Supreme Court

New South Wales

Case Name:	The Owners Strata Plan No 2245 v Veney
Medium Neutral Citation:	[2020] NSWSC 134
Hearing Date(s):	5 February 2020; 12 February 2020
Date of Orders:	27 February 2020
Decision Date:	27 February 2020
Jurisdiction:	Equity
Before:	Darke J
Decision:	Summons is dismissed with costs.
Catchwords:	LAND LAW – strata title – by-laws – construction – special by-law conferring right upon lot owner to use part of common property for parking – whether right conferred in substitution for right of lot owner to park in existing parking lot – use of extrinsic circumstances as an aid to construction – cautionary approach – special by-law construed so that right conferred is not in substitution for owner's right to park in existing lot LAND LAW – strata title – obligations of owners and occupiers – whether parking by lot owner in parking lot causes a nuisance to other occupiers of lots – inconvenience also caused by presence of gardens on common property – parking on lot held not to amount to a nuisance – not an unreasonable interference with the rights of other owners or occupiers of lots – Strata Schemes Management Act 2015 (NSW), s 153(1)(a)
Legislation Cited:	Strata Schemes (Freehold Development) Act 1973 (NSW) Strata Schemes Management Act 2015 (NSW), s 153(1)(a)

	Strata Schemes Management Act 1996 (NSW)
Cases Cited:	Cannell v Barton [2014] NSWCATCD 103 EB 9 & 10 Pty Ltd v The Owners – Strata Plan No 934 (2018) 97 NSWLR 227; [2018] NSWSC 464 Elston v Dore (1982) 149 CLR 480 Gisks v The Owners – Strata Plan No 6743 [2019] NSWCATCD 44 Hargrave v Goldman (1963) 110 CLR 40 Sedleigh-Denfield v O'Callaghan [1940] AC 880 The Owners of Strata Plan No 3397 v Tate (2007) 70 NSWLR 344; [2007] NSWCA 207
Category:	Principal judgment
Parties:	The Owners Strata Plan No 2245 (Plaintiff) Allan Veney (Defendant)
Representation:	Counsel: Mr A E Maroya (Plaintiff) Mr H Jewell (Defendant) Solicitors: Taitz Solicitors (Plaintiff)
File Number(s):	2019/242472
Publication Restriction:	None

JUDGMENT

Introduction

1 By its Summons filed on 5 August 2019 the plaintiff, the Owners Corporation of strata scheme No 2245, seeks declaratory relief in relation to the proper construction of a Special By-Law, and injunctive relief to prevent the defendant, Mr Veney, from parking any motor vehicle in his Lot 51 in the strata scheme.

2 The strata scheme, which is located in Dover Heights, was established in 1966. The scheme includes 50 lots (lots 1-50) which may be described as home units or residential lots. The other 50 lots (lots 51-100) are much smaller spaces (some of which are under cover, and some five of which are enclosed garages), evidently intended to be used as car parking spaces.

3 Mr Veney is the owner of residential Lot 33 and parking Lot 51.

4 It appears that the dimensions and location of at least some of the parking lots has contributed to deficiencies in the suitability of the lots for parking. That is the case in relation to Lot 51 and a number of lots (especially garage Lots 87, 86 and 85) that are located in the vicinity of Lot 51. A garden rockery that is located in the vicinity of Lot 51 (in front of residential Lot 4) also contributes to the deficient state of affairs. In short, it appears that the combination of the location of the rockery (which was apparently installed around the time the buildings in the scheme were constructed in 1966), and the location of Lot 51, gives rise to problems if Lot 51 is occupied by a motor vehicle.

5 On 2 December 1998, a resolution of the Owners Corporation was passed in accordance with s 52 of the *Strata Schemes Management Act 1996* (NSW) to make Special By-Law 4. Special By-Law is in the following terms:

> The owner for the time being of lot 51 shall be entitled to the exclusive use and enjoyment of the area of common property 2.5 metres x 5.5 metres adjacent to the wall and south of lots 99 and 100 for the purpose of parking a car thereon subject to the following conditions: -
>
> (a) The owner shall be responsible for the proper maintenance and keeping in a state of good and serviceable repair of the common property the subject of this By-Law;
>
> (b) The Owners shall indemnify and keep indemnified the Owners Corporation against: -
>
> (1) any sum payable by the Owners Corporation by way of increased insurance premiums as a direct or indirect result of the use of the relevant areas of the common property.
>
> (2) All actions, proceedings, claims and demands, costs, damages and expenses which may be incurred by or brought or made against the Owners Corporation and arising directly or indirectly out of the use of the deck [sic].
>
> (3) The Owners shall indemnify and keep indemnified the Owners Corporation against:
>
> any sum payable by the Owners Corporation by way of increased insurance premiums as a direct or indirect result of the use of the relevant areas of the common property;
>
> all actions, proceedings, claims and demands, costs, damages and expenses which may be incurred by or brought or made against the Owners Corporation and arising directly or indirectly out of the use of the relevant areas of the common property;
>
> any costs or damages incurred by or for which the Owners Corporation is or becomes liable pursuant to Section 63(3) of the Strata Schemes Management Act, 1996 in respect of the use and maintenance of the common property the subject of this By-Law.

> (c) Where the owner fails or neglects to carry out any work or discharge any duty referred to herein, the Owners Corporation may carry out such work or perform such duty, and may, by its agents, servants or contractors, enter upon any part of the parcel for this purpose at any reasonable time or on notice given to any occupier of that part of the parcel, and may recover the costs of doing such work or duty as a debt from the owner.

6 A Change of By-Law form in respect of Special By-Law 4 was registered in March 1999. The Special By-Law remains in force (see s 134(3) of the *Strata Schemes Management Act 2015* (NSW)). Mr Veney was not the owner of either Lot 33 or Lot 51 when the Special By-Law was made. He acquired those lots in January 2006.

7 The Owners Corporation contends that, read in the context (including statutory context) in which it was made, Special By-Law 4 should be construed so that the right of exclusive use it confers over part of the common property is given to the owner of Lot 51 in substitution for the right to use Lot 51 as a car parking space. Accordingly, at least whilst Special By-Law 4 remains in existence, Mr Veney has no right to use his Lot 51 as a parking space. Declaratory and injunctive relief is sought on that basis.

8 The Owners Corporation contends, in the alternative, that insofar as Mr Veney uses his Lot 51 as a car parking space he commits an actionable nuisance such that s 153(1)(a) of the *Strata Schemes Management Act 2015* is contravened. Section 153(1)(a) provides:

> 153(1) An owner, mortgagee or covenant chargee in possession, tenant or occupier of a lot in a strata scheme must not—
>
> (a) use or enjoy the lot, or permit the lot to be used or enjoyed, in a manner or for a purpose that causes a nuisance or hazard to the occupier of any other lot (whether that person is an owner or not), or
>
> …

9 The Owners Corporation submits that parking a motor vehicle in Lot 51 causes a nuisance within the meaning of s 153(1)(a) to at least the occupiers of the garage Lots 83 to 87, who are said to be entitled to have unobstructed vehicular access to their parking lots. Injunctive relief is sought accordingly.

10 Mr Veney submits that Special By-Law 4 should not be construed in the manner advanced by the Owners Corporation. He submits that a plain reading of the by-law is against that construction. He further submits that no evidence

was adduced of any circumstances that existed when the by-law was made, and could be taken into account in accordance with established principles, in support of the Owners Corporation's construction. Mr Veney submitted that in any event the relief sought should be refused on discretionary grounds, because of the failure of the Owners Corporation to take alternative measures to deal with the parking problems, principally by removing the rockery near residential Lot 4.

11 As for the alleged nuisance and contravention of s 153(1)(a) of the *Strata Schemes Management Act 2015*, Mr Veney submitted that the evidence, which was very general in its nature, was insufficient to make out a case of actionable nuisance. It was submitted that if any lot owners are subjected to any nuisance, the nuisance is really created by the existence of the rockery on the common property near residential Lot 4. Again, it was submitted that the Court should be slow to grant relief in circumstances where the Owners Corporation has not taken steps to remove the rockery.

Summary of salient evidence

12 The Owners Corporation adduced evidence from eight witnesses, the first three of whom were called to give oral evidence, and were cross-examined.

13 The Chairman of the Strata Committee, Rabbi Cohen, deposed that apart from their general amenity, the plants in the garden rockery serve to shield residential Lot 4 from the headlights of cars entering the property driveway at night. He further deposed that the "situation of the rockery garden would also obstruct access to, and egress from, the garages of Lots 83 to 87 if the Lot 51 space were occupied by a vehicle". Rabbi Cohen deposed that from about 2013 Mr Veney has from time to time parked his vehicle in Lot 51, causing "considerable nuisance and difficulty" to other residents, chiefly the owners of Lots 83 to 87, but also "the users of the carpark in general". Rabbi Cohen deposed that Mr Veney was the only lot owner to have a right of exclusive use of any common property for parking. A number of documents were annexed to Rabbi Cohen's affidavit, including a report received by the Owners Corporation from ML Traffic Engineers. The content of that report, and the contents of a

report of The Transport Planning Partnership, is referred to later in these reasons.

14 Hilary Shill deposed that she is the owner (and occupier) of residential Unit 28 and parking Lot 65. She deposed that she is also renting and currently using one of the enclosed garage spaces (confirmed in cross-examination to be the middle garage, Lot 85). Ms Shill deposed that parking in Lots 65 and 85 "is compromised by the positioning of parking space Lot 51" and that if Lot 51 is occupied by a vehicle "the result is that the entrance and exit to both my parking spaces is either completely blocked, or severely impeded". Ms Shill went on to state that in all the years since she has resided in Unit 28 (i.e. since 2006) she has never observed Lot 51 being used for a parking space, but gave evidence that on 27 October 2016 Mr Veney parked in Lot 51 and caused "absolute great inconvenience to residents, including myself, in not being able to get in or out of the car park, as the turning circle was impeded".

15 In the witness box, Ms Shill stated that parts of Lot 51 were included within what she described as "the turning circle". Ms Shill gave further evidence about the events on 27 October 2016. She said that on that morning Mr Veney parked in Lot 51, and that those who parked in the underground parking and garages section of the parking lot "had no access in or out of the building" and "no access to the driveway in or out". She said that perhaps eight to ten people were inconvenienced on that occasion. Ms Shill went on to explain that the reason why the car parked in Lot 51 made it impossible to get in or out was that "there's a garden there". Whilst not entirely clear, it seems that Ms Shill was referring not to the rockery in front of Unit 4, but to some other garden in the vicinity of Lot 51. Ms Shill stated that if no car is parked in Lot 51 it is possible to manoeuvre a car through the area. Ms Shill was asked what the situation would be if the rockery was removed and a car was parked on Lot 51. She did not agree that in that scenario it would be possible to park a car comfortably in the garage Lot 87. (Lot 87 is located across the aisle from Lot 51, and perpendicular to Lot 51.)

16 Robert Rinn deposed that he is the owner (and occupier) of residential Unit 48 and garage Lot 86 (also located directly across the aisle from Lot 51 and

perpendicular to Lot 51). In the witness box, Mr Rinn gave evidence that Mr Veney's proposal to park a vehicle on Lot 51 would render access to Lot 86 more difficult to obtain. He explained that if there was a car in Lot 51 "it would take multiple manoeuvres to get around and get into a position where you could make a clear exit". He said that if an attempt was made to get into the garage it would also require multiple manoeuvres, as opposed to going directly into the garage. He said that coming out and going in would be a very difficult task. It was apparent that this evidence was Mr Rinn's assessment of the likely effect of parking on Lot 51, not a description of any actual events. Mr Rinn also said that currently (presumably a reference to the situation when Lot 51 is not occupied by a vehicle) "it's virtually impossible not to cross Lot 51 to get out of the garage". Mr Rinn went on to say that when Lot 51 is not occupied, going in and out still requires a number of turns and reversing back and forth. He described the situation as "doable but it is a bit tight – bear in mind that the garages are not very wide either". Mr Rinn accepted that he had never sought permission to drive over Lot 51. He said that the need to do so did not arise.

17 Elliot Afif deposed that he is the owner of residential Unit 43 and garage Lot 87. He leases the lots to Ryan Gordon. Mr Afif deposed that he was concerned that if a vehicle is parked in Lot 51 it will cause inconvenience, not only to his tenants, but also the occupiers of Lots 83 to 86, and those who have parking spaces under the building in the unit complex.

18 Brian Holford deposed that he is the owner of residential Unit 47 and parking Lot 92. Mr Holford gave evidence that he lived in Unit 47 from 1966 to 1979. He recalls that during that time, Lot 51 was not used for car parking. He says that since 1966 various owners of and tenants of Lot 33 (Mr Veney's residential lot) have not parked in Lot 51, thereby enabling the owners of Lots 83 to 87 "to have unimpeded access [to] their parking spaces". Mr Holford deposed that although he has visited his Unit 47 [sic] many times since 1979, he has never seen a vehicle parked on Lot 51.

19 Lillian Oblat deposed that she is the owner of residential Unit 26 and parking Lot 68. She deposed that she has lived in Unit 26 for the last 36 years (i.e. since about 1983), and now lives part of the time in Melbourne, returning to

Sydney about six or seven times a year for periods of between about 5 days and 2 weeks. Ms Oblat gave evidence that before Mr Veney bought his unit she had not seen anyone park in Lot 51. She deposed that if someone parked their car in Lot 51 "it would block me from accessing my allocated car space", and similarly block other owners or tenants. She says that she has observed owners of Unit 33 park in an area of common property designated for that purpose, instead of parking in Lot 51.

20 Jonathan Rosenberg deposed that he is the owner of residential Unit 4 and parking Lot 74. He says that if Mr Veney uses Lot 51 as a parking spot it "would obstruct the underground parking area". He deposed that Mr Veney's stated intention to begin parking in Lot 51 is a matter of great concern, particularly given the possible need to have unobstructed egress in the event of a medical emergency.

21 Ryan Gordon deposed that he and his wife are the tenants of residential Unit 43 and garage Lot 87. He deposed that if Mr Veney parks in Lot 51 it completely blocks his car's access in or out of Lot 87. Mr Gordon deposed that on 27 October 2016 it was necessary to ask Mr Veney to move his car from Lot 51.

22 Mr Veney was called as a witness in his case. He deposed that he purchased residential Unit 33 and parking Lot 51 in January 2006. He says he was aware of Special By-Law 4 at the time of the purchase, and understood that as the owner of Lot 51 he had the benefit of parking in the area the subject of the by-law as well as Lot 51. Mr Veney deposed that prior to 2013 he either had no car or had no need to park on Lot 51. He gave evidence that after November 2013 he has "periodically" parked on Lot 51. He says that he is aware that this has caused concern amongst other residents. A number of documents were annexed to Mr Veney's affidavit, including copies of letters to the Owners Corporation from its then solicitor, Jane Crittenden, and a copy of a report of The Transport Planning Partnership ("TTPP").

23 In cross-examination, Mr Veney accepted that he was aware (in November 2013) that the parking of a motor vehicle on Lot 51 would cause inconvenience and disturbance to surrounding lot owners. He stated that he was entitled to

park on Lot 51 because he owned it. He further stated that he did not like causing inconvenience and suggested that if Lot 51 was marked as a car space “it would not cause a nuisance”. Mr Veney maintained that he had the choice of both the Special By-Law space and Lot 51, and that sometimes it was more convenient for him to park on Lot 51. Mr Veney said that if he was not concerned about the inconvenience he would park on Lot 51 “every day”. He later said that in general terms he has refrained from parking on Lot 51 “until it’s sorted out”. Mr Veney agreed that parking on Lot 51 causes inconvenience to others “if the rockery is still there”.

24 Mr Veney denied that Lot 51 was not physically suitable for parking. By reference to the TTPP report he stated that the width of the aisle between Lot 51 and the garages was 5.15m which was “the average”. He said that “everybody else” parks with an aisle width of between 5m and 5.3m. Mr Veney disagreed entirely with the statement in the ML Traffic Engineers report to the effect that parking on Lot 51 would prevent vehicle access and egress to the covered spaces by the building and 5 single space garages. Mr Veney denied that he was trying to extort a commercial advantage for himself. He stated that he was trying to exercise his right to his property.

25 The ML Traffic Engineers report was commissioned by the Chairman of the strata scheme committee in April 2016 (or perhaps April 2017) to undertake a review of proposed car parking changes. The report is brief, and expressed in rather conclusionary terms. In relation to Lot 51 it is stated:

> Car Space Lot 51 would prevent vehicle access and egress to the covered spaces by the building and 5 single space garages. That space adjacent to car space 52 and marked 18 is not a feasible or practical arrangement. I believe that the current parking lot 33 as per Special Bylaw no.4 was allocated to owner in lieu of lot 51.

26 The TTPP report is dated 10 May 2018. It was apparently commissioned by the strata managing agent for the strata scheme committee. The report includes the following:

> A car parking space (labelled as Lot 51) was initially indicated on the strata plan, as shown in Figure 1 below (as provided by Stratamark Strata Management). However, this space has not been marked out, but the space is allocated to one of the units and the owner has indicated that he intends to use it unless a convenient alternative can be found.

…

One alternative might involve the provision of a space on the common property or the use of the area currently used as landscaping. Another alternative suggested was to consider the redesign of the car park to try and fit another space into the existing area.

First of all, it should be noted that there is no survey information available. Consequently, the existing parking layout used for our analysis has been developed using a combination of the latest aerial images supplemented with on-site measurements. The swept paths analyses have been based upon the use of an AS2890.1:2004 B99 car. A B99 design motor car has the physical dimensions which represent the 99.8th percentile class of all cars and light vans on the road.

If any of the below options are pursued, TTPP would recommend that a detailed topographical survey of the site be undertaken to enable a more accurate assessment to be made.

Potential Car Park Redesign

TTPP has visited the site and it is clear that the existing car park is not designed in accordance with current Australian Standards for Off-Street parking (AS2890.1:2004). Parking bays are 2.4m wide and 4.6m/4.8m long, with aisle widths of between 5m and 5.3m, whereas, according to AS2890.1, spaces should be 2.4m wide x 5.4m long with aisle widths of 5.8m. There is clearly no scope to resize the existing car parking spaces to be able to create an additional space.

Use of Parking Space 51

Should space 51 be used, as shown on the strata plan, movements of vehicles entering and leaving the enclosed garage spaces (particularly Lots 86 and 87 as marked on the Strata Plan) would be compromised due to the decreased aisle width as shown in Figure 2.

Multiple manoeuvres would be required to enter and exit the garages. Removal of the existing landscaping and some portion of the footpath which serves the adjacent residential building would also be required to provide adequate space to accommodate even one-way movement.

27 Figure 2 in the report contains diagrammatic depictions of a “swept path analysis” in relation to the use of Lot 51 as a parking space. The diagrams depict pathways in and out of what are clearly garage Lots 87 and 86 that do not encroach upon any part of Lot 51. The pathways do, however, encroach to some extent upon the “landscaped area and footpath” in front of what is evidently residential Unit 4. It is noted that, despite what an aerial photograph appears to show, “the vegetation does not block the access to the garage”. As pointed out by Mr Veney in the witness box, these diagrams indicate that the aisle width between Lot 51 and the adjacent garage lots is 5.15m. Beneath the diagrams it is stated:

> The use of the Lot 51 parking space is not recommended, and so alternative locations have been investigated to provide this parking space.

28 It is not necessary to refer to the TTPP analysis of alternatives.

29 In the Summary and Conclusion section of the TTPP report it is stated:

> TTPP has been commissioned by Stratamark Strata Management to undertake a car park review of the existing residential development at 7 Gilbert Street, Dover Heights. The main objective of this study is to determine the provision of a Lot 51 car space which is not provided as per the strata plan and to identify viable solutions.
>
> TTPP conducted swept path assessments to determine the impacts of utilising the original location of Lot 51 car space and to identify potential alternative locations. A summary of the findings is presented below:
>
> Reuse of Lot 51 car space as designated on the strata plan would compromise movements of vehicles entering and exiting the enclosed garage spaces (i.e. Lots 86 and 87 as marked on the Strata Plan)

30 The TTPP report was provided by the strata scheme committee to its solicitor, Ms Jane Crittenden. On 16 May 2018 Ms Crittenden provided advice which included the following:

> I have been provided with the report prepared by The Transport Planning Partnership, dated 10 May 2018 ("the Car Park Review"). The Car Park Review provides three alternative locations on the common property where the owner of Lot 51 could park a vehicle. However, none of these options appear to be satisfactory, and Mr Veney does not appear to be prepared to consent to a strata plan of subdivision whereby his parking space is relocated.
>
> The Car Park Review also concludes that the parking space of Lot 51 could be used to park a vehicle, and that access to the parking spaces of Lots 86 and 87 would be possible, if some existing landscaping and a portion of footpath are removed. While the report indicates that movement of vehicles entering and exiting the enclosed garages of Lots 86 and 87 would be compromised, such movement would still be possible with multiple manoeuvres. While this is not an ideal solution, it appears to be the only solution in the circumstances. I note that the Car Park review does not indicate that Lots 83 to 85 will be affected by the proposal.
>
> While I understand that the Owners Corporation does not want to remove the common property rockery/landscaping and footpath, it appears that this may be its only option. Mr Veney is legally entitled to use Lot 51 to park a vehicle, and he does not appear to be willing to consent to a strata plan of subdivision being registered whereby his parking space is relocated.
>
> I recommend that the Owners Corporation:
>
> (1) obtain a quotation and scope of works from a suitable qualified tradesperson to remove the common property rockery/landscaping and footpath, and to lay a concrete surface (or other such appropriate surface), as recommended in the Car Park Review;

(2) once the quotation and scope of works has been obtained, instruct me to prepare a motion under Section 108 of the *Strata Schemes Management Act 2015*, to authorise the Owners Corporation to alter the common property by carrying out this work;

(3) instruct me to prepare a motion to repeal special by-law 4; and

(4) consider whether it would like to seek offers from any other owners interested in obtaining a right of exclusive use over the parking space described in special by-law 4, in return for fair and reasonable monetary compensation. If so, please instruct me to prepare the appropriate motion for a by-law, with a covering letter that can be distributed to all Lot owners, inviting them to make the Owners Corporation an offer. These funds can be used to offset the costs of removing the rockery/landscaping and footpath.

The meaning of Special By-Law 4

31 In *The Owners of Strata Plan No 3397 v Tate* (2007) 70 NSWLR 344; [2007] NSWCA 207, McColl JA (at [34]-[71]) considered the question of characterisation of strata scheme by-laws, and how the nature of such by-laws affected the proper approach to be taken in their interpretation. Her Honour noted that strata scheme by-laws can be seen to possess the characteristics of delegated legislation as well as of statutory contracts (see at [35] and [47]) and, further, that not all principles of contractual interpretation apply unreservedly to statutory contracts (see at [56] and the discussion of the authorities at [57]-[70]). McColl JA stated at [71]:

> The following propositions emerge from the foregoing discussion:
>
> 1. By-laws are the "series of enactments" by which the proprietors in a body corporate administer their affairs; they do not deal with commercial rights, but the governance of the strata scheme: *Bailey*;
>
> 2. By-laws have a public purpose which goes beyond their function of facilitating the internal administration of a body corporate; cf *National Roads and Motorists' Assoc Ltd v Parkin, Lion Nathan Australia*;
>
> 3. Exclusive use by-laws may be inspected by third persons interested in acquiring an interest in a strata scheme, whether, for example, by acquiring units, or by lending money to a lot proprietor; such persons would ordinarily have no access to the circumstances surrounding their making; their meaning should be understood from their statutory context and language: *National Roads and Motorists' Assoc Ltd v Parkin, Lion Nathan Australia*.
>
> 4. By-laws may be characterised as either delegated legislation or statutory contracts: *Dainford; Re Taylor; Bailey; North Wind; Sons of Gwalia*;
>
> 5. Whichever be the appropriate characterisation, exclusive use by-laws should be interpreted objectively by what they would convey to a reasonable person: *Lion Nathan Australia*;
>
> 6. In interpreting exclusive use by-laws the Court should take into account their constitutional function in the strata scheme in regulating the rights and

> liabilities of lot proprietors inter se: *National Roads and Motorists' Assoc Ltd v Parkin, Lion Nathan Australia*.
>
> 7. Unlike the articles of a company, there does not appear to be a strong argument for saying exclusive use by-laws should be interpreted as a business document, with the intention that they be given business efficacy: cf *National Roads and Motorists' Assoc Ltd v Parkin* (at 236 [75]). That does not mean that an exclusive use by-law may not have a commercial purpose, and be interpreted in accordance with the principles expounded in cases such as *Antaios Compania Naviera SA*, but due regard must be paid to the statutory context in so doing;
>
> 8. An exclusive use by-law should be construed so that it is consistent with its statutory context; a court may depart from such a construction if departure from the statutory scheme is authorised by the governing statute and if the intention to do so appears plainly from the terms of the by-law: *Re Taylor*;
>
> 9. Caution should be exercised in going beyond the language of the by-law and its statutory context to ascertain its meaning; a tight rein should be kept on having recourse to surrounding circumstances: *Lion Nathan Australia*.

Mason P expressed his agreement with McColl JA in this regard (see at [1]).

32 Based on the foregoing, it appears that in ascertaining the meaning of Special By-Law 4, it is necessary to consider the language of the by-law, viewed in the statutory context in which it was made; and whilst recourse to surrounding circumstances may be permissible as an aid to construction it is necessary, particularly bearing in mind the public purpose of strata scheme by-laws, to exercise caution in going beyond the language of the by-law itself and its statutory context.

33 The Owners Corporation submitted, however, that the Court should take into account as surrounding circumstances certain evidence concerning the historical use (or non-use) of Lot 51 as a parking space, the physical characteristics of the land at the time Special By-Law 4 was made, and the contents of a letter dated 27 November 1997 (about a year before the by-law was made on 2 December 1998) sent by the then strata managing agent to Mr Len Robinson, solicitor.

34 The historical evidence referred to above is to the effect that since 1966 the "various owners" of Lot 33 have not parked in Lot 51. The letter dated 27 November 1997 is relevantly in the following terms:

> There is a carspace at the above building that was converted to a rockery by the builders 30 years ago presumably during construction. The owners of this

> carspace Mrs Messenger (u33) was given a separate space (on common property) to use for parking. Nothing happened for 30 years.
>
> We believe that the reason for this change was that the original spot was going to interfere with access for other vehicles so the builders made the change without modifying the strata plan.
>
> We have therefore proposed exclusive use rights over the common property carspace be granted to the current owners of lot 33 Falcons Crest P/L who purchased this year.
>
> Our concern is however that whilst this may satisfy the current owner it may not satisfy an incoming owner who may try to claim their original carspace.
>
> Can we grant exclusive use with a condition that it be subject to no action, from lot 33 the rockery removed in order to create a second parking space [sic] and if they do claim the spot on the strata plan that they forfeit to have the exclusive use rights.

35 The Owners Corporation submitted that the terms of Special By-Law 4, considered in the statutory context in which it was made, and in the light of the abovementioned circumstances (including the physical characteristics of the site), should be read as conferring upon the owner of Lot 51 an exclusive right to park on part of the common property in substitution for the right to park on Lot 51. It was submitted that, so viewed, that was the only sensible construction of the by-law.

36 Mr Veney submitted that, in accordance with the principles enunciated by McColl JA in *The Owners of Strata Plan No 3397 v Tate* (supra), the Court should not take into account, on the question of the construction of the by-law, the surrounding circumstances advanced by the Owners Corporation.

37 I agree that in accordance with the cautionary approach laid down in *The Owners of Strata Plan No 3397 v Tate* (supra) recourse should not be had to either the historical evidence relied upon or the terms of the 27 November 1997 letter as surrounding circumstances on the question of construction of the by-law. Those materials are not available to third persons, such as Mr Veney himself, and are in any event open to various interpretations. Further, whilst the strata plan itself could in my view be considered for the purpose of identifying the essential subject matter of the by-law (being the location of the area of common property over which exclusive use rights are conferred), I do not think that the physical characteristics of the site at the time the by-law was made (whether as revealed by the strata plan or otherwise) should be considered as

a useful aid to construction. In the absence of evidence of what material was placed before the meeting when the by-law was made, it cannot be assumed that any particular physical characteristics were considered to be relevant, let alone considered to be relevant in a particular way (cf *The Owners of Strata Plan No 3397 v Tate* (supra) at [77]).

38 In my opinion, Special By-Law 4 is to be interpreted by reference to its language, understood in the statutory context in which it was made. The by-law was made pursuant to Division 4 of Chapter 2 of the *Strata Schemes Management Act 1996*. The by-law fell within the ambit of those provisions because it conferred on an owner of a lot a right of exclusive use and enjoyment of a specified part of the common property (see s 51(1)(a)). As permitted by s 53 of that Act, the right of exclusive use and enjoyment was conferred subject to a number of conditions specified in the by-law.

39 The terms of the by-law do not explicitly state that the right of exclusive use and enjoyment is conferred in addition to the rights the owner of Lot 51 has apart from the by-law. Neither do the terms of the by-law explicitly state that the right of exclusive use and enjoyment is conferred in substitution for any rights the owner of Lot 51 has apart from the by-law, or is conferred so as to reduce or qualify such rights. None of the conditions specified in the by-law are concerned with the existence or exercise of any rights the owner of Lot 51 has as such.

40 The ordinary and natural meaning of the words of the by-law, considered in the context of Division 4 of Chapter 2 of the *Strata Schemes Management Act 1996*, is that a new right is conferred upon the owner for the time being of Lot 51. I note that the right is not conferred in exchange for any monetary consideration. However, there is nothing in the language of the by-law which affirmatively suggests that the existence of any other right held by the owner of Lot 51 is to be removed or reduced, or that the exercise of any such right is to be restricted in any way. If it was intended to cut down the property rights of the owner of Lot 51 it would be expected that words clearly showing the intention would be included. I do not think that words to that effect should be effectively read into the by-law.

41 Moreover, none of the conditions specified in the by-law operate so as to restrict the exercise of the right held by the owner of Lot 51 to park a vehicle upon the lot. It was properly accepted by the Owners Corporation that it would have been open to include a condition to the effect that, for so long as the by-law was in place, the owner of Lot 51 would not exercise that right. Had that been the intention, it would have been a simple matter to include a suitably worded condition accordingly. (I note in passing that the 27 November 1997 letter reveals that the Owners Corporation was at that time floating the possibility of a condition of a similar nature.)

42 I am unable to accept the Owners Corporation's submission concerning the proper construction of Special By-Law 4. The language of the by-law, read in its statutory context, would convey to a reasonable person that a new right was being conferred upon the owner for the time being of Lot 51, subject only to the specified conditions, and that the rights of that owner that exist apart from the by-law continue unabated. I do not accept that this is not a sensible construction of the by-law. It follows that the by-law does not confer upon the owner of Lot 51 a right which is in substitution for that owner's right to park on Lot 51.

43 For the above reasons, the Owners Corporation's claim for declaratory relief as to the proper construction of Special By-Law 4 must be rejected. It is not necessary to consider whether relief in that regard ought be withheld on discretionary grounds.

Nuisance

44 I do not think it can be doubted, and Mr Veney himself seems to accept, that if he parks a motor vehicle on Lot 51 rather than leaving the space vacant, a degree of inconvenience is caused to at least some other owners of lots in the strata scheme. This acceptance on the part of Mr Veney is found in the concluding words of a notice he gave to residents on about 7 February 2019, and his evidence in the witness box (see, for example, at transcript 73.41, 77.15 and 77.27). Of course, the mere causing of some inconvenience to a neighbouring land owner is not necessarily an actionable nuisance.

45 In broad terms, an actionable nuisance may be described as unlawful interference with a person's use or enjoyment of land, or of some right over or in connection with the land (see *Hargrave v Goldman* (1963) 110 CLR 40 at 59). Liability is founded upon a state of affairs created, adopted or continued by a person, otherwise than in the reasonable and convenient use of the person's own land, which, to a substantial degree, harms another owner or occupier of land in the enjoyment of that person's land (see *Hargrave v Goldman* (supra) at 62). In *Elston v Dore* (1982) 149 CLR 480 Gibbs CJ, Wilson and Brennan JJ (with whom Murphy J agreed) stated (at 487-8) that in most cases the proper test to apply in determining whether a nuisance has been committed is as put by Lord Wright in *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 at 903 where his Lordship said:

> A balance has to be maintained between the right of the occupier to do what he likes with his own, and the right of his neighbour not to be interfered with. It is impossible to give any precise or universal formula, but it may broadly be said that a useful test is perhaps what is reasonable according to the ordinary usages of mankind living in society, or more correctly in a particular society.

46 In the present case, the Owners Corporation invoked s 153(1)(a) of the *Strata Schemes Management Act 2015*. That provision is set out above at [8]. The Owners Corporation contends that Mr Veney, as an owner or occupier of Lot 51 in the strata scheme, has contravened s 153(1)(a), or is at least threatening to contravene s 153(1)(a), by parking a motor vehicle in Lot 51. It is said that such parking amounts to use or enjoyment of Lot 51 in a manner that causes a nuisance to at least some of the occupiers of other lots in the strata scheme. The Owners Corporation submitted that nuisance within the meaning of s 153(1)(a) should be interpreted in accordance with the common law meaning of an actionable nuisance.

47 I think that submission is correct in circumstances where nuisance is not defined for the purposes of s 153. The language of the provision and the context in which it appears does not suggest that some other meaning was intended. I note that the term, as found in s 153(1)(a) and also in the predecessor provision s 117(1)(a) of the *Strata Schemes Management Act 1996*, has been interpreted in that way in the New South Wales Civil and Administrative Tribunal (see, for example, *Cannell v Barton* [2014]

NSWCATCD 103 at [95]; see also *Gisks v The Owners – Strata Plan No 6743* [2019] NSWCATCD 44 at [26] where the Tribunal made an order to settle a dispute as to whether smoking by one lot owner caused a nuisance to another lot owner – see at [32]-[33]). Mr Veney did not submit that some other meaning should be given to "nuisance" within s 153(1)(a).

48 I turn then to consider whether, by parking a motor vehicle on Lot 51, Mr Veney has committed or would commit an actionable nuisance against any other occupier of a lot in the strata scheme.

49 I should state at the outset that much of the evidence adduced about the effects or consequences of parking on Lot 51 was expressed by the witnesses in very general and often conclusionary terms. There was very little evidence of the actual dimensions and areas of the car parking lots or the surrounding common property available for the passage of motor vehicles, aside from what can be gleaned from the strata plan itself and the TTPP report which appears to be based in part on some on-site measurements. The ML Traffic Engineers report refers to the taking of measurements at a site inspection, but the measurements themselves are not included in the report.

50 In these circumstances, it is difficult to ascertain with precision the extent to which parking on Lot 51 interferes with the occupiers of other lots in the use and enjoyment of their parking lots. The difficulty is made more acute because when Lot 51 is used for parking, the ensuing inconvenience is not brought about solely by the parking. Other factors operate in tandem to produce the inconvenience, notably the presence of the garden rockery near residential Unit 4.

51 The strata plan reveals that Lot 51 was intended to be 18ft (approximately 5.49m) long and 8ft (approximately 2.44m) wide. Each of the five garage lots (Lots 83-87) was intended to be 21ft (approximately 6.405m) long and 8ft (approximately 2.44m) wide. However, the TTPP report suggests that the parking bays in the parking area "are 2.4m wide and 4.6m/4.8m long". The TTPP report states that aisle widths in the parking area are between 5m and 5.3m, and Figure 2 depicts an aisle width of 5.15m between Lot 51 and the garage lots. It is further stated that according to the current Australian

Standard, AS-2890.1:2004, “spaces should be 2.4m wide x 5.4m long with aisle widths of 5.8m”.

52 It appears, therefore, that the aisle width between Lot 51 and the garages is about 650mm narrower than that called for under the current Australian Standard. The car parking area was of course designed many years prior to the introduction of that standard. However, and as pointed out by Mr Veney in the witness box, given that the TTPP report indicates that aisle widths in the car parking area range from 5m to 5.3m, the width of the aisle between Lot 51 and the garages is about “average” for that car park.

53 Leaving aside the presence of the rockery near residential Unit 4, it seems clear (including by reference to the Australian Standard) that a 5.15m wide aisle is adequate to allow at least one way vehicular movements through the area between Lot 51 and the garages. I accept that the 5.15m width presents some difficulties to users of Lots 86 and 87 (and perhaps also Lot 85) in attempting to move vehicles into and out of those garage lots which are situated perpendicular to Lot 51. In this regard, I accept the evidence given in the witness box by Mr Rinn to the effect that if there was a car in Lot 51 “it would take multiple manoeuvres to get around and get into a position where you could make a clear exit” from Lot 86. I infer that Mr Rinn is there describing what it would be like reversing out of the garage in order to exit the car parking area. I also accept Mr Rinn’s evidence that a number of manoeuvres would be needed to get a vehicle into the garage. Mr Rinn was of the view that in these circumstances it would be more difficult to obtain access than if Lot 51 was not occupied by a vehicle. He stated that even if Lot 51 is unoccupied, getting in and getting out of the garage requires a number of reversing manoeuvres. He described the position as “doable” but “a bit [of a] tight”.

54 In light of that evidence, I am not able to accept that if a vehicle is parked in Lot 51 entry to and exit from the garages directly across the aisle is “completely blocked”, as suggested by Ms Shill (Lot 85) and Mr Gordon (Lot 87). Neither of those witnesses gave detailed evidence that would provide a sound foundation for the conclusions they expressed. I am not persuaded, having considered all of the evidence concerning the use of the garages, that the aisle is too narrow

to enable vehicles to gain entry or achieve exit from those garages. It is likely, based on the evidence, such as it is, that entry and exit is achievable, albeit with numerous manoeuvres required, particularly when reversing out of (or possibly into) one of the garages. This conclusion is consistent with opinions expressed in the TTPP report.

55 The presence of a vehicle within Lot 51 reduces the area otherwise able to be used for the manoeuvring of a vehicle either into or out of Lots 85, 86 or 87. However, Lot 51 is not truly an area available for that purpose. It is the property of Mr Veney, not part of the common property. The evidence given by Ms Shill about the "turning circle" and the evidence given by Mr Rinn about crossing Lot 51 establishes that parts of Lot 51 are routinely employed by at least some of the occupiers of the garages to assist in the effecting of entry to or exit from their garages. Of course, in the absence of the consent or agreement of Mr Veney, those occupiers have no legal right to make use of Lot 51 in that way. To the extent that parking on Lot 51 prevents or impedes such use, I do not think it can be said to be a substantial interference with another owner or occupier in the enjoyment of that person's land or of some right over or in connection with it (see *Hargrave v Goldman* (supra) at 59).

56 It is also relevant to consider the evidence to the effect that the situation of the rockery garden near residential Unit 4 (and perhaps also another garden area in the vicinity of Lot 51, as referred to by Ms Shill) itself contributes to the difficulties experienced by the occupiers of garage lots in achieving access to or egress from their garages. These gardens are located on the common property of the strata scheme. The garden near Unit 4 is best seen in the photograph that is Exhibit 1. (It is also shown towards the bottom right of the photograph that is Exhibit 2; and in the centre of the photograph that is Exhibit 3.) Other small gardens in the vicinity of Lot 51 can be seen in Exhibits 2 and 3.

57 It may be accepted as a general proposition that owners of lots in a strata scheme have rights to use the common property of the scheme in order to obtain reasonable access to their lots (see *EB 9 & 10 Pty Ltd v The Owners – Strata Plan No 934* (2018) 97 NSWLR 227; [2018] NSWSC 464 at [33]-[34]). In the present case those rights, for at least some lot owners, are impeded to a

degree by the presence of the rockery garden near residential Unit 4 and possibly by other small gardens in the vicinity. The responsibility for that situation lies with the Owners Corporation, which holds title to the common property as agent for the proprietors of the lots in the strata scheme (see s 20 of the *Strata Schemes (Freehold Development) Act 1973* (NSW)).

58 The swept path analysis undertaken by TTPP, as depicted in Figure 2 of their report and read with the section of the report concerning the use of Lot 51, suggests that if the existing landscaped area and some portion of the footpath in front of residential Unit 4 was removed, it would be possible for vehicles to effect entry to and exit from garage Lots 86 and 87 without encroaching upon Lot 51, albeit that multiple manoeuvres would be required. The TTPP report was interpreted in that fashion by the Owners Corporation's solicitor in 2018. She thought that whilst this was not an ideal solution, it appeared to be the only solution in the circumstances. She recommended that the Owners Corporation take steps to have the landscaped area and footpath removed and a new surface laid in that area, but the Owners Corporation was, and apparently remains, unwilling to take those steps. Rabbi Cohen gave evidence to the effect that what TTPP was suggesting was "not practical". He based this conclusion on "common sense", not any analysis of actual measurements. In these circumstances I do not accept that TTPP's suggestion is impractical.

59 I have not overlooked the evidence concerning the effects that parking on Lot 51 has upon the occupiers of parking lots other than the five garage lots. That evidence includes the account given by Ms Shill of the events of 27 October 2016 when Mr Veney parked his vehicle in Lot 51. Ms Shill deposed that great inconvenience was caused on that occasion because the "turning circle" was impeded. It is clear that the turning circle she was referring to includes parts of Lot 51 itself. Her evidence about these events was somewhat imprecise. I nonetheless gained the impression from some of her answers in the witness box that the parking in Lot 51 caused something in the nature of a bottleneck in the area where vehicles (including vehicles from parking Lots 52-83) need to pass around Lot 51 to get into or out of the parking area. One can readily appreciate that a need for multiple manoeuvres could cause a bottleneck in that area, particularly at times of the day when traffic movements are more

frequent, and that this would produce delays and thus inconvenience. Again, however, the difficulties are not solely the product of parking on Lot 51; they are also the product of the presence upon the common property of the rockery garden near residential Unit 4, and possibly other small gardens in the vicinity.

60 Having considered the totality of the evidence, I am not satisfied that the exercise by Mr Veney of his right to park a vehicle upon his Lot 51 amounts to an actionable nuisance against any other occupier of a lot in the strata scheme.

61 Whilst it is true that the exercise of the right gives rise to inconvenience for owners or occupiers of other lots (particularly Lots 86 and 87, and perhaps Lot 85), the inconvenience is also brought about by the maintenance upon the common property of garden areas. The nature and extent of the evidence before the Court does not permit any close analysis or findings to be made about the relative contributions made by those factors to any inconvenience caused. However, given that lot owners have rights to use the common property to gain reasonable access, but have no rights to use Lot 51 for that purpose, it is fair to regard the presence of the gardens which reduce the space in the common property available for vehicular movements, as the true impediment to the enjoyment of the rights of the other lot owners. The owners, through the Owners Corporation, are presently unwilling to take action to remove or reduce that impediment. The Owners Corporation may consider that there are sound reasons for taking that stance, but the fact remains that the existence of the gardens impedes the use of the common property for vehicular movements.

62 I further consider that use of Lot 51 for parking a vehicle is a reasonable use of the land in all the circumstances. Lot 51 is a small area located in open space. With the possible exception of storage of goods, it is really only suitable for parking. (Of course, use of Lot 51 for storage would give rise to similar issues to those that arise from parking.) The fact that the owner of Lot 51 has the benefit of the right conferred by Special By-Law 4 does not in my view lead to the conclusion that parking on Lot 51 is other than a reasonable use of the lot. The by-law confers a right upon the owner for the time being of Lot 51 and, properly construed, does not cut down the property rights of the owner of Lot

51. The fact that Mr Veney may have a choice as to whether to park a vehicle in Lot 51, or the area the subject of Special By-Law 4, does not in my view render it unreasonable for him to exercise his right to park on Lot 51. Parking on Lot 51 does not take away space that other lot owners have a right to use for the purpose of gaining access to or egress from their parking lots and, as I have said, any inconvenience is also brought about by the existence of the gardens the Owners Corporation chooses to keep on the common property.

63 Viewing the circumstances of the strata scheme overall, I do not think that the use of Lot 51 for parking should be regarded as amounting to an unreasonable interference with the rights of any other owners or occupiers of lots in the strata scheme. It follows that the claim for injunctive relief based on s 153(1)(a) of the *Strata Schemes Management Act 2015* has not been made out.

64 It is not necessary to consider the question, not dealt with in the submissions of either party, whether in any event the Owners Corporation could have obtained injunctive relief in this Court based on s 153(1)(a) in respect of a nuisance caused to an occupier of a lot. Had the matter been brought in the Civil and Administrative Tribunal, an order could be made under s 232 of the *Strata Schemes Management Act 2015* on the application of the Owners Corporation as an interested person, but the power to make orders under that section is conferred only upon the Tribunal. The Owners Corporation did not clearly identify the power relied upon to claim relief in this Court. I would merely observe that insofar as reliance was placed upon the power of the Court to issue injunctions in aid of legal rights, questions of standing and sufficiency of parties would likely have arisen.

Conclusion

65 The claims for relief brought by the Owners Corporation have not been made out, and the Summons must therefore be dismissed. There is no apparent reason why the usual rule that costs follow the event should not apply. Accordingly, the Court will order that the plaintiff pay the defendant's costs of the proceedings. In these circumstances, there does not seem to be any need or occasion for the Court to consider whether it should form the opinion, referred to in s 253 of the *Strata Schemes Management Act 2015*, that the

taking of the proceedings in this Court was not justified. The formation of that opinion would lead to the making of the same costs order.

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