Civil and Administrative Tribunal

New South Wales

Case Name:	Eadie v Harvey
Medium Neutral Citation:	[2017] NSWCATAP 201
Hearing Date(s):	3 August 2017
Date of Orders:	18 October 2017
Decision Date:	18 October 2017
Jurisdiction:	Appeal Panel
Before:	G Curtin SC, Senior Member J Currie, Senior Member
Decision:	(1) Amber Wheedon is joined to the proceedings as the second appellant. (2) Leave is granted to the first appellant to represent the second appellant on the hearing of the appeal. (3) Appeal dismissed.
Catchwords:	STRATA TITLES- due adoption and registration of By-Laws- effect of Model By-Laws under Strata Schemes Management Act 1996 (NSW) and Strata Schemes Management Act 2015 (NSW)- effect of oral agreements to vary- absence of licence to use the common property or any proposed change of relevant by-law- effect of ss 131(2) and 149(3) of Strata Schemes Management Act 2015 (NSW). APPEALS- consideration of evidence by Tribunal below- what constitutes proper consideration- Appeal dismissed.
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (No 2) (NSW), ss 44, 45 Strata Scheme Management Act 1996 (NSW), ss 47, 48,

	Strata Scheme Management Act 2015 (NSW), ss 131, 141, 149 Strata Schemes (Freehold Development) Act 1973 (NSW) s 8 Strata Schemes Management Regulation 1997 (NSW)
Cases Cited:	Pollard v RRR Corporation Pty Ltd [2009] NSWCA 110 Whisprun Pty Ltd v Dixon [2003] HCA 48 at [62]; (2003) 77 ALR 1598 at 1610 Collins v Urban [2014] NSWCATAP 17
Texts Cited:	Nil
Category:	Principal judgment
Parties:	Stuart James Eadie (First Appellant) Amber Wheedon (Second Appellant) Joni Harvey (Respondent)
Representation:	S Eadie (Appellants) Self-Represented (Respondent)
File Number(s):	AP 17/18879
Publication Restriction:	Unrestricted
Decision under appeal:	
Court or Tribunal:	NSW Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Date of Decision:	13 April 2017
Before:	R Harris, General Member
File Number(s):	SC 16/54159

REASONS FOR DECISION

1 This is an appeal from a decision of the Tribunal dismissing the appellants' application under the *Strata Scheme Management Act 2015* (NSW) ("SSM Act") for, in substance, orders allowing them to permanently park their cars on common property.

2 For the reasons that follow the appeal is dismissed.

Parties and Representation

3 The first and second appellants are husband and wife. They are co-owners of Lot 1 in a two-lot strata scheme. The respondent is the owner of Lot 2.

4 The second appellant was a party to the proceedings below, but was not named as a party to the appeal.

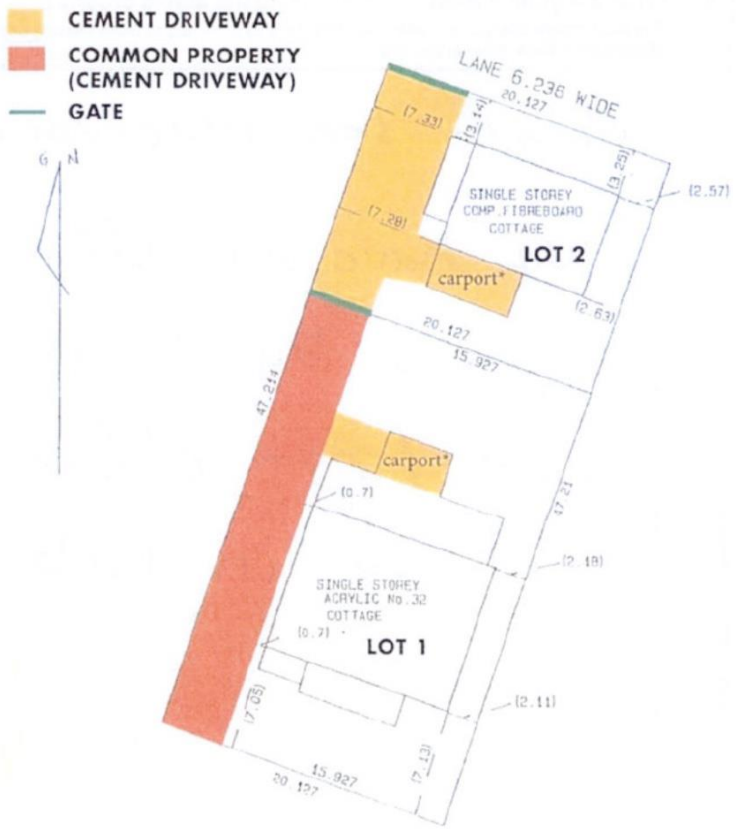
5 The second appellant is a necessary party to the appeal given she is one of the co-owners of Lot 1 and seeks orders in her and her husband's favour. Therefore, after obtaining her consent to do so by telephone, we ordered that she be joined to the appeal as the second appellant pursuant to s 44(1) of the *Civil and Administrative Tribunal Act 2013 (No 2)* (NSW) (the "NCAT Act"). The respondent did not object to that course.

6 Leave was granted to the first appellant to represent the second appellant on the hearing of the appeal pursuant to s 45(1) of the NCAT Act. Again, the respondent did not object to that course.

Background

The Land

NOT IMPLEMENTED: support for w:pict - without v:imagedata



7 A partially redacted plan of the strata scheme is reproduced below:

8 The strata scheme consists of a rectangular block of land running approximately north-south, with Lot 2 to the north and Lot 1 to the south. Each lot contains a detached dwelling.

9 The dwelling on Lot 1 is constructed predominantly towards the south of the strata scheme, and the dwelling on Lot 2 constructed predominantly towards the north. The result of this is that there is some distance between the two dwellings.

10 The distance between the northern edge of the appellants' dwelling and the southern boundary of Lot 2 is approximately 14 m. The distance between the southern edge of the respondent's dwelling to the northern boundary of Lot 1 is approximately 6 m.

11 To the south of the strata scheme is a sealed road (the "Road") running approximately east-west. To the north of the strata scheme is an un-sealed laneway (the "Laneway") running approximately east-west.

12 Along the entire western length of the strata scheme is a concrete driveway. That driveway runs from the Road through to the Laneway. That part of the driveway (coloured red in the plan) to the south of the gate marked on the plan is common property and is the subject of this dispute between the parties.

13 That part of the driveway (coloured yellow in the plan) to the north of the gate is part of Lot 2.

14 The result is that although the concrete driveway runs the entire western length of the strata scheme, from the Laneway to the Road, the northern third (approximately) of the driveway is part of Lot 2, whilst the southern two-thirds is common property.

15 The Road has grass verges on either side, slightly wider than the width of the average vehicle. The grass verge on the northern side of the Road (immediately outside Lot 1) slopes downwards from the Road to a concrete drainage gutter. There is a dispute about the precise angle of the slope but that matter is unnecessary to decide. Suffice to say that when a vehicle is parked on this grass verge the vehicle is on a sideways slope. If the vehicle is parked in the direction of traffic, the vehicle is sloped away from the driver's side, thereby requiring greater effort to open the driver's side door.

History

16 The appellants purchased Lot 1 in 2005. At that time, each dwelling on the strata scheme had a carport abutting their dwellings as indicated on the diagram above.

17 At the time of the appellants' purchase of Lot 1, Lot 2 was owned by a previous owner to the respondent, the appellants knew that the subject driveway was common property and knew that they were not to obstruct access to the common property.

18 The appellants' evidence was that after they purchased Lot 1 they found that unauthorised persons would traverse the driveway from time to time. Neither they, nor the previous owner of Lot 2, saw that situation as desirable.

19 Therefore, the appellants, and the previous owner of lot 2, orally agreed that a gate be constructed on the boundary between the two lots and extending the

width of the driveway. They agreed that the owner of Lot 2 would use the Laneway for vehicular access to Lot 2, and the appellants would use the Road. It followed that the appellants could, in substance, use the common property for their exclusive use i.e. could park their cars there whenever and for however long they desired. They did so.

20 The carports on both lots were subsequently demolished, the appellants saying that the owners of both lots found the turns into the carports from the driveway were too tight.

21 The respondent then purchased Lot 2. The oral arrangement entered into between the appellants and the previous owner of Lot 2 continued between the appellants and the respondent, and the relationship between the appellants and the respondent was amicable. During this time, both parties converted their previous carport areas into living areas.

22 There then appears to have been a falling out between the parties for reasons that are not relevant to this appeal.

23 Subsequently, the respondent informed the appellants that they should not park their cars on the common property except on a temporary and non-recurring basis.

24 The parties attempted to reach agreement about the common property but without success. Thereafter, the appellants brought an application in the Tribunal for a:

> "… by-law … to be set that the (common property) should become available for the (appellants') use, to be shared with the (respondent) as a thoroughfare for the purpose of collecting mail and if necessary taking out the bins. Then on occasions for other purposes when it is agreeable to both parties, like garage sales etc."

The By-Laws

25 The strata scheme by-laws were not in evidence before the Tribunal. The parties seemed to assume that no by-laws existed, or no "official" by-laws as one party put it, but that is probably not the case.

26 A document in evidence suggests the strata scheme was registered on 17 August 2005. Section 8 of the then applicable (but since repealed) Strata Schemes (Freehold Development) Act 1973 required that proposed by-laws for

a strata scheme had to accompany a strata plan submitted for registration. Accompanying by-laws were then registered with the strata plan.

27 The same document suggests that the Model by-laws set out in Schedule 1 of the then applicable Strata Schemes Management Regulation 1997 (NSW) were adopted as the scheme's by-laws.[1]

28 A Certificate of Title for the common property was in evidence, and that Certificate states, in cl 2 of the Second Schedule:

> "ATTENTION IS DIRECTED TO THE RESIDENTIAL SCHEMES MODEL BY-LAWS CONTAINED IN THE STRATA SCHEMES MANAGEMENT REGULATION 1997
>
> KEEPING OF ANIMALS – OPTION C HAS BEEN ADOPTED"

29 Thus, it appears the Model by-laws provided in Schedule 1 of the Strata Schemes Management Regulation 1997 (NSW) were adopted and registered by the strata scheme. Whether that was the case, or remains the case, is unknown as no party addressed their mind or evidence to this issue.

30 Under the *Strata Schemes Management Act 1996* (NSW) **("the 1996 Act")**, which was substantially in force until 30 November 2016, the owners corporation could amend, repeal or add to the by-laws by special resolution (s 47), but no amendment, repeal or addition had any force or effect unless a notification of it was lodged with the Registrar-General within two years of its passing, and the Registrar-General had made an appropriate recording of the notification in the folio of the Register comprising the common property (s 48).

31 Those provisions have been substantially reproduced in s 141 of the now applicable SSM Act, other than that the period of two years has been shortened to six months.

32 The Tribunal found that the owners corporation had not amended, repealed or added to the by-laws by special resolution (s 47 of the 1996 Act) in relation to the common property and to the effect of the orders the appellants seek. No amendment, repeal or addition had been notified to the Registrar-General, nor had any been recorded in the folio comprising the common property.

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[1] The Regulation was repealed on 31 August 2005.

33 Therefore, the parties are bound to comply with the by-laws as registered. The oral arrangement first entered into with Lot 2's previous owner and continued with the respondent, even if regarded as an amendment, repeal or addition to the by-laws (which it is not), has no force and effect because of s 48 of the 1996 Act or s 141 of the SSM Act**.**

34 As previously mentioned, the by-laws were not in evidence. Whether they had been otherwise amended, repealed or added to in the intervening years is not known. What they provide in relation to common property is not known. Rather, in the proceedings below, the parties assumed that, whatever legal principles applied, the appellants were prohibited from parking their vehicles on the common property except on a temporary and non-recurring basis (such as for the purpose of loading or unloading their vehicles).

35 If the Model by-laws referred to earlier are the applicable by-laws, we note they provide as follows:

> **2. Vehicles**
>
> An owner or occupier of a lot must not park or stand any motor or other vehicle on common property except with the prior written approval of the owners corporation.
>
> **3. Obstruction of common property**
>
> An owner or occupier of a lot must not obstruct lawful use of common property by any person except on a temporary and non-recurring basis.

36 Be that as it may, the parties agreed that if the appellants' parked their cars on the common property other than on a temporary and non-recurring basis that would obstruct the respondent's lawful use of that common property.

The Tribunal's Decision

37 The Tribunal characterised the appellants' application as one which sought an order under either s 131 or s 149 of the SSM Act.

38 Section 131 is in the following terms:

> **131. Order granting certain licences**
>
> (1) The Tribunal may, on application by an owner of a lot in a strata scheme, order that the owner and any occupier of the lot may use specified common property in the manner, for the purposes, and on the terms and conditions (if any), that are specified in the order.
>
> (2) The Tribunal must not make the order unless satisfied:

(a) that the lot would otherwise be incapable of reasonable use and enjoyment by the current owner or occupier of the lot or generally by an owner or occupier of the lot, and

(b) that the owners corporation has refused to grant a licence to use common property in a manner, for purposes, and on terms and conditions that would enable the current owner or occupier, or generally any owner or occupier, reasonably to use and enjoy that lot, and

(c) in the case of a leasehold strata scheme, that the lessor of the scheme has, before the making of the order, been given an opportunity to make representations to the Tribunal with respect to the application for the order.

(3) An order under this section, when recorded under section 246, has effect as if its terms were a by-law (but subject to any relevant order made by a superior court).

39 Section 149 is in the following terms:

149. Order with respect to common property rights by-laws

(1) The Tribunal may make an order prescribing a change to a by-law if the Tribunal finds:

(a) on application made by an owner of a lot in a strata scheme, that the owners corporation has unreasonably refused to make a common property rights by-law, or

(b) on application made by an owner or owners corporation, that an owner of a lot, or the lessor of a leasehold strata scheme, has unreasonably refused to consent to the terms of a proposed common property rights by-law, or to the proposed amendment or repeal of a common property rights by-law, or

(c) on application made by any interested person, that the conditions of a common property rights by-law relating to the maintenance or upkeep of any common property are unjust.

(2) In considering whether to make an order, the Tribunal must have regard to:

(a) the interests of all owners in the use and enjoyment of their lots and common property, and

(b) the rights and reasonable expectations of any owner deriving or anticipating a benefit under a common property rights by-law.

(3) The Tribunal must not determine an application by an owner on the ground that the owners corporation has unreasonably refused to make a common property rights by-law by an order prescribing the making of a by-law in terms to which the applicant or, in the case of a leasehold strata scheme, the lessor of the scheme is not prepared to consent.

(4) The Tribunal may determine that an owner has unreasonably refused consent even though the owner already has the exclusive use or privileges that are the subject of the proposed by-law.

> (5) An order under this section, when recorded under section 246, has effect as if its terms were a by-law (but subject to any relevant order made by a superior court).
>
> (6) An order under this section operates on and from the date on which it is so recorded or from an earlier date specified in the order.

40 The Tribunal found that there had been no formal application by the appellants to the owners corporation for a licence to use the common property to park their vehicles other than on a temporary and non-recurring basis (the "Licence"), nor had there been any proposed change of by-law (to the same effect) put by the appellants to a meeting of the owners corporation.

41 Therefore, the Tribunal determined that it could not make an order pursuant to s 131 as there had been no refusal as required by s 131(2)(b). Similarly, the Tribunal said it could not make an order pursuant to s 149 because there had been no refusal as required by s 149(1)(a) or (b). In other words, the Tribunal found that, before it could make any orders under either s 131 or s 149 of the SSM Act (assuming it was persuaded to do so), the appellants would have had to have applied for the Licence, or a common property by-law to the same effect, to the owners corporation, and the owners corporation would have had to have refused those applications. As no applications had been made by the appellants, there had been no refusals, and so no orders could be made under s 131 or s 149.

42 The Tribunal went on to say that, even if it was incorrect about those matters, it was not satisfied that Lot 1 would otherwise be incapable of reasonable use and enjoyment by the appellants or generally by an owner or occupier of that lot per s 131(2)(a).

43 The Tribunal said that it did not accept that the difficulty in parking at the rear of Lot 1 (where the carport used to be), the alleged privacy concerns, loss of amenity and other issues raised by the appellants, taken individually or collectively, made Lot 1 incapable of reasonable use and enjoyment without the grant of a license in the terms proposed.

44 The Tribunal also said that even if there had been a refusal to make a common property rights by-law under s 149, it was not persuaded that such refusal would be (sic) or was unreasonable.

45 The Tribunal said that there was no significant impairment to the appellants parking at the rear of Lot 1. They had removed the carport by choice.

46 The Tribunal said that if the local council approval for the strata scheme prohibited the use of the Laneway for vehicle access (as the appellants alleged and as some documents in evidence suggest) then the granting of the orders sought would have the effect that the respondent would have no legal vehicular access to Lot 2 whenever the appellants parked one of their cars on the common property.

47 The Tribunal said that it was required to consider the interests of all owners in the use and enjoyment of their lots and common property as well as the appellants' rights and reasonable expectations [per s 149(2)], and, having weighed the respective interests of the parties, it was not persuaded that there had been an *unreasonable* refusal of an application for a common property by-law.

48 Accordingly, the Tribunal dismissed the appellants' application.

Grounds of Appeal

49 The appellants' Grounds of Appeal were:

(1) The Tribunal failed to properly study or review the documentary evidence tendered by the appellants.

(2) The respondent gave no evidence why she had difficulty using the rear lane access.

(3) The statement in the Tribunal's reasons that there was an informal agreement allowing the appellants to park their cars on common property with Lot 2's previous owner was in error in that it was not "an informal agreement" but an agreement reached in a strata meeting.

(4) The statement in the Tribunal's reasons that the previous informal agreement had stopped working when the appellants denied the respondent use of the driveway was incorrect.

(5) This case was not a black and white strata ruling decision.

(6) The strata meeting of 8 March 2016 was not valid.

(7) The engineer who gave evidence on the half of the respondent was retired.

(8) The cost of constructing a sliding gate in the fence that fenced off the balance carport area up from the driveway was prohibitive for the appellants.

(9) The absence of off-street parking seriously affected the value of the appellants' property.

(10) The respondent does not need to drive on the common property to access the property.

(11) The appellants did not wish to restrict access to the common property.

50 There was no appeal from the findings that there had been no formal application by the appellants to the owners corporation for a licence, nor had there been any proposed change of by-law put by the appellants to a meeting of the owners corporation.

51 There was no appeal from the Tribunal's holdings that it could not make an order pursuant to:

(1) s 131 of the SSM Act as there had been no refusal as required by s 131(2)(b);

(2) s 149 of the SSM Act because there had been no refusal as required by s 149(1)(a) or (b).

The Appeal Must Fail

52 The absence of any appeal from the findings and holdings in the above two paragraphs inevitably means that the appeal must fail.

53 Both sections 131(2) and 149(3) of the SSM Act say that the Tribunal "must not" make any order or make any determination in favour of the appellants unless the owners corporation had refused to grant the Licence, or has unreasonably refused to have made a common property rights by-law.

54 That is, the Tribunal held, it is simply not allowed to make any orders in favour of the appellants unless they had made relevant applications to the owners corporation and those applications had been refused.

55 The plain meaning of the words "must not" is obligatory in nature, although the authorities have not adopted any fixed rule to that effect.[2] Be that as it may, in the absence of authority to the contrary in relation to the use of those words in the SSM Act (or other matter which would suggest a clear error by the Tribunal), the absence of any appeal on the point and the absence of any submissions on those matters from the appellants, there is no proper basis for this Appeal Panel to further explore those matters.

[2] DC Pearce and RS Geddes, Statutory Interpretation in Australia, 6th ed, 2006, LexisNexis Butterworths at 330.

56 The Appeal Panel drew Mr Eadie's attention to these matters on several occasions, explained what they meant and their significance, but no application to amend the Notice of Appeal and no submissions addressing those matters were made.

57 Accordingly, the appeal must fail.

Further Matters

58 Given our opinion that the appeal must fail for the reasons given above it is unnecessary for us to decide the Grounds of Appeal raised by the appellants. However, given the matters were argued before us we shall make some brief observations as to why those grounds would also have failed.

Ground 1

59 Ground 1 is a reference to an absence in the Tribunal's reasons of any mention of various medical reports, records and similar documents concerning the second appellant. It raises the question of the adequacy of the Tribunal's reasons which is a question of law.

60 In short, those documents establish that the second appellant has some considerable physical difficulties walking on, and getting into and out of her vehicle on, uneven ground. Doing so causes her existing knee pain to become exacerbated, and, according to one medical opinion, is both difficult and dangerous for the second appellant.

61 In *Pollard v RRR Corporation Pty Ltd* [2009] NSWCA 110 McColl JA, with whom Ipp JA and Bryson AJA agreed, said at [62] – [63]:

> "[62] In Beale (at 443) Meagher JA referred to the requirement that a judge should refer to evidence which is important or critical to the proper determination of the matter as the first of the three fundamental elements of a statement of reasons. While his Honour explained that it was unnecessary to refer to the relevant evidence in detail, especially in circumstances where it is clear that the evidence has been considered, he added that where such evidence was not referred to by the trial judge, an appellate court may infer that the trial judge overlooked the evidence or failed to give consideration to it, referring to North Sydney Council v Ligon 302; see also TCN Channel Nine Pty Ltd v Anning [2002] NSWCA 82 ; (2002) 54 NSWLR 333 at [150] per Spigelman CJ (Mason P and Grove J agreeing). Meagher JA added that "[w]here conflicting evidence of a significant nature is given, the existence of both sets of evidence should be referred to."

> [63] Where, as in the present case, there is documentary material arguably supporting a party's case, that material must be considered in the judge's reasons in a satisfactory way: State Rail Authority (NSW) v Earthline Constructions Pty Ltd (in liq) [1999] HCA 3 ; (1999) 73 ALJR 306(at [94]) per Kirby J."

62 At the same time, the law does not require mention of every fact or argument relied upon by the losing party as relevant to an issue.[3] It will ordinarily be sufficient if by its reasons the Tribunal apprises the parties of the broad outline and constituent facts of the reasoning on which he or her has acted.[4]

63 In its reasons, the Tribunal recorded that both appellants gave evidence, and tendered documents. Amongst those documents were medical documents concerning the second appellant. The Tribunal also referred to the appellants' claim that "parking in the street was difficult", which must be a reference to the second appellant's medical difficulties.

64 The mention of the documents tendered and difficulty parking is, in our opinion, a reference (albeit not detailed) to the various medical reports, records and similar documents concerning the second appellant which were tendered at the hearing below and which mentioned the second appellant's difficulties walking on, and getting into and out of her vehicle on, uneven ground.

65 In short, it appears to us that the Tribunal did properly study and review the documentary evidence tendered by the appellants and did take into consideration the second appellant's medical difficulties. As we read the Tribunal's reasons, the Tribunal has apprised the parties of the broad outline and constituent facts of the reasoning on which it acted, namely that, notwithstanding all of the appellants' evidence and submissions, the Tribunal was not persuaded to make the orders sought because of the other factors the Tribunal took into consideration. We would have dismissed this Ground.

The Remaining Grounds

66 The remaining grounds do not raise any discernible error of law. Accordingly, leave to appeal would have been required pursuant to s 80(2)(b) of the NCAT Act.

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[3] Whisprun Pty Ltd v Dixon [2003] HCA 48 at [62]; (2003) 77 ALJR 1598 at 1610.

[4] Soulemezis v Dudley (Holdings) Pty Ltd (1987) 10 NSWLR 247.

67 We doubt whether we would have granted leave to appeal on any of the remaining grounds taking into consideration the matters discussed in *Collins v Urban* [2014] NSWCATAP 17 and like cases. We do not think the appellants would have satisfied us that leave to appeal ought to have been granted. Be that as it may, we briefly address each of the grounds below.

68 Ground 2: The appellants did not provide a sound recording of the hearing below as directed, and so it is unclear whether or not their submission is correct. However, even if it be correct, it was not in error for the Tribunal to accept that evidence in the absence of any challenge to it. We would have dismissed this Ground.

69 Ground 3: Whether there was an informal agreement allowing the appellants to park their cars on common property with Lot 2's previous owner, or whether it was an agreement reached in a strata meeting, is irrelevant in this case. The law is that no such agreement, informal or otherwise, is of any force or effect (as a by-law) unless a notification of it was lodged with the Registrar-General, and the Registrar-General had made an appropriate recording of the notification in the folio of the Register comprising the common property. We would have dismissed this Ground.

70 Ground 4: The appellants did not provide the evidence and sound recording of the hearing below as they were directed. Accordingly, we are unable to determine whether this submission is correct. But even if the appellants' submission is correct, it does not matter. The case was not concerned with why the previous agreement came to an end. The case was about whether orders should be made granting the appellants the right to use the common property on more than a temporary and non-recurring basis. They failed to make out a case justifying those orders.

71 Ground 5: This is not a ground of appeal.

72 Ground 6: Whether the strata meeting of 8 March 2016 was "valid" or not is irrelevant. The strata scheme has by-laws. It seems (but was not proved) those by-laws prevent the appellants parking their vehicles permanently on common property. The meeting did not change those by-laws, and so is irrelevant.

73 Ground 7: It is irrelevant that the engineer was retired. He had expertise to give the opinions he did.

74 Ground 8: No doubt some cost would be involved, but there was no evidence it was “substantial” and no evidence that the appellants could not afford that cost.

75 Ground 9: There was no evidence that the absence of off-street parking seriously affected the value of the appellants’ property. Not only was there off-street parking (where the carport used to be), the appellants’ purchased the property knowing they could not park their cars on the common property. Therefore, the “value” they paid for the property reflected that cars could not be permanently parked on the common property.

76 Ground 10: The respondent does appear to need to drive on the common property as using the Laneway, on the evidence, is in breach of the local council’s consent. In any event, she gave evidence, accepted by the Tribunal, that she had difficulty using the Laneway access. The appellants have not shown that that evidence was incorrect.

77 Ground 11: Whilst the appellants did not wish to restrict access to the common property, the effect of the orders they sought was to do just that. They did not make out a case for orders in effect converting common property to their (almost) exclusive use.

Orders

78 The appeal is dismissed.

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I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.
Registrar