Civil and Administrative Tribunal

New South Wales

Case Name:	Gleeson v The Owners – Strata Plan No 48226
Medium Neutral Citation:	[2018] NSWCATAP 204
Hearing Date(s):	29 June 2018
Date of Orders:	31 August 2018
Decision Date:	31 August 2018
Jurisdiction:	Appeal Panel
Before:	R Titterton, Principal Member G Sarginson, Senior Member
Decision:	(1) The appeal is allowed, and the orders of the Consumer and Commercial Division of the Civil and Administrative Tribunal quashed. (2) Remit the matter to the Consumer and Commercial Division of the Civil and Administrative Tribunal constituted by a member other than the member who made the original decision, to be determined in accordance with these reasons and otherwise according to law. (3) The Appellants are file and serve written submissions in relation to costs on or before 7 September 2018. (4) The Respondent is file and serve written submissions in relation to costs on or before 14 September 2018.
Catchwords:	APPEALS – Adequacy of reasons – whether the Civil and Administrative Tribunal failed to take into account "key" considerations raised by the appellant at the first hearing RES JUDICATA – whether the doctrines of res judicata and issue estoppel bind the Consumer and Commercial

	Division of the Civil and Administrative Tribunal from hearing a strata schemes dispute in circumstances where a Strata Schemes Adjudicator had determined a similar issue in 2006
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) Environmental Planning and Assessment Act 1979 (NSW) Strata Schemes Management Act 1996 (NSW) Strata Schemes Management Act 2015 (NSW) Strata Titles Act 1973 (NSW)
Cases Cited:	Akkari v Sartor [2015] NSWCATAP 79 Camilleri v Eastlake [2018] NSWCATAP 176 CG Constructions Pty Ltd v Hansen Constructions Materials Pty Ltd [2017] NSWCATAP 130 Maganja v Arthur [1984] 3 NSWLR 561 Moloney v Collins [2011] NSWSC 628 Moussa Enterprises Pty Ltd v Stanford [2015] NSWCATAP 99 Owners Corporation Strata Plan 7596 v Risidore [2003] NSWSC 966 Pollard v RRR Corporation Pty Limited [2009] NSWCA 110 Port of Melbourne Authority v Anshun Pty Ltd (1981) 147 CLR 589 Prendergast v Western Murray Irrigation Ltd [2014] NSWCATAP 69
Texts Cited:	Halsburys (online version)
Category:	Principal judgment
Parties:	Paul Gleeson (First Appellant) Michael Trovato (Second Appellant) Ranjit Kaur (Third Appellant) K Singh (Fourth Appellant) Wing Sze Yeung (Fifth Appellant) Stephanie Messina (Sixth Appellant) Lisa Sutton (Seventh Appellant) Katraina See-Kay Lui (Eighth Appellant) Leonard Pinto Messias (Ninth Appellant) The Owners – Strata Plan No 48226 (Respondent)

Representation:	Solicitors:
	J S Meuller & Co, Lawyers (All Appellants) Jane Crittenden Lawyer (Respondent)
File Number(s):	AP 18/16658
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Date of Decision:	13 March 2018
Before:	G Meadows, Senior Member
File Number(s):	SC 17/36625

REASONS FOR DECISION

In these reasons the following definitions are used:

1973 Act: Strata Titles Act 1973 (NSW)

1996 Act: Strata Schemes Management Act 1996 (NSW)

2015 Act: Strata Schemes Management Act 2015 (NSW)

NCAT Act: Civil and Administrative Tribunal Act 2013 (NSW)

Summary

1 Strata Plan 48226 was registered on 10 November 1994, and consists of 73 lots, including residential and commercial lots, together with 65 parking spaces, some of which have been designated as visitor car parking spaces.

2 On 22 December 1994, the Respondent, in general meeting, passed a motion in accordance with s 58(2) of the 1973 Act repealing existing by-laws 12 to 29 and replacing them with new by-laws 33 to 54. Relevantly, those new by-laws, and the subject of the decision under appeal, included by-laws 13 and 54. The text of these by-laws will be set out below.

3 By application filed 10 April 2018, the Respondent sought an order pursuant to s 149(1)(b) of the 2015 Act that a by-law should be made to repeal by-laws 13

and 54 on the grounds that the Appellants, who are nine of the 73 lot owners, unreasonably refused to consent to the proposed repeal of those by-laws.

4 In its Decision of 13 March 2018, the Tribunal granted that application, ordering the Respondent to make a by-law to repeal by-laws 13 and 54.

5 The Appellants have appealed from that decision. For the following reasons, we have decided to allow the appeal, and to remit the matter to the Tribunal for redetermination.

Grounds of Appeal

6 The Appellants raise ten grounds of appeal. These can be divided into two groups, those that raise questions of law, and those for which leave to appeal is required: see s 80 of the NCAT Act.

7 The grounds falling within the first group can be divided into the following sub-groups:

(1) the Tribunal erred in finding that the decision and order made by Strata Schemes Adjudicator Thane on 7 March 2006 did not give rise to an issue estoppel or res judicata; either of which operated to preclude the Respondent from bringing and maintaining its application before the Tribunal;

(2) the Tribunal erred by failing into account adequately or at all the Appellants' "key" submissions that any refusal by them to the repealing of by-laws 13 and 54 was not unreasonable because:

(a) they paid valuable consideration for acquiring rights of exclusive use and enjoyment of certain car spaces under those two by-laws; and

(b) the Respondent did not offer to pay them any compensation in consideration for consenting to the repeal of by-Laws 13 and 54;

(3) the Tribunal erred by failing into account adequately or at all the Appellants' the following relevant considerations:

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

(b) the rights and reasonable expectations of any lot owner deriving or anticipating a benefit under by-laws 13 and 54;

(4) the Tribunal erred by finding (at par [7] of the Decision) that by-laws 13 and 54 had the effect of granting the Appellants exclusive use of certain visitor car parking spaces in circumstances where there was no evidence before the Tribunal to prove that those car spaces were visitor car parking spaces.

8 In *Prendergast v Western Murray Irrigation Ltd* [2014] NSWCATAP 69 the Appeal Panel considered the requirements for establishing an "error of law" giving rise to an appeal as of right. Without exhaustively expressing possible questions of law, the Appeal Panel referred at [13] errors of law including whether there has been a failure to provide proper reasons (at [13](1)) and whether the Tribunal identified the wrong issue or asked the wrong question (at [13](2)).

9 In our view:

(1) the ground set out in par [6](1) raises the argument that a wrong principle of law has been applied; and

(2) the grounds set out in par [6](2), (3) and (4) raise the issue whether there has been a failure to provide proper or adequate reasons.

10 Each of these matters therefore raises a question of law, and leave to appeal is not required.

11 We propose to deal first deal with the issue res judicata/issue estoppel ground of appeal. If that ground is successful, significant ramifications follow, namely that the Tribunal should not have even considered the application before it.

Ground of appeal (1): Res judicata – Issue Estoppel

12 Before considering this ground of appeal, we make the following brief observations about the proceedings before the Tribunal (the Present Proceedings), and a previous adjudication made by Strata Schemes Adjudicator Thane on 7 March 2006 (the Previous Proceedings).

13 In Present Proceedings:

(1) the applicant was the Respondent;

(2) the nine lot owners respondents were P Gleeson, M ichael Trovato, Ranjit Khan, K Singh, Wing Sze Yeung, Stephanie Messina, Lisa Sutton, Katrina See-Kay Lui and Leonard Pinto Messias;

(3) the Respondent sought an order pursuant to s 149(1)(b) of the 2015 Act to the effect that a by-law should be made to repeal by-laws 13 and 54 on the grounds that the lot owners had unreasonably refused to consent to the proposed repeal of those by-laws and that it is in the interests of all owners in their use and enjoyment of lots and common property that the by-laws be repealed;

(4) the Tribunal ordered the Respondent to make a by-law to repeal by-laws 13 and 54.

14 In Previous Proceedings:

(1) the applicant was the Respondent;

(2) the 17 lot owner respondents were P Gleeson, Emmanuel Gasparro, Wentworth Falls Pty Ltd as trustee for the Clatworthy Superannuation Fund, A C Gidney and M E Buckle, Michael Trovato, Kelvin Yiu Fai Leung and Joey Sin Yim Lau, K Singh and R Kaur, J Kennedy, K Yeung, John Denis Callaghan, Darryl Thomas, Grant Hood and Deidre Anne Hood, PG Smith, Catherine Valerie Sanderson, W Chen, Lisa Margaret Sutton, Katrina See-Kay Lui and Leonardo Pinto Messias. (Here we have set out the lot owners' names as they appear in the Adjudication);

(3) the Respondent sought an order pursuant to s 158 of the 1996 Act for the repeal of by-laws 13 and 54. It was submitted that the by-laws had been improperly made during the "initial period" (see the definition in the Dictionary of the 1996 Act) of the strata scheme, and were contrary to certain conditions of a development consent;

(4) the Adjudicator dismissed the application.

15 The Appellants contend that the Tribunal erred by finding that the Decision of Adjudicator Thane of 7 March 2006 did not give rise to res judicata or issue estoppel. The Appellants say that the Tribunal should have found that the decision and order of Adjudicator Thane in 2006 created an issue estoppel and res judicata that operated to preclude the Respondent from bringing the proceedings before the Tribunal now the subject of this appeal.

16 The Appellants note that the Respondent did not appeal against the decision of Adjudicator Thane. They submit that it appears that the Respondent did not do anything further in relation to by-laws 13 and 54 for more than 10 years.

17 The Respondent submits that the doctrines of res judicata and issue estoppel have no application as, in summary:

(1) only one of the respondents to the Previous Proceedings was a party to the present proceedings, namely, W S Yeung, the owner of Lot 32;

(2) the causes of action in the Previous Proceedings were not the same as the cause of action in the Present Proceedings;

(3) no issue estoppel arises as there was no determination in the Previous Proceedings of the question as to whether owners unreasonably refused on 8 December 2016 to repeal by-laws 13 and 54. The Respondent submits that the Previous Proceedings did not determine whether the Appellants and/or the Respondent had unreasonably refused to repeal by-laws 13 and 54;

(4) whether the lot owners or the Respondent unreasonably refused on 8 December 2016 to repeal by-laws 13 and 54 was not in issue, either directly or indirectly, in the Previous Proceedings and so is not a matter to which a plea of estoppel by res judicata could succeed in the Present Proceedings.

Relevant principles

18 The relevant principles appear in Halsburys (online version) at [190-45] and following. We summarise and paraphrase those principles as follows:

(1) res judicata is the principle of law which prohibits a party from bringing a further action in respect of a subject matter raised and determined in a prior final judgment before a competent tribunal between the same parties or their privies litigating in the same capacity; if made out, res judicata is a complete bar to the claim;

(2) res judicata is founded on the necessity of avoiding re-agitation of issues and of preventing the raising of issues which could have been and should have been decided in earlier litigation;

(3) res judicata is not restricted to courts of record. It applies to judicial decisions of a final nature of any court or tribunal upon any matter over which it has jurisdiction to give a final judicial decision, including arbitral tribunals and a consumer claims tribunal: *Maganja v Arthur* [1984] 3 NSWLR 561 at 563;

(4) in order to establish a plea of res judicata, it must be shown that the cause of action in the later proceedings is the same as that which was litigated in the former proceedings. “Cause of action” means (i) the series of facts which the plaintiff must allege and prove to substantiate a right to judgment, (ii) the legal right which has been infringed, and (iii) the substance of the action as distinct from its form: *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 at 610;

(5) res judicata applies where there is an identity of parties. This occurs where the parties are literally the same or there is privity of interest or capacity. The determination of identity between litigants for the purpose of establishing privity is a question of fact. There are three classes of privies, blood, title and interest.

19 As to issue estoppel, the principle is that a final judgment by a competent tribunal creates an issue estoppel in that it forever binds the parties and all those who claim through them in respect of any issue of fact or law which was legally indispensable to that decision. For the doctrine of issue estoppel to apply in a second set of proceedings:

(1) the same question must have been decided;

(2) the judicial decision which is said to create the estoppel was final; and

(3) the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

20 The parties are bound in the sense that they are precluded in subsequent proceedings from asserting, as against other parties to the judgment, to the contrary of any issue fundamental to the judgment. The issue in the subsequent proceedings must be precisely the same as that decided in the earlier proceedings. However, unlike res judicata, the plea of issue estoppel may succeed although the causes of action in the two cases are entirely different (see Halsburys at [190-100]).

Consideration

21 For the following reasons, we do not accept the Appellants' submissions.

22 First, there is no commonality of parties. In the two proceedings, only one lot owner, W S Yeung, is said to respondent in both proceedings. (Even here, we note that there is a lot owner identified in the Present Proceedings as "W S Yeung", and a "K Yeung" in the Previous Proceedings. We understand the Respondent to be submitting that those persons are in fact the same. As the Appellants have made no submission to the contrary we will assume that to be the case).

23 We accept that a successive lot owner stands in the shoes of the previous lot owner for the purpose of the doctrine. Even so, there are nine lot owners in the Present Proceedings, and 17 in the Previous Proceedings.

24 Secondly, and more importantly, there is substance in the Respondent's submission that the decision in the Previous Proceedings did not determine the issue that was before the Tribunal in the Present Proceedings. As noted above, in the Present Proceedings, the Respondent sought an order pursuant to s 149(1)(b) of the 2015 Act that a by-law be made to repeal by-laws 13 and 54 on the grounds that the lot owners had unreasonably refused to consent to the proposed repeal of those by-laws and that it is in the interests of all owners in their use and enjoyment of lots and common property that the by-laws be repealed. The Tribunal granted that request.

25 In the Previous proceedings, the Respondent sought an order pursuant to s 158 of the 1996 Act for the repeal of by-laws 13 and 54. It was submitted that the by-laws had been improperly made during the "initial period" (see the definition in the Dictionary of the 1996 Act) of the strata scheme, and were contrary to certain conditions of a development consent. The Adjudicator dismissed the application, noting that p 7 that:

> It is also difficult to see how any of the subject owners could be accused of acting unreasonably (as is required to satisfy sections 157 and 158). On all accounts the owners acted in good faith for valid consideration at the time of purchasing their units. The repeal of the by-laws in question will have a significant and detrimental effect on a right they have enjoyed for over ten years.

26 In our view, the Tribunal was to correct to state at [42]:

> I do not accept that the prior proceedings give rise to an issue estoppel or res judicata. This is because this application is brought in relation to an alleged unreasonable refusal to make a by-law put to the parties in 2016 and at an EGM in 2016. That is, the application relates to a refusal in 2016, not to the refusal or other circumstance occurring earlier.

27 In any event, as the Tribunal notes at [43], it was not aware who provided evidence or submissions in relation to the Previous Proceedings nor of the nature of such evidence or submissions. The Tribunal further noted (at [44]) that it appeared that circumstances had changed in that one of the lot owners, that is, the owners of Lot 24, had consented to the making of the proposed by-law.

28 As the Respondent submits, prior to the Previous Proceedings, no motion had been considered at a general meeting to repeal by-laws 13 and 54, and no order to repeal by-laws 13 and 54 was sought in the Previous Proceedings. In the Previous Proceedings, it was not alleged that the Appellants had unreasonably refused to consent to the repeal by-laws 13 and 54;

29 In the Present Proceedings, a motion to repeal by-laws 13 and 54 was considered at a general meeting of the Respondent on 8 December 2016 and was not approved. The Present Proceedings concerned an application by the Respondent for an order prescribing the making of a by-law pursuant to s 149(1) of the 2015 Act, to repeal by-laws 13 and 54, following the failure to repeal the by-laws at that general meeting.

30 The Previous Proceedings did not involve any consideration of the unreasonableness of owners at the general meeting held on 8 December 2016 to repeal by-laws 13 and 54. Accordingly, the decision in the Previous Proceedings did not determine the issue that was before the Tribunal in the Present Proceedings.

31 For the above reasons therefore, we consider that the Tribunal was correct to reject the submission that it was prevented from hearing and determining the Respondent's application by reason of the doctrine of res judicata or issue estoppel.

Grounds of appeal (2): Inadequacy of reasons

Summary of the Decision

32 As the grounds of appeal relate to the adequacy of the reasons given by the Tribunal, it is appropriate to set out a summary of the reasons for decision.

33 The Tribunal's reasons for decision were 15 pages in length. At pars [1] to [10] the Tribunal sets out the background to the application. Relevantly:

(1) the strata plan was registered on 10 November 1994;

(2) the strata plan comprises the following levels:

(a) level 0 - basement 3 - car spaces;

(b) level 1A: basement 1 - car spaces;

(c) level 1B: basement 1 - car spaces;

(d) level 2A: basement 2- car spaces;

(e) level 2B: basement 2 - car spaces;

(f) level 3: ground floor – commercial;

(g) level 4-8: residential;

(3) the redevelopment of Lot 1 followed consent to development application No U92-007409 dated 16 November 1992. The terms of the consent included the following condition:

> "(7) That all visitor, handicapped and retail car spaces shall be suitably signposted and used as such."

(4) the consent also included numerous other conditions referred to as "Council's approved standard conditions";

(5) on 22 December 1994, the Respondent in general meeting passed a resolution in accordance with s 58(2) of the 1973 Act repealing by-laws

12 to 29 inclusive and replacing those by-laws with new by-laws 12 to 29 inclusive and new by-laws 33 to 54 inclusive;

(6) the change of by-laws was subsequently registered at the Land Titles Office (instrument U901565X);

(7) the new by-laws included by-laws 13 and 54:

> 13. A proprietor or occupier of a lot in respect of which there exists a Relevant Car Space shall have the exclusive use and enjoyment of the Relevant Car Space.
>
> 54. . . .
>
> (c) "Relevant Car Space", in relation to a lot, means a car space (if any) marked on the Strata Plan by a designator, which designator is specified in the schedule hereto in respect of that lot, but does not include a car space that forms part of a lot.

(8) the Schedule referred to in by-law 54 provided a designator (respectively letters “A” through to “N”, and letters “P”, “Q” and “R”) in respect of 17 separate lots;

(9) it was not disputed that the effect of that change of by-laws purported to give the 17 numbered lots exclusive use of certain visitor car parking spaces;

(10) the strata plan showed that only car parking spaces not marked "PT.NN" (where "NN" was a lot number) were marked with a "designator" letter. That also complies with the term of by-law 54 that any designated lot *"does not include a car space that forms part of a lot'.*

(11) none of the lots listed in the schedule otherwise had a car parking space included in that lot, and therefore did not have a car parking space within the scheme, but for the special by-laws.

34 Paragraphs [11] to [18] summarise the basis for the Respondent’s application to the Tribunal. In summary, it was the Respondent’s case that:

(1) the disputed by-laws were in contravention of the original development consent conditions;

(2) the disputed by-laws amount to an offence under s 121B of the *Environmental Planning and Assessment Act 1979* (NSW);

(3) the Respondent could not validly make a by-law in terms similar to the disputed by-laws, even if it wished to do so, because of that would breach (as the disputed by-laws breach) s 136(2) of the 2015 Act;

(4) all except one of the lot owners failed to consent to the repeal of by-laws 13 and 54.

35 Paragraphs [19] to [28] summarise the Appellants’ position. In summary, the Appellants submitted that:

(1) there was no evidence that all the lot owners refused to consent;

(2) in the alternative, the refusal was reasonable because valuable consideration was paid for the relevant lots;

(3) no compensation was offered by the Respondent, and the Appellants all purchased their lots with knowledge of the disputed by-laws;

(4) there was no evidence of any adverse effects on any lot owner or visitor;

(5) even if all statutory elements were proved by the Respondent, the Appellants submitted that making the order was a matter of discretion and it should not be made, relying on the voting proportions in the rejection of the motion at an extraordinary general meeting.

36 Paragraphs [29] and [30] briefly summarise the basis for the Respondent's reply.

37 Paragraph [31] sets out relevant sections of the 2015 Act. Paragraphs [32] to [40] deal with and application for an adjournment of the hearing made by the Appellants. The application was refused.

38 Paragraphs [42] to [54] then set out the Tribunal's consideration of the application. In summary:

(1) the Tribunal did not accept that the prior proceedings give rise to an issue estoppel or res judicata;

(2) none of the Appellants, except the owners of Lot 24, had taken any action to demonstrate that any of them had not refused to consent;

(3) it was unreasonable to refuse to consent to a by-law to repeal two by-laws which were made in contravention of conditions of the Development Consent. In this respect the Tribunal stated:

> It can readily be accepted that the approval authority at the time of the Consent was concerned to make firm arrangements for parking in an area of the CBD where street parking was strictly limited if not totally banned during normal business hours. It is true there is no actual evidence of that fact but it can be inferred from the conditions themselves, including, importantly in my opinion, that condition requiring the placement of sign visible from the street that visitor parking is available.

39 At pars [48] and following the Tribunal then considered whether or not it should exercise its discretion pursuant to s 149 of the 2015 Act to make an order prescribing a change to the by-law, having found that the refusal was unreasonable. The Tribunal here considered the following matters:

(1) 17 lot owners or occupiers from time to time of the lots concerned had had the benefit of a car parking space for over 23 years; apart from

some temporary interest shown by Council in 2000, no other action had been taken or was to be taken proposed by the Council;

(2) there was no evidence of any adverse effects of the passing of the disputed by-laws to any other lot owner or to any visitor;

(3) an Owners Corporation has positive duties to manage and administer the common property and cannot overlook by-laws made in contravention of the Development Consent.

40 The Tribunal concluded that it was:

> quite inimical to the good management of the scheme and the care with which the Parliament has over the years provided a detailed management scheme for strata units and, for that matter, for approvals of development applications and development consents. It would not be proper or seemly for this Tribunal to simply permit that situation to continue.

Relevant principles

41 We set out below a number of the relevant principles in relation to the adequacy of the Tribunal's reasons.

42 If, following a hearing, a party requests written reasons, s 62(3) of the Act sets out what must be contained in those reasons. The reasons must include the findings on material questions of fact, the Tribunal's understanding of the applicable law, and the reasoning processes that lead the Tribunal to the conclusions it made. Section 62(3) is not applicable in the circumstances of this appeal, as no request for written reasons was made. Nevertheless, the Tribunal sitting in the Consumer and Commercial Division has a duty under the common law to give reasons for its decisions: *Collins v Urban* [2014] NSWCATAP 17 at [48] to [57]; see *Hernady v Raccani* [2016] NSWCATAP 67 at [37].

43 In *Pollard v RRR Corporation Pty Limited* [2009] NSWCA 110 McColl JA, with whom Ipp JA and Bryson AJA agreed, noted the following relevant principles.

(1) the giving of adequate reasons lies at the heart of the judicial process. Failure to provide sufficient reasons promotes "a sense of grievance" and denies "both the fact and the appearance of justice having been done", thus working a miscarriage of justice;

(2) the extent and content of reasons will depend upon the particular case under consideration and the matters in issue;

(3) while a judge is not obliged to spell out every detail of the process of reasoning to a finding, it is essential to expose the reasons for resolving a point critical to the contest between the parties;

(4) the reasons must do justice to the issues posed by the parties' cases. Discharge of this obligation is necessary to enable the parties to identify the basis of the judge's decision and the extent to which their arguments have been understood and accepted;

(5) because a primary judge is bound to state his or her reasons for arriving at the decision reached, the reasons actually stated are to be understood as recording the steps that were in fact taken in arriving at that result. Where it is apparent from a judgment that no analysis was made of evidence competing with evidence apparently accepted and no explanation is given in the judgment for rejecting it, the process of fact finding miscarries.

44 In *Akkari v Sartor* [2015] NSWCATAP 79 at [48] the Appeal Panel noted the observations of Johnson J in *Moloney v Collins* [2011] NSWSC 628 at [63] to [64], made in the context of a civil hearing in the Local Court. His Honour said:

> 63 Failure to give reasons as required by law may itself disclose error of law: Pettitt v Dunkley [1971] 1 NSWLR 376; Soulemezis v Dudley (Holdings) Pty Limited (1987) 10 NSWLR 247 at 278-279. However, the extent and content of the reasons required will depend upon the particular case and the issues under consideration.
>
> 64 The duty does not require the trial Judge to spell out in minute detail every step in the reasoning process or refer to every single piece of evidence. It is sufficient if the reasons adequately reveal the basis of the decision, expressing the specific findings that are critical to the determination of the proceedings: Stoker v Adecco Gemvale Constructions Pty Limited [2004] NSWCA 449 at 41. It is essential to expose the reasoning on a point critical to the contest between the parties: Pollard v RRR Corporation Pty Limited [2009] NSWCA 110 at [58].

45 Finally, as the Appeal Panel recently stated in *Camilleri v Eastlake* [2018] NSWCATAP 176 at [26]:

> It is correct that a failure to give reasons is an error of law: *Pettitt v Dunkley* [1971] 1 NSWLR 376; *Soulemezis v Dudley (Holdings) Pty Limited* (1987) 10 NSWLR 247 at 278-279. However, the extent and content of the reasons required will depend upon the particular case and the issues under consideration: *Moloney v Collins* [2011] NSWSC 628. The duty does not require a court or tribunal to spell out in minute detail every step in the reasoning process or refer to every single piece of evidence. It is sufficient if the reasons adequately reveal the basis of the decision, expressing the specific findings that are critical to the determination of the proceedings: *Stoker v Adecco Gemvale Constructions Pty Limited* [2004] NSWCA 449at 41. It is essential to expose the reasoning on a point critical to the contest between the parties: *Pollard v RRR Corporation Pty Limited* [2009] NSWCA 110 at [58].

Failure to take into account key submissions

46 The Appellants submit, and this does not appear to be disputed by the Respondent, that in the proceedings before the Tribunal, the Appellants

submitted both orally and in writing that any refusal by them to consent to a by-law repealing by-laws 13 and 54 was not unreasonable because they:

(1) paid valuable consideration for acquiring rights of exclusive use and enjoyment of the car spaces the subject of those by-laws; and

(2) the Respondent did not offer to pay them any compensation in consideration of them consenting to a by-law to repeals those by-laws and thereby forfeiting their rights under those by-laws.

47 The Appellants submit, correctly, that the Tribunal referred to these submissions at [20] and [21] of the Decision. The Appellants further submit, again correctly, that the Tribunal did not "deal with" those submissions, or otherwise explain why he rejected them and indeed, did not "grapple with" those submissions at all.

48 We agree. The core reasoning of the Tribunal can be reduced to pars [47] and [52] of the Decision. At [47] the Tribunal states

> 47. In my opinion it is unreasonable to refuse to consent to a by-law to repeal two by-laws which were made in contravention of conditions of the Development Consent. It can readily be accepted that the approval authority at the time of the Consent was concerned to make firm arrangements for parking in an area of the CBD where street parking was strictly limited if not totally banned during normal business hours. It is true there is no actual evidence of that fact but it can be inferred from the conditions themselves, including, importantly in my opinion, that condition requiring the placement of sign visible from the street that visitor parking is available.

49 We note here the Tribunal's comment that there was no "actual evidence" of what was, for the Tribunal, a relevant finding of fact. The Tribunal, after stating that there was no "actual evidence" to support its factual finding that the two by-laws were made in contravention of the development consent, did not, in our view, adequately explain how there was sufficient circumstantial evidence for the Tribunal to be satisfied an inference should be drawn that supported the ultimate finding of fact that by-laws 13 and 54 contravened the provisions of the development consent issued by the Council. There is a clear ambiguity between the Tribunal stating, on the one hand, that there is no "actual evidence" to support a factual finding, but then, on the other hand, going on to make that factual finding in any event. To provide adequate reasons, the reasoning process of the Tribunal required a sufficiently clear and thorough explanation of how the evidence established that by-laws 13 and 54 contravened the development consent.

50 The Tribunal then goes on to refer to the fact that that the 17 lot owners had the benefit of a car parking space for over 23 years and that, apart from some "apparently temporary" interest shown by Council in 2000, no other action had been taken or proposed by Council. However, the Tribunal concludes, after referring (at [51]) to an Owners Corporation's positive duties to manage and administer the common property, that:

> [52] . . . an Owners Corporation simply cannot overlook by-laws made in contravention of the Development Consent. That is quite inimical to the good management of the scheme and the care with which the Parliament has over the years provided a detailed management scheme for strata units and, for that matter, for approvals of development applications and development consents. It would not be proper or seemly for this Tribunal to simply permit that situation to continue.

51 The Appellants submit that the Tribunal's failure to deal with their key considerations is a denial of procedural fairness and a constructive failure to exercise jurisdiction. We agree. As the Appeal Panel stated in *CG Constructions Pty Ltd v Hansen Constructions Materials Pty Ltd* [2017] NSWCATAP 130 at [34]:

> in Dranichnikov -v- Minister for Immigration and Multicultural Affairs [2003] HCA 26; (2003) 77 ALJR 1088, Gummow and Callinan JJ (Hayne J agreeing) said at [24] that a failure to respond "to a substantial, clearly articulated argument relying upon established facts was at least" a failure to accord an applicant natural justice. A failure of that kind has also been described as a constructive failure to exercise jurisdiction (see, for example, MZAES v Minister for Immigration and Border Protection [2015] FCA 113 at [66]). Such a failure will constitute an error of law.

52 Further, even if by-law 13 and by-law 54 were inconsistent with the development consent, s 149 of the 2015 Act relevantly states:

> "**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.
>
> …"

53 The evidence and submissions of the Appellants that:

- lot owners who purchased into the strata scheme after by-laws 13 and 54 were registered had paid valuable consideration for a Lot that included exclusive use of a car parking space;
- the Council had not taken any action, or proposed to take any action, against the owners corporation for breach of the development consent conditions relating to parking; and
- the Respondent had not offered to compensate lot owners in respect of the proposed repeal of by-laws 13 and 54,

were clearly pertinent to the mandatory considerations under s 149(2) of the 2015 Act, and whether or not the Tribunal should exercise its discretion under s 149(1) of the 2015 Act. The reasons of the Tribunal do not reflect that there has been proper consideration of such issues, in the statutory context of s 149 of the 2015 Act.

54 Nevertheless, as the Appeal Panel observed in *Moussa Enterprises Pty Ltd v Stanford* [2015] NSWCATAP 99 at [32], fundamentally, the reasons, be they oral or written, must do justice to the issues posed by the parties' cases.

55 For the reasons given above, we are unable to conclude that this occurred on this occasion.

56 In our view, this appeal closely resembles *CG Constructions.* There the Appeal Panel found that the Tribunal's decision made no reference to material evidence, and that it was necessary that the matter be remitted for re-hearing.

57 For the reasons stated, the decision under appeal discloses a material error of law. The reasons of the Tribunal did not engage with the Appellant's "key" considerations in reaching its Decision.

58 We are mindful that:

(1) an object of the Tribunal is to resolve the real issues in proceedings justly, quickly, cheaply and with as little formality as possible: NCAT Act, s 3(d);

(2) the guiding principle to be applied is to facilitate the just, quick and cheap resolution of the real issues in the proceedings (s 36(1)); and

(3) the Tribunal is to act with as little formality as the circumstances of the case permit and according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms (s 38(4)).

59 However, we consider that the appropriate course is that the matter be remitted to the Tribunal for redetermination by another Member.

60 We consider that our conclusions on these grounds of appeal are sufficient to dispose of the appeal, and it is not necessary to consider any of the other grounds agitated.

Costs

61 The Appellants have been successful. If they wish to make an application for costs they should file and serve written submissions on or before 7 September 2018. The Respondent may respond on or before 14 September 2018. The written submissions must address the mattes set out in s 60 of the NCAT Act.

62 Our preliminary view is that any application for costs should be determined on the papers and without a hearing. If either party thinks otherwise, they should address that matter in their written submissions.

Other

63 As the proceedings are to be remitted, it will be for the Tribunal, on remitter, to direct what evidence, or further evidence, may be led by either party at the final hearing of the proceedings.

Orders

64 For the above reasons, we make the following orders.

(1) The appeal is allowed, and the orders of the Consumer and Commercial Division of the Civil and Administrative Tribunal quashed.

(2) Remit the matter to the Consumer and Commercial Division of the Civil and Administrative Tribunal constituted by a member other than the member who made the original decision, to be determined in accordance with these reasons and otherwise according to law.

(3) The Appellants are file and serve written submissions in relation to costs on or before 7 September 2018.

(4) The Respondent is file and serve written submissions in relation to costs on or before 14 September 2018.

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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