden Proposal was without any specific detail.

(2) When the point had been reached of a real controversy between the parties, it would be a matter for NCAT (see Part 12 of the *Strata Schemes Management Act 2015* (NSW) (the "*Management Act*")). In the exercise of its discretion, the Court should not now make bare declarations of right in respect of an insufficiently defined dispute.

(3) The declaration sought would impermissibly fetter the defendant's statutory rights in respect of the Area, including to sell or lease it.

(4) The plaintiff was impermissibly seeking to exercise a particular right over a particular part of the Area.

(5) The declaration sought would only be productive of more disputation between the parties.

Consideration

30 Section 28 of the *Development Act* provides:

> "28 Holding common property and dealing with lots and common property
>
> (1) The owners corporation of a strata scheme holds the common property in the scheme as agent for the owners as tenants in common in shares proportional to the unit entitlement of the owners' lots.
>
> (2) An owner's interest in the common property cannot be severed from, or dealt with separately from, the owner's lot.
>
> (3) A dealing or caveat relating to an owner's lot affects the owner's interest in the common property even if the common property is not expressly referred to in the dealing or caveat."

31 Section 106 of the *Management Act* provides:

> "106 Duty of owners corporation to maintain and repair property
>
> (1) An owners corporation for a strata scheme must properly maintain and keep in a state of good and serviceable repair the common property and any personal property vested in the owners corporation.
>
> (2) An owners corporation must renew or replace any fixtures or fittings comprised in the common property and any personal property vested in the owners corporation.
>
> (3) This section does not apply to a particular item of property if the owners corporation determines by special resolution that:
>
> (a) it is inappropriate to maintain, renew, replace or repair the property, and
>
> (b) its decision will not affect the safety of any building, structure or common property in the strata scheme or detract from the appearance of any property in the strata scheme.
>
> (4) If an owners corporation has taken action against an owner or other person in respect of damage to the common property, it may defer compliance with subsection (1) or (2) in relation to the damage to the property until the completion of the action if the failure to comply will not affect the safety of any building, structure or common property in the strata scheme.
>
> (5) An owner of a lot in a strata scheme may recover from the owners corporation, as damages for breach of statutory duty, any reasonably foreseeable loss suffered by the owner as a result of a contravention of this section by the owners corporation.
>
> (6) An owner may not bring an action under this section for breach of a statutory duty more than 2 years after the owner first becomes aware of the loss.
>
> (7) This section is subject to the provisions of any common property memorandum adopted by the by-laws for the strata scheme under this Division, any common property rights by-law or any by-law made under section 108.
>
> (8) This section does not affect any duty or right of the owners corporation under any other law."

32 Section 153 of the *Management Act* provides:

> "153 Owners, occupiers and other persons not to create nuisance

> (1) An owner, mortgagee or covenant chargee in possession, tenant or occupier of a lot in a strata scheme must not:
>
> > (a) use or enjoy the lot, or permit the lot to be used or enjoyed, in a manner or for a purpose that causes a nuisance or hazard to the occupier of any other lot (whether that person is an owner or not), or
> >
> > (b) use or enjoy the common property in a manner or for a purpose that interferes unreasonably with the use or enjoyment of the common property by the occupier of any other lot (whether that person is an owner or not) or by any other person entitled to the use and enjoyment of the common property, or
> >
> > (c) use or enjoy the common property in a manner or for a purpose that interferes unreasonably with the use or enjoyment of any other lot by the occupier of the lot (whether that person is an owner or not) or by any other person entitled to the use and enjoyment of the lot. ..."

33 I accept the plaintiff's submission that inherent in the sections to which I have just referred and the scheme of the strata title scheme registration generally, is the fact that one of the fundamental (if not the fundamental) purpose of common property is to provide owners with reasonable access to their lots. Section 153(1)(c) of the Management Act makes clear that an owner (amongst others) cannot use the common property in a way that unreasonably interferes with another owner's use or enjoyment of his or her lot.

34 Although an owners corporation is not subject to s 153, it would be a strange result if an owners corporation (which, after all, is only the body corporate comprising the owners of the lots from time to time: see s 8 of the *Management Act*) could act in relation to the common property in a way that individual lot owners cannot. In making that observation, I immediately acknowledge that the rights and obligations of the owners corporation are in the first instance those set out in the legislation. Nevertheless, I am satisfied on the basis of the authorities to which Ms Peden has referred, that an owners corporation cannot exercise its rights in relation to the common property which it holds as agent for the owners (see s 28 of the *Development Act*) in a way which derogates from any owner's right to use the common property for reasonable access to his or her lot.

35 It is not necessary for me to consider in detail to what extent the principle I have just expressed is an incident of the agency relationship, a trustee or fiduciary obligation between the owners corporation and the individual owners or between the owners themselves, or pursuant to an "implied right" to be divined from the sections of the *Development Act* and the *Management Act* to which I have referred and the strata title scheme generally, or pursuant to the application of the principles of fraud on the minority. All of these legal characterisations may be said to be derived from or are complementary to the legislative provisions, and they all point to the same result.

36 Insofar as the utility of the declarations is concerned, I am satisfied that there is a sufficiently well-defined or "ripe" controversy to be quelled. If I am wrong in that conclusion, I also consider that making the declarations sought will quell a future potential dispute of the kind identified by Brereton J in *BIS Cleanaway* at [27] (see paragraph [28(7)] above).

37 I would have had some sympathy for the defendant's lack of utility submission if matters were confined to the Building Proposal. This is at the pre-DA meeting stage and the plans which were the subject of the special resolution (see paragraph [19] above) are clearly marked "preliminary — not for construction". On one view, this is a long way from an actual proposal to be implemented with a real threat to the plaintiff's right of access to Lot 89.

38 However, the history of the matter is more complex. The Garden Proposal is a proposal which has been approved and which could be implemented without further formal steps. While short on specific detail, on its face the Garden Proposal has the potential to impede the plaintiff's access to Lot 89.

39 When the chain incident, the Building Proposal and the Garden Proposal are taken together, it is clear that the parties are in dispute about the extent to which the defendant can make changes to the Area which will affect the plaintiff's capacity to use Lot 89 for its intended purpose as a car space. Even if that characterisation be wrong, the same facts give rise to the conclusion that acting upon any of those proposals will give rise to a dispute as to the plaintiff's rights to protect its reasonable access to Lot 89.

40 It is necessary to dispose of four other submissions put by the defendant.

41 First, it was submitted that the Court should take into account that when a specific proposal was to be acted upon by the defendant, the plaintiff would have the full panoply of rights afforded to it in NCAT (see Part 12 of the *Management Act*). The answer to this is that NCAT does not have the power to make declarations: see *Walsh v Owners Corporation SP No 10349* [2017] NSWCATAP 230 at [60]. The defendant did not suggest otherwise. A party in the position of the plaintiff is entitled to approach this Court to seek to persuade it that a declaration of right is the appropriate relief.

42 Second, the defendant submitted that declarations in the form sought by the plaintiff could not be made because they would fetter other rights conferred on the defendant under the *Management Act*, such as to sell or lease the Area. I disagree. This submission demonstrates the utility of the relief sought by the plaintiff. Whether it be the chain incident, the Building Proposal, the Garden Proposal or the exercise of any

other power by the owners corporation (including to sell or lease the Area), the same issue will arise: to what extent is the exercise of that power limited or qualified by the plaintiff's entitlement to use the Area to gain access to Lot 89 for its intended purpose as a car space?

43 Third, I do not accept the defendant's submission that the proposed declarations are an impermissible claim by the plaintiff to a particular right to a particular part of the common property, contrary to the unity of possession of equitable tenants in common of the common property. On the contrary, in my view the declarations are the legal expression of the prohibition on the other co-owners from excluding a co-owner from a part of the common property which, as a matter of fact, that co-owner must use to gain access to its lot.

44 Fourth, there is no absolute bar to the Court making a "mere" declaration of rights. The entitlement to such declaration can be "an ordinary incident of ownership": *Walter Construction* at [49]–[50].

The terms of the declaration

45 Two issues arise in this context: first, the extent to which reasonable access to Lot 89 requires use of the Area and, second, how that should be reflected in the terms of any declaration.

46 As to the first issue, the Court will disregard Mr Demlakian's Scenario 2. This is because Scenario 2 assumes Lot 89 is being used for something other than car parking, namely storage at its eastern end. The plaintiff's rights must be determined by reference to the intended purpose of Lot 89 as a car space only.

47 Looking at Mr Demlakian's Scenario 1, his uncontradicted evidence is that a forward in/reverse out exit manoeuvre would encroach onto the Area to a maximum of 1,175 millimetres, whereas a reverse in/forward out manoeuvre would encroach to a maximum of 870 millimetres. The plaintiff's entitlement to go through the Area as common property is limited by its obligations under s 153(1)(b) of the *Management Act* not to unreasonably interfere with other owners' enjoyment of the common property. Balancing those considerations means that the minimum (and, therefore, unquestionably reasonable) use of the Area which enables the plaintiff to have reasonable access to Lot 89 is 870 millimetres by a reverse in/forward out manoeuvre.

48 The final issue is how that conclusion should be given declaratory form. It is evident from Mr Demlakian's drawings (see Annexure B) that, strictly speaking, the plaintiff does not need to use the Area to access Lot 89 to the extent of the entire length of the boundary between them.

49 Nevertheless, in my view it is appropriate to protect the plaintiff's entitlement to use the Area to be able to park a car in Lot 89 by a declaration which refers to a strip that intrudes 870 millimetres into the Area for the entire length of the boundary between the Area and Lot 89. The reason for this conclusion, in the exercise of the Court's discretion, is to prefer the simplicity and certainty of such delineation over the doubt (and, therefore, potential for future disputes) of attempting to follow Mr Demlakian's work with precision. The Court is dealing with car parking, not microsurgery. Insofar as this approach may appear to protect the plaintiff's interest beyond what may be its "strict" entitlement, the "loss" of that "extra" amount of an 870 millimetre wide strip that a car in fact will never use is de minimis when compared to the advantages of simplicity and certainty to which I have referred.

50 The Court will give the parties an opportunity to consider the appropriate form of orders to give effect to these reasons.

ANNEXURE A - EB 9 & 10 PTY LTD v OWNERS SP 934 (40.6 KB, pdf)
ANNEXURE B - EB 9 & 10 PTY LTD v OWNERS SP 934 (230 KB, pdf)
ANNEXURE C EB 9 & 10 PTY LTD v STRATA PLAN 934 (50.2 KB, pdf)

****