Civil and Administrative Tribunal

New South Wales

Case Name:	John Maait Properties Pty Ltd v The Owners - Strata Plan No 50396
Medium Neutral Citation:	[2019] NSWCATAP 26
Hearing Date(s):	17 January 2019
Date of Orders:	23 January 2019
Decision Date:	23 January 2019
Jurisdiction:	Appeal Panel
Before:	M Harrowell, Principal Member Dr J Lucy, Senior Member
Decision:	Leave to appeal is refused and the appeal is otherwise dismissed
Catchwords:	STRATA SCHEMES – unauthorised alteration to common property – obligation on Owners Corporation to reinstate common property – damages for breach of duty to repair – by-law regulating security access to building – by-law limiting access devices and areas of common property to which access is given – not harsh, unconscionable or oppressive – jurisdiction to award damages for loss arising from exercise of power in respect of issuing security access devices.
Legislation Cited:	Civil and Administrative Tribunal Act, 2013 (NSW) Strata Schemes Management Act, 1996 (NSW) Strata Schemes Management Act, 2015 (NSW)
Cases Cited:	Davenport v The Owners – Strata Plan No 536; The Owners – Strata Plan No. 536 v Davenport [2018] NSWCATAP 301 The Owners – Strata Plan 21702 v Krimbogiannis [2014] NSWCA 411 The Owners Strata Plan No. 30621 v Shum [2018]

	NSWCATAP 15 The Owners – Strata Plan No. 50276 v Thoo [2013] NSWCA 270
Texts Cited:	Nil
Category:	Principal judgment
Parties:	John Maait Properties Pty Ltd (Appellant) The Owners - Strata Plan No 50396 (Respondent)
Representation:	Solicitors: Norris Somers Maait (Appellant) Jane Crittenden, Lawyer (Respondent)
File Number(s):	AP 18/43327
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal of New South Wales
Jurisdiction:	Consumer and Commercial Division
Citation:	N/A
Date of Decision:	3 September 2018
Before:	S De Jersey, General Member
File Number(s):	SC 18/25971

REASONS FOR DECISION

Introduction

1 This is an appeal by the owner of Lot 147 in strata scheme SP 50396. The strata scheme consists of a number of lots and common property in a building located at Parramatta (Building).

2 The appellant filed application SC 18/25971 in the Consumer and Commercial Division of the Tribunal on 25 May 2018 (original proceedings). In that application, the appellant sought various relief including:

(1) an order to invalidate by-law 10, which regulated the issue to lot owners of “fobs”, being an electronic device used to access common property areas of the strata scheme;

(2) an order that the respondent Owners Corporation reinstate hot water in the showers available in the pool area of the common property of the strata scheme;

(3) an order for compensation in respect of the unavailability of hot showers in the pool area; and

(4) an order for relief of payment of levies said to arise from the limited access provided by the fobs on issue.

3 In addition to the matters outlined above, the original application sought the imposition of a penalty and various other relief. However, for reasons that will become apparent, it is not necessary to record all issues which were raised in the original proceedings.

4 The original proceedings were heard by the Tribunal on 3 September 2018. The Tribunal made orders to dismiss the application (decision) and published reasons for decision (reasons).

Notice of Appeal and history of appeal proceedings

5 The appellant filed a Notice of Appeal dated 5 October 2018 (original Notice of Appeal). The appellant seeks the following orders on appeal:

(1) A declaration that, pursuant to s 139(1) of the *Strata Schemes Management Act, 2015 (NSW)* (Management Act) by-law 10 is harsh, unconscionable or oppressive.

(2) A declaration that, pursuant to s 150(1) of the Management Act, bylaw 10 is invalid;

(3) a declaration that the deliberate disconnection by the respondent of the hot water service in the pool shower facilities was without authority and constituted a defect and that the respondent failed to repair same in satisfaction of its statutory duty under s 106 of the Management Act.

(4) That, by reason of the breach of s 106(1), the appellant is entitled to compensation pursuant to s 106(5) of the Management Act for the costs of membership of public swimming pool facilities.

(5) In the circumstances in which the appellant was limited or denied access to common property facilities, that it be exempted from paying the respondent any levies or a component of the levies commencement with the denial of said access commencing in about November 2017.

6 The appellant seeks leave to appeal to the extent this is necessary. The grounds of appeal, contained in a second notice of appeal dated 26 October 2018, can be summarised as follows:

(1) The decision was not fair and equitable and "was so against the weight of evidence … as to amount in some respects to a denial of natural justice".

(2) The reasons provided were inadequate, particularly in relation to the "voluminous documentary evidence led by the appellant as to the harsh and oppressive manner By-law 10 was used to the detriment of the applicant and its tenants". In this regard, the Tribunal also failed to give adequate reasons for not accepting "the only admissible evidence before the Tribunal at first instance".

(3) The Tribunal was in error in concluding that the deliberate disconnection of the hot water in the shower facilities of the pool did not fall within the respondent's statutory obligation to repair. This proposition was put as a reason why the decision was "unfair and not equitable". However, we also take it to be a challenge to the interpretation of s 106 and the obligations imposed thereby upon an owners corporation. As such, it also raises a question of law.

(4) The Tribunal "was in error in refusing, without any or any adequate reasons, the appellant's claim for relief from paying levies during the period when the appellant's and its invitees access to common property facilities was severely restricted or denied".

7 The respondent filed a Reply to Appeal. That document replied to the grounds contained in the original Notice of Appeal. For present purposes, it is unnecessary to set out the detail of this reply.

8 The Appeal Panel made directions for the preparation of the hearing for appeal.

9 The parties subsequently filed copies of documents from the original proceedings and provided written submissions. The Appeal Panel was not provided with a copy of the sound recording or transcript of the proceedings, the parties not wishing to rely on the transcript.

10 The appeal was heard on 17 January 2019.

11 Mr Maait, solicitor, appeared for the appellant. He did so in his capacity as a solicitor. Mr Maait was also the sole director and shareholder of the appellant: see Appellant's Bundle Tab 7, statement of Mr Maait para 1.

12 Ms Crittenden, solicitor appeared for the respondent.

Consideration

13 There were essentially four topics covered by the submissions of the parties. These were:

(1) Was the Tribunal in error in concluding s 106 did not impose on the respondent an obligation to reinstate the hot water to the showers in the pool and, if so, should such an order be made?

(2) Was the Tribunal in error in failing to award compensation to the appellant being the cost of tickets to an alternative pool facility?

(3) Was by-law 10 harsh and unconscionable and should an order be made to invalidate the by-law?

(4) Was the appellant entitled to an order relieving it from an obligation to pay levies during the period in which its access to common property was limited because certain fobs which had been issued to it pursuant to by-law 10 did not permit access to all areas building?

14 The parties made oral submissions in respect of these topics at the hearing of the appeal, the topics also being addressed on the basis of legal and factual challenges in the written submissions to which we have referred.

15 While the appellant had originally challenged the conclusions of the Tribunal in respect of an application to remove a member of the Management Committee, an application for a penalty to be imposed on the respondent and a complaint concerning the alleged failure of the respondent to place on the notice board a copy of the Interim Orders made in the proceedings at first instance, these matters were not pursued in the appeal. Consequently it is unnecessary to deal with them.

16 There is a right of appeal on a question of law. Otherwise leave to appeal is required. Leave may only be granted if the Appeal Panel is satisfied the appellant may have suffered a substantial miscarriage of justice: see s 80(2)(b) and Sch 4 cl 12 of the *Civil and Administrative Tribunal Act, 2013 (NSW)* (NCAT Act).

17 It is convenient to deal with the submissions made by the parties by reference to the topics we have identified above.

Was the Tribunal in error in concluding s 106 did not impose on the respondent an obligation to reinstate the hot water to the showers in the pool and, if so, should such an order be made to reinstate the hot water?

18 This issue was dealt with by the Tribunal at [34]-[35] of the reasons. There the Tribunal said:

> 34. The applicant seeks an order for hot water to be restored by the respondent to the showers in the pool area. This application is brought under section 106 of the Act which imposes a statutory duty on the respondent to repair and maintain the common property. The respondent's response was that the hot water was disconnected some 10 years ago due to a number of occupants of the strata using the pool showers rather than their own showers within their lots. For this reason, it is said that the then Chairman without any authority from the Executive Committee or owners in general meeting, disconnected the hot water to the pool showers. Ms Crittenden said she has given advice to the respondent that this action was an alteration to the common property which could only be authorised by special resolution. Ms Crittenden said the respondent sought to regularise the matter by proposing to put a special resolution to the owners at the next general meeting to vote on whether the hot water facility ought be restored or remain disconnected from the pool showers. This meeting is to be held in September 2018.
>
> 35. I agree with the respondent's characterisation that this is not a repair or maintenance issue under section 106, but an unauthorised alteration to common property, namely a withdrawal of the hot water shower facility in the pool bathrooms. As the issue is to be put to the owners very shortly to decide (and it needs a 75% majority to uphold the alteration) I do not propose to interfere with that process by making an order that would have the effect of usurping the rights of the owners to decide whether this is a facility they wish to provide or not to as part of the pool facilities. In the appeal, the respondent accepted that, insofar as unauthorised work had been done by the then chairman of the Owners Corporation to disconnect the hot water supply to the showers in the pool, there was a duty on the respondent to reinstate this service which properly fell within the obligations to repair and maintain found in s 106 of the Management Act.

19 In our view, this concession was properly made. Insofar as the Tribunal concluded there was no obligation under s 106 to reinstate common property which had been altered by unauthorised work, it was in error.

20 In *Davenport v The Owners – Strata Plan No 536; The Owners – Strata Plan No. 536 v Davenport* [2018] NSWCATAP 301 at [35] and following, the Appeal Panel dealt with the obligations of an owners corporation to repair and maintain common property. The Appeal Panel referred to the decisions of the Court of Appeal of the Supreme Court of New South Wales in *The Owners – Strata Plan No. 50276 v Thoo* [2013] NSWCA 270 (*Thoo*) and *The Owners – Strata Plan 21702 v Krimbogiannis* [2014] NSWCA 411 (*Krimbogiannis*).

21 In *Krimbogiannis*, Basten JA said at [15]:

> … "maintain" is not limited in its meaning. Keeping in good repair assumes the continued existence of the property in question; maintaining the property includes preserving it by not removing, replacing or destroying the property. So much is clear from the dictionary definition relied on by McColl JA in *Ridis* at [158].

22 Consequently, his Honour accepted that the obligation to repair and maintain imposed on the owners corporation under s 62 of the *Strata Schemes Management Act, 1996 (NSW)* (1996 Act), which is in the same terms as s 106 of the Management Act, permitted the owners corporation in that case to reinstate the building in circumstances where a tenant of a registered proprietor had, without authority, removed a glass panel forming part of an external wall of the building, which was common property, and replaced it with a glass sliding door.

23 It follows in the present case that the respondent was obliged to reinstate the hot water supply to the showers in the pool area which had been disconnected without authority by the former chairman.

24 However, that is not an end of the matter.

25 The Tribunal declined to make any order because there was a proposal by the respondent to seek authority to disconnect the hot water supply pursuant to a special resolution of the respondent in general meeting. Since the hearing of the proceedings at first instance, such a meeting has been held and a resolution was passed under s 108 of the Management Act on 26 September 2018.

26 The respondent sought leave to adduce evidence of this fact in this appeal, that evidence being an affidavit of Ms Crittenden affirmed 11 December 2018. That evidence included a copy of special by-law 24 which has been registered. This was a bylaw to alter the common property by disabling the hot taps in the showers available in the swimming pool area.

27 The appellant said leave should not be granted as it would be unfair to resolve this appeal on the basis of events occurring after the original hearing. However, the appellant did not seek to challenge the validity of the resolution which was passed on 26 September 2018.

28 In our view, the new evidence should be permitted in this appeal. Although we are satisfied an error was made by the Tribunal, it would be inappropriate to order reinstatement of the hot water to the showers where the respondent has resolved to alter the shower facilities provided in the pool area. Rather, the matter should be left to the respondent in general meeting to resolve this issue, as it has done, the appellant being able to challenge that resolution in separate proceedings if it considers it appropriate to do so.

29 It follows that the relief sought in the Notice of Appeal should be refused and this ground of challenge dismissed.

Was the Tribunal in error in failing to award compensation to the appellant being the cost of tickets to an alternative pool facility?

30 The second issue is whether the appellant is entitled to an order for compensation in respect of the lack of hot water shower facilities in the pool.

31 The appellant claims that it is entitled to recover compensation under s 106(5) of the Management Act because the respondent breached its duty to repair and maintain the property by not reinstating the hot water connection.

32 Section 106(5) provides:

> 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.

33 In *The Owners Strata Plan No. 30621 v Shum* [2018] NSWCATAP 15 the Appeal Panel concluded there was power of the Tribunal to make an award for damages arising from a breach by an owners corporation of its obligations under s 106 of the Management Act. In doing so, it determined that damages could not be recovered in respect of a breach of the duty occurring before the introduction of s 106(5), namely under the former s 62 of the 1996 Act: *Shum* at [97]-[120].

34 In the present case, the initial breach of an obligation to repair following the unauthorised disconnection of the hot water supply to the showers occurred 10 years ago or more. In these circumstances, any breach of an obligation to repair and maintain first occurred prior to the introduction of the Management Act. Prima facie, no losses would be recoverable.

35 However, as made clear in *Shum* at [122] and following, particularly at [128], the obligation to repair and maintain is continuing. Consequently, it is necessary to see whether there is a loss suffered by the appellant as a result of a continuing contravention of the section. This requires an examination of period of loss and the nature of the claim made.

36 In its submission, the appellant identifies the evidence of loss as an email dated 11 July 2018 found at AB 96. This email is from the City of Parramatta Council to Mr John Maait. The email records the payment of various amounts between 8 December 2015 and 1 October 2016 in respect of "Visit Passes/Memberships" to the Parramatta Swimming Centre. The correspondence is addressed to Mr Maait, no reference being made to the appellant.

37 The Management Act commenced on 30 November 2016. It follows for the reasons in *Shum*, to which we have referred above, that any loss suffered was during a period before the Management Act commenced and therefore is unrecoverable.

38 Secondly, the claim under s 106(5) is out of time. In this regard, s 106(6) provides:

> An owner may not bring an action under this section for breach of a statutory duty or than 2 years after the owner first becomes aware of the loss.

39 At least in respect of the claims for loss suffered prior to 22 May 2016 (being a date 2 years prior to the filing of the original application in the Tribunal), the appellant must have been aware of the loss. This is because the loss is said to arise from the disconnection of the hot water supply which, in turn, has caused Mr Maait to seek membership and access to the Parramatta Swimming Centre.

40 Further, and in any event, we are not satisfied that the appellant has proved any relevant loss.

41 The respondent submitted that the evidence to which we have referred is not evidence of any loss suffered by the appellant. At best, it is evidence that Mr Maait personally paid for visitor passes or membership of the Parramatta Swimming Centre. The respondent also said that the appellant, as a company,

had not in fact suffered any relevant loss as he could not utilise the passes itself, being a company.

42 On the other hand, the appellant submitted that Mr Maait was the sole director and shareholder of the appellant and, in the absence of any other evidence, the Tribunal was incorrect to reject evidence of loss of the appellant.

43 In our view, the fact the appellant is a company would not prevent it from recovering any reasonably foreseeable losses suffered by it in consequence of the respondent's breach of an obligation under s 106 of the Management Act. However, the evidence to which the appellant refers is not sufficient to satisfy us that it has suffered any loss. There is no evidence that the appellant in fact paid the money or that the appellant did so because it was obliged to make facilities available to a tenant or third party because the facilities were unavailable in the Building.

44 Finally, the amount claimed is in respect of alternative swimming facilities. However, there being no evidence that the existing swimming facilities (as opposed to hot shower facilities) were not available for use and why they could not be used in the absence of hot shower facilities.

45 It follows that we are not satisfied relevant loss has been proved. Consequently, the claim for compensation fails.

Was by-law 10 harsh and unconscionable and should an order be made to invalidate the by-law?

46 Special by-law 10 was passed by a special resolution at the annual general meeting of the respondent held on 3 November 2015. The by-law was subsequently registered on the title of the property under dealing AJ975966L. At that time it was called by-law 9, subsequently being renamed by-law 10 following consolidation of the by-laws. The by-law is in the following terms:

> SPECIAL BY-LAW
>
> On the conditions set out in this by-law, the Owner's corporation is empowered to govern the access rights to all common areas of the complex by control of the distribution of access key fobs and remote controls and the management of the Access control system.
>
> CONDITIONS

> The Owners Corporation is empowered to appoint a party to manage the access control system being either an appointed building manager/caretaker, a member of the executive committee, the Strata Manager or some other elected party to manage the building's computerised access system and to code/issue/delete/retrieve remotes and fobs.
>
> Access Control fobs and remote controls strictly remain the property of the Owners Corporation at all times.
>
> Residents are entitled to access Fobs on the basis of an initial supply of 3 Key Fobs for 2-bedroom apartments and 4 Key Fobs for 3-bedroom apartments. One of the Key Fobs issued, which will be colour coded, will also operate the Sorrell Street Vehicle Gate and the roller door appropriate for the resident's car space on the basis of one colour coded Key Fob for each car space.
>
> Apartments 138, 139 and 147 are to each be issued with 2 Key Fobs programmed to operate the Main Vehicle Gate and there roller door, as these apartments have double car spaces.
>
> Residents may apply for additional key fobs but only once they have been provided with the full entitlement as above. Investor owners and Real Estate Agents are not to withhold key fobs and remotes and must present all remotes and fobs to the tenant regardless of how many residents are named on the lease.
>
> Should a resident require more key fobs than the initial entitlement they must advise in writing the circumstances of why traditional fobs or remotes are required and the Owners Corporation or their Executive Committee has the final decision on whether additional access is to be granted.
>
> If additional access is granted the resident must pay a deposit of $100.00* to the Owners Corporation per fob or remote control. Once the fob or remote is returned along with the receipt a refund of 75%*of the deposit will be made. The 25%*amount currently $25.00*will be kept by the Owners Corporation as an Administration Fee.
>
> *The above deposit amount and refund percentage is subject to change via a majority vote of the executive committee or Owners Corporation.

47 In reliance upon ss 139 and 150 of the Management Act, the appellant contends that the by-law is harsh, unconscionable or oppressive and that an order should be made to invalidate the by-law.

48 In its original application to the Tribunal, the appellant identified the complaint being made as one arising from the limitations imposed in respect of particular fobs to which the appellant was entitled under the by-law. The complaint did not appear to extend to that part of the by-law which required a Lot owner to provide all fobs to a tenant, regardless of the number of occupants of the tenanted lot.

49 At [17] of the reasons, the Tribunal noted that the appellant was not contending a by-law limiting the number of access fobs was impermissible. Rather, it was

the number of fobs on issue and the access for each fob which the appellant said made the by-law harsh and unconscionable. In this regard the Tribunal also noted the appellant was not seeking access to floors other than 3 (the storeroom) and 19 (the level on which the residence constituted by part of Lot 147 is located). Rather the appellant was seeking access to garage B by the roller door "because the Lot 147 storeroom can be accessed more easily via Garage B to move large furniture (as an example) rather than the pedestrian access door near the Garage B roller door or via the lift." Finally the complaint was that the by-law was harsh and unconscionable because "it treats lot owners differently".

50 In its written submissions in this appeal dated 23 November 2018 (AB Tab 1), the appellant contends the by-law is harsh, unconscionable or oppressive and the Tribunal fell into error because:

(1) The by-law does not provide for any reasonable exceptions to its operation.

(2) The Tribunal failed to analyse the appellant's evidence which demonstrated that the appellant was "in effect left … with no entitlement to any fob access at all to the appellant's property or any part of the common property because by-law 10 mandates every owner, regardless of circumstances, where the property is tenanted, is to deliver all fobs, with no exceptions provided, to the tenant". In this regard, the appellant points to the fact that access may be required by an owner to a storeroom, in circumstances where that storeroom was not otherwise subject of a tenancy agreement with the occupier of other lot property. The appellant also says access may be required where the "tenant fails or refuses to return those fobs mandated under by-law tend to be delivered to them".

(3) While conceding the argument "was not expressly advanced" at first instance, the appellant says the by-law conferred exclusive use rights and there was no evidence of compliance with s 143(1) of the Management Act.

(4) The Tribunal made a factual error in weighing the appellant's evidence with comments or submissions from the respondent's solicitor as to the intention of the by-law and its alleged effect. In this regard, the appellant submits that it evidence shows that the implementation of the by-law which has occurred between November 2017 and April 2018 demonstrates the by-law is harsh and unconscionable. Consequently, the "unorthodox manner" adopted by the Tribunal in analysing the evidence led to an unfair overall outcome. Consequently, leave to appeal should be granted.

51 In making these submissions, the appellant also challenged the adequacy of the reasons, a matter which raises a question of law.

52 As the strata plan records, the present strata scheme consists of 148 lots. As is apparent from our reasons above, there is common property which includes garages, a pool area with shower facilities. The strata scheme has a security access system for the building and its facilities. By-law 10 regulates the provision of the access devices for this security system to particular Lot owners.

53 The substantial complaint on appeal was that the limitation of access to particular fobs and the denial of access to some areas of the building because of the manner in which the fobs had been programmed meant that the by-law was harsh, unconscionable or oppressive. In this regard, in oral submissions, Mr Maait said that, on its proper construction, in all circumstances the by-law:

(1) prevents access to all areas of the common property by any fob; and

(2) prevents all fobs issued to a particular Lot owner from having the same access.

54 In making the second submission about fobs issued to individual Lot owners having differential access, the appellant referred to the fact that it had been inconvenienced when work was being done to its Lot because various contractors were not able to obtain separate fobs in order to carry out their work.

55 An example of correspondence which the appellant says was written in connection with the fobs issue is an email dated 23 May 2018 (AB 79-80). At point 5 of that email (AB 80), Mr Maait says:

> 5. My tenant and I continued to be held ransom by the OC with the latter failing to provide me with my legitimate quota and entitlement to 5 fobs that allow access to me and my tenant to all lifts, gates and doors to which I am entitled by virtue of my holding.

56 In short, the appellant submits that the history of requests demonstrates that the by-law is harsh, unconscionable or oppressive.

57 In response, the respondent denies the claim that the by-law is harsh, unconscionable or oppressive. The respondent submits that there is a

legitimate security issue and that fobs are issued to permit access to areas of the common property for which a Lot owner has a particular need.

58 The respondent says that insofar as a particular Lot owner is excluded from an area, they would have no reason to enter that area. For example, at para 11 of its written submissions dated 11 December 2018, the respondent says:

> Owners and occupiers who do not have a car parking space in garage B do not need a fob key to open the garage B door. By only giving fob keys to the garage B door to owners and occupiers who have a car parking Lot in garage B, owners and occupiers who do not have a car parking Lot in garage B are prevented from driving a car into garage B. The by-law has the effect of limiting access to garage B and preventing unauthorised parking on common property in garage B.

59 In relation to access to the storage room which is found in the same part of the building, the respondent submitted:

> Although the Appellant has a storage room that is accessible through the garage B door, it is also accessible by a pedestrian door next to the garage B door and by a lift from the main foyer. The door to the storage room is no higher or wider than the lift door or the pedestrian door next to the garage door, and so there would be no large items that could fit into the Appellant's storeroom that could not be transported to the storeroom in the lift or through the pedestrian door.

60 We were not referred to any evidence to support this submission, nor does the submission itself refer to such evidence. On the other hand, as the Tribunal found in its reasons at [30], we have not been referred to any evidence that suggests that access other than through the garage door to the storage area, that is via the lift or the pedestrian door of garage B, is not sufficient.

61 The by-law is clearly intended to restrict access to parts of the common property which a particular Lot owner might have a legitimate need to access. It is also intended to limit the total number of security devices issued to any particular Lot owner by providing a numerical limit to the number of devices. Within each set of devices issued to a Lot owner, access to parts of the common property is limited for each device.

62 Notwithstanding the complaint about the absence of evidence to explain the provenance of the by-law, the reasons for security appear self-evident as does a desire to limit the total number of devices. The appellant suggested that the limitation on the number of devices was unnecessary because each device

could be tracked. However, this submission does not deal with the practical consequences of a particular Lot owner being issued with an unlimited number of devices, the whereabouts of which might not be monitored or known and the consequences of which might be to reduce the effectiveness of the security system.

63 At [31] and following the Tribunal found:

> 31 … I am not satisfied that the threshold of "harsh" "oppressive" or "unconscionable" are satisfied by the applicant's evidence and submissions regarding access to the storeroom.
>
> 32 as for the second limb on which the [appellant] brings this part of its case-namely that the by-law **is** harsh, oppressive or unconscionable because it has the effect of limiting the devolution of a Lot or a transfer or lease or other dealing with a lot, I find there is insufficient evidence to establish this proposition. The effect of the By-law is to control the number of access fobs issued, and the range of access granted to various lot owners and lot occupiers. There is a process by which further fobs can be applied for. I do not agree that the terms of the By-Law, which set out a management structure to control fob access, this prohibits or restricts (sic) the devolution of a lot or a transfer or other dealing.
>
> 33 Illegal parking is a very common problem in a strata; the steps taken by this strata to control the problem were voted on at a meeting of the owners and a resolution was passed with the requisite majority of at least 75%. The applicant did not challenge the validity of the meeting or the special resolution in terms of procedure. I accept the respondent's submission that this by-law is necessary as a means of controlling illegal parking and to protect the rights of owners to be able to park and have access to park in their allocated spaces. It is a serious measure to overturn a special by-law which has had no less than 75% of owners late in its favour. The Tribunal is not persuaded that it should exercise its discretion in this case.

64 We note that no challenge was made in the appeal to the Tribunal's decision concerning rights of devolution of a Lot. Rather, as outlined above, the substantive challenge was that the by-law inappropriately prevented a person from obtaining access to particular common property where they had a legitimate need to do so and was in terms that inappropriately limited the number of devices and the areas to which those devices permitted access. Consequently, according to the appellant's argument, the by-law was harsh, unconscionable and oppressive.

65 In our view, this submission should not be accepted.

66 The by-law prescribes a formula and a regime which, by special resolution passed in general meeting, the owners have agreed to adopt to regulate the

security system and access to the Building. While it has the effect of preventing Lot owners from accessing all floors in the building and/or using particular entryways, such as the roller door to garage B in the case of the appellant, the prescribed limitations imposed are by reference to the particular Lot owner's rights and the areas to which that lot owner would ordinarily require access.

67 For example, as pointed out by the respondent in respect of garage B, there is no visitor parking in this garage. Consequently, only those Lot owners having a car space within this area would have a need to access this area by the roller door. Otherwise, to the extent that a Lot owner, such as the appellant, has a storage area on this level, access is available by the fob system through the lift and through a pedestrian access way.

68 In these circumstances, we agree with the Tribunal's reasons that the by-law is not, on its face, harsh, oppressive or unconscionable, there being a legitimate need to ensure the security of the building which is to be balanced against a particular Lot owner's need to access their Lot and relevant common property areas.

69 Further, contrary to the submissions of the appellant, the by-law does not, by its terms, impose an absolute embargo on access being granted to a particular Lot owner to common property areas that might otherwise not be permitted by the General specification in the special by-law. While the respondent is "empowered to govern the access rights to all common areas of the complex by the control and distribution of access key forms and remote-controls," it must do so in accordance with the conditions of the by-law.

70 The conditions in the by-law permit the issue of more key fobs to a lot owner with the respondent or its Management Committee having power to decide "on whether additional access is to be granted". The expression "access" is not defined. However, there is no reason why the expression should be given a narrow meaning, referring only to the number of fobs which might be issued. Rather, in our view the word "access" should be given its ordinary meaning and means that the respondent or the Management Committee is empowered to make decisions concerning the number of access devices issued to a particular

Lot owner, the access available for a particular device, and the areas to which a particular device might access.

71 A more limited construction of the expression “access” such that the respondent or the Management Committee can only regulate the number of fobs on issue to a particular Lot owner would otherwise mean the by-law operated to prevent the respondent or the Management Committee allowing access through the security system to particular Lot owners where they had a legitimate entitlement to enter upon particular common property. Nothing in the by-law suggests it was intended to operate that way.

72 It is not hard to think of examples where the need for additional access outside the standard conditions might arise. For instance, friends on different floors might have a legitimate entitlement to access common property areas to visit each other without the need to be “let in”. Similarly, there may be circumstances in which access might be needed through the garage door to move goods in and out of storage and it would be anomalous to suggest that the respondent or Management Committee could not authorise fob access for proper purposes. Another example in respect of the garage might be where multiple parties living in the same Lot drive the same car and for reasons of convenience and common sense each of those people might have separate access devices to come and go from the Building

73 Our view is strengthened by the fact that the by-law did not purport to grant common property rights (special privileges) to lot owners in particular areas of the building, such as the car park, to the exclusion of all other Lot owners. Rather, the by-law provides for predetermined allocation and standard conditions for particular fobs and the capacity for a Lot Owner to apply for different access.

74 Accordingly, we are not satisfied that the by-law is, in terms, harsh, unconscionable or oppressive.

75 In reaching this conclusion, we express no view as to whether the refusal of a particular request may be unreasonable. The challenge made in the appeal related to the by-law, not the exercise of power under that by-law by the respondent or the Management Committee in respect of specific request for

different access. While factual material was relied on by the appellant, the appellant made clear that his challenge was limited to the invalidity of the by-law, not individual decisions made in respect of particular requests.

76 A decision to refuse a legitimate and reasonable request for additional access, including of a more general nature, may be susceptible to challenge under s 232 of the Management Act. This was conceded by the solicitor for the respondent.

77 Hopefully, any future issues arising in respect of the access right granted in respect of fobs issued to the appellant can be resolved by reference to what we have said.

78 However, in our view the appellant has not established that there are grounds for the Appeal Panel to set aside the decision and make an order invalidating by-law 10. Accordingly, this aspect of the appeal fails.

Was the appellant entitled to an order relieving it from an obligation to pay levies during the period in which its access to common property was limited because certain fobs which had been issued to it pursuant to by-law 10 did not permit access to all areas building?

79 The appellant sought to be relieved from an obligation to pay any levies for the period in which there has been a dispute concerning fob access, where the appellant claims that only one of the five fobs issued to it was working. While the amount sought was not finally quantified, we were told that the levies from which relief was sought total $3,666 per quarter.

80 The levies have in fact been paid. As such, the appellant clarified that it was seeking an order for repayment.

81 On this aspect of the appellant's claim, the Tribunal said at [45]:

> … the Tribunal is not satisfied that there has been a breach by the respondent against which a claim for compensation could even be considered.

82 On appeal, the appellant's solicitor was asked to identify the source of power which the Tribunal had to award damages for the alleged breach. Mr Maait was unable to identify any provision of the Management Act that would authorise such an award by the Tribunal.

83 The Tribunal found at [45] that such a claim would not fall within the terms of s 106(5), namely a claim for compensation arising out of the failure of an owners corporation to repair and maintain common property. We see no error in this conclusion.

84 Otherwise, no cause of action has been identified by the appellant on which the Tribunal might have authority to adjudicate to make an award in the present case.

85 In *Thoo* at [222] the Court of Appeal concluded there was no statutory duty imposed by s 62 of the 1996 Act. For the reasons expressed in *Shum* and as is self-evident from the terms of s 106(5) of the Management Act, this decision has been displaced by the legislature conferred an express right of action in favour of a Lot owner to recover lost reasonably foreseeable from a breach of the obligations under s 106.

86 However, in the absence of the appellant identifying any power to make an award for damages in the present case or identifying a particular cause of action which it wishes to pursue, the decision in *Thoo* would support the view that there is no relevant statutory duty which might give rise to an action for damages by an affected Lot owner. While there might be a right to challenge in Tribunal proceedings any decision made in the exercise of a power by the respondent or Management Committee under by-law 10, we are not satisfied that the improper exercise of such power would entitle a person affected to claim damages.

87 It follows that this aspect of the appeal fails.

Orders

88 The appellant has been unsuccessful in all aspects of its appeal. Accordingly, we make the following orders:

(1) Leave to appeal is refused and the appeal is otherwise dismissed.

89 Our preliminary view is that there are no special circumstances that would warrant the making of an order for costs. There appears nothing out of the ordinary in respect of this dispute. While the issues identified are reflected in a long history of correspondence between the parties, the Management Act

permits the bringing of the present proceedings in order to resolve relevant disputes. Further, while the appeal has been dismissed and the appellant has been unsuccessful in the ultimate outcome, a matter which would ordinarily prevent the appellant recovering any costs, the appellant has been partially successful in relation to the respondent's obligation to repair.

90 Again, as a preliminary view, these matters would suggest that even if special circumstances were established, no order for costs should be made in favour of either party.

91 In the event the parties take a different view and wish to make an application for costs, such application must be filed and served within 7 days of the date these reasons are published. The respondent to the costs application must file and serve evidence in response 14 days after the date these reasons are published and any reply submissions by the costs applicant must be filed 21 days after the date of these reasons. Submissions must include whether a hearing should be dispensed with under s 50(2) of the NCAT Act.

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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