Civil and Administrative Tribunal

New South Wales

Case Name:	Dehsabzi v The Owners Corporation – Strata Plan No 83556
Medium Neutral Citation:	[2020] NSWCATAP 142
Hearing Date(s):	24 June 2020
Date of Orders:	16 July 2020
Decision Date:	16 July 2020
Jurisdiction:	Appeal Panel
Before:	Dr R Dubler SC, Senior Member S Thode, Senior Member
Decision:	(1) The appeal is dismissed. (2) Each party shall pay their or its own costs.
Catchwords:	LANDLAW – Strata title – functions of owners corporation – consent to development application affecting common property – power of Tribunal to make an order requiring an owners corporation to give consent to a development application affecting common property – test to be applied in determining whether to make an order requiring an owners corporation to give consent to a development application affecting common property LANDLAW - Strata title – owners corporation – functions of owners corporation – issue of keys – whether the owners corporation of a mixed commercial and residential strata scheme should be directed to provide the owners of a commercial lot with keys giving access to utility meters and keys giving access to residential areas
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) Environmental Planning & Assessment Act 1979 (NSW)

	Retail Leases Act 1994 (NSW) Strata Schemes Management Act 1996 (NSW) Strata Schemes Management Act 2015 (NSW)
Cases Cited:	AHB v HSW Trustee and Guardian [2017] NSWCATAP 79 Coulton v Holcombe (1986) 162 CLR 1 Director-General, Department of Finance and Services v Porter [2014] NSWCATAP 6 House v R (1936) 55 CLR 499 Prendergast v Western Murray Irrigation Ltd [2014] NSWCATAP 69 Ros v Commissioner of Police [2020] NSWCATAP 70 The Owners Strata Plan No 50411 v Cameron North Sydney Investments Pty Ltd (2003) NSWCA 5
Texts Cited:	None cited
Category:	Principal judgment
Parties:	Pamir Gulyar Dehsabzi (First Appellant) Anita Dehsabzi (Second Appellant) The Owners - Strata Plan No 83556 (Respondent)
Representation:	Counsel: N Astill (Respondent) Solicitors: Garry Pickering Solicitor and Conveyancer (Appellants) Ken Kanjian & Co (Respondent)
File Number(s):	AP 20/19984
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	NSW Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Citation:	N/A
Date of Decision:	06 April 2020
Before:	D Robertson, Senior Member

File Number(s): SC 19/36855

REASONS FOR DECISION

Introduction

1 On Sailors Bay Road in Northbridge, there is a mixed commercial and residential strata development: Strata Plan 83556. The Appellants are the proprietors of lot 12. The Respondent is the owners corporation of Strata Plan 83556.

2 The Strata Plan contains 15 lots. Lots 1 to 11 are residential lots over levels 1 to 3. Lots 12 to 15 are commercial lots on the ground floor. There are two levels of basement car parking. The third-floor residential units, lots 9, 10 and 11, each include a share of the roof deck on level 4.

3 Lot 12 is currently used as office premises, but the Appellants want to change the use of the premises to enable them to operate a Domino's Pizza restaurant with extended trading hours, including in the evenings and weekends. The other lot owners strongly oppose such an intensification of use.

4 The Appellants also wish to connect to the existing grease trap and upgrade the air ventilation currently existing on the premises so that they can operate the proposed pizza restaurant. This would involve use of the common property. The Appellants sought the consent of the Respondent to the lodging of a development application to permit this change of use and use of the common property. The Appellants also sought a direction about the provision of keys giving them access to utility meters and access to other parts of the development.

5 The Respondent declined both requests and the Appellants commenced proceedings in the Tribunal. The Tribunal dismissed the application.

6 This is an internal appeal from the decision of the Tribunal in the Consumer and Commercial Division on 6 April 2020 ("the Decision"). In essence, the Appellants contend that the Respondent, as a matter of law, was obliged to consent to both requests.

7 For the reasons which follow, we have decided to dismiss the Appeal.

Background

8 Lot 12 in Strata Plan 83556 is a commercial unit located in the north–east quadrant of the ground floor fronting on to Sailors Bay Road. The existing development consent for lot 12, DA 2011/336, permits the use of the premises as "office premises" and is subject to Condition 13 which provides:

> The hours of operation of use are restricted to those times listed below, i.e.:
>
> Weekdays, 8.30am and 5.30pm.
>
> Any variation of these hours is subject to the PRIOR CONSENT OF COUNCIL. (Reason Amended)

9 As mentioned above, the Appellants seek to utilise the premises for the operation of a Domino's Pizza restaurant with extended hours of trade. Hence, the consent of Council is required.

10 The Appellants sought orders pursuant to the provisions of the *Strata Schemes Management Act 2015* (NSW) (SSMA) as follows:

> (1) An order pursuant to sections 232 and 241 that the respondent fix its seal in the manner prescribed by section 273 to the Development Application Form to Willoughby City Council, served on the Owners Corporation by the Applicant on 11 December 2018, and in a way which indicates the owners corporation's consent to that development application being lodged.
>
> (2) An order pursuant to sections 232 and 245(1Xe) declaring that order 1 above is to take effect as a decision of the Owners Corporation to consent to the lodgement of the said Development Application Form.
>
> (3) An order that the Owners Corporation hand over to the Applicant a complete set of keys for Lot 12 including keys to the Front Foyer, the Level B2 basement area, the communal toilets, the loading dock, the rubbish bins and access to gas, electricity and water.
>
> (4) Costs of these proceedings be awarded to the Applicant in view of the special circumstances in being forced to bring these proceedings.

11 Sections 232, 241 and 245(1)(e) of the SSMA provide:

> **232 Orders to settle disputes or rectify complaints**
>
> (1) Orders relating to complaints and disputes

The Tribunal may, on application by an interested person, original owner or building manager, make an order to settle a complaint or dispute about any of the following-

(a) the operation, administration or management of a strata scheme under this Act,

(b) an agreement authorised or required to be entered into under this Act,

(c) an agreement appointing a strata managing agent or a building manager,

(d) an agreement between the owners corporation and an owner, mortgagee or covenant chargee of a lot in a strata scheme that relates to the scheme or a matter arising under the scheme,

(e) an exercise of, or failure to exercise, a function conferred or imposed by or under this Act or the by-laws of a strata scheme,

(f) an exercise of, or failure to exercise, a function conferred or Imposed on an owners corporation under any other Act.

(2) Failure to exercise a function

For the purposes of this section, an owners corporation, strata committee or building management committee is taken not to have exercised a function if-

(a) it decides not to exercise the function, or

(b) application is made to it to exercise the function and it fails for 2 months after the making of the application to exercise the function in accordance with the application or to inform the applicant that it has decided not to exercise the function in accordance with the application.

(3) Other proceedings and remedies

A person is not entitled-

(a) to commence other proceedings in connection with the settlement of a dispute or complaint the subject of a current application by the person for an order under this section, or

(b) to make an application for an order under this section if the person has commenced, and not discontinued, proceedings in connection with the settlement of a dispute or complaint the subject of the application.

(4) Disputes involving management of part strata parcels

The Tribunal must not make an order relating to a dispute involving the management of a strata scheme for a part strata parcel or the management of the building concerned or its site if—

(a) any applicable strata management statement prohibits the determination of disputes by the Tribunal under this Act, or

(b) any of the parties to the dispute fail to consent to its determination by the Tribunal.

(5) The Tribunal must not make an order relating to a dispute involving a matter to which a strata management statement applies that is inconsistent with the strata management statement.

(6) Disputes relating to consent to development applications

The Tribunal must consider the interests of all the owners of lots in a strata scheme in the use and enjoyment of their lots and the common property in determining whether to make an order relating to a dispute concerning the failure of an owners corporation for a strata scheme to consent to the making of a development application under the Environmental Planning and Assessment Act 1979 relating to common property of the scheme.

(7) Excluded complaints and disputes

This section does not apply to a complaint or dispute relating to an agreement that is not an agreement entered into under this Act, or the exercise of, or failure to exercise, a function conferred or imposed by .or under any other Act, if another Act confers jurisdiction on another court or tribunal with respect to the subject matter of the complaint or dispute and the Tribunal has no jurisdiction under a law (other than this Act) with respect to that subject-matter.

241 Tribunal may prohibit or direct taking of specific actions

The Tribunal may order any person the subject of an application for an order to do or refrain from doing a specified act in relation to a strata scheme.

245 Effect of certain orders imposing obligations on owners corporation

(1) The terms of the following orders, to the extent to which they impose a requirement on an owners corporation, are taken to have effect.as a resolution of the owners corporation to do what is needed to comply with the requirement-

…

(e) an order under section 232 in which the Tribunal declares that the order is to have effect as a decision of the owners corporation.

12 The development application for which the Appellants sought the Respondent's consent was tendered before the Tribunal and became exhibit C. That development application was delivered to the Respondent on 11 December 2018 and sought approval to fit out the premises as a Domino's Pizza restaurant, conduct that business from the premises, and extend the opening hours. At the hearing the Respondent stated that the intended extended hours

were to be 11am to 11pm Monday to Thursday, 11am to midnight on Friday and Saturday and 11am to 11pm Sunday: see [24] of the Decision.

13 By letter dated 26 February 2019, the Appellants' solicitor wrote to the Respondent and contended by reason of s 232(2)(b) of the SSMA, the Respondent was deemed to have refused the request that it give consent to the development application.

14 Proceedings were then commenced in the Tribunal. Those proceedings were commenced on 26 September 2019. Previously at an extraordinary general meeting at 23 August 2019 the Respondent resolved not to give its consent to the development application.

15 The Appellants tendered and relied upon by-laws 11.1 and 11.2 of Strata Plan 83556 which relevantly provide as follows:

> **PART 11 Special Agreements and Exclusive Use of Commercial Lot**
>
> **11.1 Exclusive Use - Shop Front**
>
> (a) Each of the Owners and Occupiers of Lots 12 and 13 ("Benefitted Lots") shall have the right of exclusive use and enjoyment of that part of the Common Property being the boundary of the lots facing Sailors Bay Road constituting shopfront including any door or doors in that front ("shopfront").
>
> (b) The Owner assumes responsibility for the proper maintenance and repair of the shopfront and indemnifies the Owners Corporation against any damage caused or suffered as a result of this exclusive use.
>
> (c) Damage to the shopfront caused by the Owner or otherwise must be made good by and at the cost of the Owner in a proper and workmanlike manner and to the satisfaction of the Owners Corporation.
>
> (d) The Owner or Occupier must keep the shopfront insured against loss, damage or defacement.
>
> **11.2 Exclusive Use – sewer, grease waste & ventilation**
>
> **11.2.1 Definitions**
>
> (a) In this by-law, the following terms are defined to mean:
>
> "Owner" means the Owner from time to time of a commercial lot.
>
> "Works" means the additions and alternations undertaken by the Owner to install a grease trap or additional sewerage, drainage

ventilation or air-conditioning necessary for the use of the lots as depicted in the plans and drawings attached to the minutes of the meeting at which this by-law was made.

(b) Where any terms used in this by-law are defined in the Act they will have the same meaning· as those words are attributed under that Act.

11.2.2 Rights

Subject to the conditions set out in this by-law the Owner will have:

(a) A special privilege in respect of the common property to perform the Works and to install and keep the Works to and on the common property; and,

(b) The exclusive use of those parts of the common property occupied by the Works.

11.2.3 Conditions

Maintenance

(a) The Owner must properly maintain and keep common property to which the Works are erected or attached in a state of good and serviceable repair.

(b) The Owners must properly maintain and keep the Works in a state of good and serviceable repair and must replace the Works as required from time to time.

Documentation

(a) Before commencing the Works the Owners must submit to the Owners Corporation the following documents relating to the Works:

i) Plans and drawings;

ii) Specifications;

iii) Structural diagrams; and,

iv) Any other document reasonably required by the Owners Corporation.

(b) After completing the Works the Owners must deliver to the Owners Corporation the following documents relating to the Works:

i) Certification by an engineer nominated by the Owners Corporation as to the Structural Integrity of the Works and the building; and

ii) Any other document reasonably required by the Owners Corporation.

Approval

> Before commencing the Works, the Owners must obtain approval for the performance of the Works from any relevant statutory authority whose requirements apply to the Works.

16 The plan referred to in by-law 11.2, which was tendered before the Tribunal and placed before the Appeal Panel, was a copy of the “ground level plan”, numbered 1.03 and stamped as “approved” in relation to the construction certificate of the building which became the strata scheme. That plan identified unit 12 (as well as unit 14) as “retail” space. Unit 13 was identified as “restaurant” and unit 15 as “medical centre”.

17 The Tribunal at [42] of its Decision stated that it is apparent from the conditions attached to the original development consent that the plans to which that consent related included similar characterisation of the commercial units. The actual plans referred to in the development consent were not included in the evidence submitted to the Tribunal.

18 Paragraph 43 of the development consent refers to the various commercial lots as: “the two ground floor retail tenancies, the proposed medical centre and the proposed restaurant tenancy”.

19 Mr Fowler, the Chairman of the Executive Committee of the owners corporation, set out in his affidavit what he asserted were the reasons why the owners corporation opposed the application:

> 52 As a starting point the lot owners' first interest is to preserve the integrity of the original conception and design of Aspect Apartments which was intended to locate on lot 13 a demure restaurant and on lot 12 a non-food retail use. In this respect, the owners rely on the original development consent, strata plan ... and by-laws *for* Aspect Apartments to establish the intended and different purposes for the two lots.
>
> 53 On registration of the strata plan and in accordance with condition 89 of the development consent. lot 12 was allocated 7 car parking spaces on basement level 1 of the building - see page 2 of the strata plan. Relevantly, in condition 89 the premises which would become lot 12 on registration of the strata plan were referred to as "retail spaces (shopfront tenancy)". This is to be contrasted with the next entry in condition 89 which required two car parking spaces for the lot which was intended to be the restaurant.
>
> 54 At page 145 [of the annexure to Mr Fowler's affidavit] is construction. drawing A 1.03 for the ground floor and level 1 of Aspect Apartments. Relevantly it demarcates:

a. Lot 1.2 as retail; and

b. Lot 13 as restaurant.

55 The strata plan discloses that on basement level 1, lot 13 is allocated two car·parking spaces in conformity with condition 89 of the development consent.

56 Lot 13 was specifically designed as the only commercial lot on and from which a food retail business might be operated. It was designed to allow access via the loading dock in a manner which did not intrude on the common property of the entrance hallway and access to the separate residential lift: namely lift 2. It was designed to connect to a grease trap and to have installed refrigeration services for use in connection with a restaurant. It was designed to operate as a quality dine in restaurant with hours of operation specifically limited. In this respect, it was constructed with:

a. an exhaust shaft to the top of the building to permit emission of smoke and odours captured by the mechanical ventilation and exhaust system to be installed in and to service the lot;

b. utility connections including gas, electricity and water;

c. direct access to the loading dock located immediately behind the lot; and

d. direct connection to the grease trap located directly below the iot in basement level 2.

20 Mr Fowler referred to the affidavits filed by other lot owners and stated:

72 The common thread running through the affidavits is that the owners believe that it is unsuitable to foist onto Aspect Apartments a fast food outlet use for lot 12 for which the building in its design, approval and construction and marketing was never intended.

73 Having regard to the nature and extent of the proposed operations including, in particular, extended trading hours, the owners identify the following interests the integrity of which they wish to preserve and protect but which will be defeated or jeopardised, if the applicants' proposal is permitted to proceed:

preservation and protection of quiet and effective use and enjoyment of their lots and common property free of the kind of pedestrian and vehicular traffic, noise, odours, rubbish, litter, vermin and loitering which the use is likely to cause or generate;

a. preservation and protection of the security of the building and the peace of mind that comes to elderly owners by reason of limited means of access to key parts of common property outside ordinary business hours;

b. preservation and protection of the upmarket standing of the

building in the locality in which it is situated;

c. preservation and protection of the market value of their respective lots.

…

75 I am informed by lot owners that they are sensitive to excess use of the ground floor foyer which they believe will increase significantly, especially after hours, if the proposed fast food pizzeria is allowed to operate.

76 The front entrance door of the foyer permits unrestricted access during usual business hours on weekdays but outside those hours and on weekends and public holidays, the front entrance door is locked and can only be opened by fob keys held by residents.

77 If the fast food pizzeria operates as the applicants intend it to, its customers and staff, outside usual business hours and on weekends and public holidays, will have access to the ground floor facilities including the foyer, common toilets and washrooms, the lift to and from basement level 1 and the loading dock in one of two ways - either:

a. via the side door to lot 12; or

b. via the rear entrance door to the foyer'

78 Therefore, the ground floor of the building previously kept secure and limited in its use by non residents outside usual business hours on weekday and on weekends and public holidays will be subject to much greater use with adverse implications for the safety and security of residents.

79 As a further risk to their safety and security, staff and delivery drivers will have unfettered access to basement level 1 for use not only of the 7 parking spaces allotted to lot 12 but also for the use of the 6 visitor car parking spaces. From basement level 1, these persons will have unfettered access to the lobby by means of lifts 1 and 2. This will result in a substantial increase of pedestrian traffic in the foyer both during usual business hours on weekdays and outside those hours 364 clays per year.

80 As there is no staffroom, staff members and delivery drivers can be expected to congregate around and use the rear outside courtyard and seating area and that will generate unacceptable noise continuing late into the evenings for residents having south facing apartments; namely, units 3, 4,7,8,10 and 11, all of which have balconies and bedrooms overlooking this rear area as disclosed in the strata plan.

81 The garbage room servicing the commercial lots houses 3 x 240 litre standard domestic size bins; two red lid bins for general waste and one yellow lid bin for recyclable material.

82 These bins on their own are manifestly insufficient for the storage of garbage and waste reasonably expected to be produced by the pizzeria let alone the fast food pizzeria and the 3 other commercial lots.

…

> 87 Given the nature of the proposed operations as a fast food outlet as opposed to a suburban restaurant, its extended trading hours and days and the provision of dine-in, take away and delivery services, lot owners are extremely concerned about excessive foot and vehicular traffic likely to be generated by the proposed use of lot 12. ...
>
> 88 This significant increase in traffic on a normally quiet street in a peaceful setting will definitely introduce an undue level of intrusive noise for owners during the resting hours of the night all year round, especially for those owners whose bedrooms face the main road and/or the building's driveway. ...
>
> 89 A franchise Domino's fast food outlet is subject to signage displays as governed by Domino's HQ policies and rules. The promotional signs, their style, size, colour and placement will not be commensurate with the building's overall facade and will clutter and degrade the visual amenity of the building. ...

21 It is of some significance that the plans attached to the proposed development applications for which consent was sought was not placed before the Appeal Panel.

22 The Respondent described the proposed development application as involving changes to common property, specifically a connection of the premises to the grease trap in the lower car park level and penetration of the external walls of the lot for the installation of a ducting system for the pizza oven: an intake vent in the western wall adjoining the foyer; and an outlet vent in the northern shop front.

23 Apart from this evidence from the lot owners objecting to the proposed development application of the Appellants, the Respondent at the Tribunal relied upon the evidence of Mr Shipp, an expert valuer, that the installation of a Domino’s Pizza restaurant in lot 12 would reduce the value of the residential lots by between 6.45% and 18% and by an aggregate sum of $2,800,000 across all residential lots.

The reasoning of the Tribunal

24 Relevantly, the reasons of the Tribunal for dismissing the application for an order that the Respondent consent to the development application were as follows:

> **Do the Applicants require the Owners Corporation’s consent?**

71 I am satisfied that the applicants do require the Owners Corporation's consent for the lodgement of the development application. It is clear that the proposed shop fit-out will involve the construction of a connection to the grease trap in the basement two floors below and the penetration of the external walls of lot 12 in two places for the installation of the ventilation duct.

72 Mr Pickering submitted that, by reason of by-laws 11.1 and 11.2, the applicants had a right to connect to the grease trap and were entitled to the exclusive use of the shop front to the north of the lot (facing Sailors Bay Road) and did not need the Owners Corporation's consent to the lodgement of a development application involving impacts on common properly within the scope of those exclusive use rights.

73 I am not persuaded that the grant of the right of exclusive use to a part of the common property has the effect that the Owners Corporation's consent is not required for the submission of a development application which involves changes to that part of the common property.

74 An exclusive use right is not equivalent to ownership. The Owners Corporation remains the owner of the common property over which the right of exclusive use has been granted. The existence of exclusive use rights will be relevant in considering whether to make an order directing the Owners Corporation to give consent but it does not remove the requirement for the Owners Corporation to give consent.

75 In any event, the applicants' proposal also involves the penetration of the western wall of lot 12 for the installation of the intake for the ventilation shaft. The applicants do not point to any basis upon which it could be said that that penetration does not involve a change to common property.

76 Even if I were incorrect in my conclusion that the Owners Corporation's consent is required, that would not warrant the making of the order sought by the applicants. If a Local Council incorrectly refuses to accept a development application for development entirely within a lot in a strata scheme, on the basis that the applicant has not obtained the consent of the Owners Corporation, the remedy lies elsewhere: see the *Owners - Strata Plan No 50411 v Cameron North Sydney Investments* at [88].

77 It would not be appropriate to make an order pursuant to s 232 of the SSMA requiring the Owners Corporation to give consent to a development application for which its consent is not required.

…

Is the Owners Corporation obliged to give consent to the development

application?

88 There are, in my view, two implications clearly arising from s 232(6). First, the Tribunal has jurisdiction to make an order that an Owners Corporation consent to the submission of a development application involving common property. Secondly, in determining whether to make such an order, the role of the Tribunal is not merely executory. The Tribunal has a discretion whether to order an Owners Corporation to consent to a development application involving common property, and in exercising that discretion, the Tribunal is required to have regard to "the interests of all the owners of lots in [the] strata scheme in the use and enjoyment of their lots and the common property".

89 In *The Owners - Strata Plan No 50411 v Cameron North Sydney Investments* at [46] Giles JA held that, under the legislation in force prior to the commencement of the SSMA (the Strata Schemes Management Act 1996 (NSW) (SSMA 1996)), the Tribunal and its predecessor did not have jurisdiction to make an order requiring an owners corporation to give consent to a development application.

90 That conclusion was also reached by Rothman J in *The Owners - Strata Plan No 37762 v Pham* [2006] NSWSC 1287. His Honour stated, at [66]- [67]:

66 In *Cameron* … Giles JA was the only member of the Court to deal with the issue in question. In so doing, his Honour dissented on the reasons on which the majority judgment turned (the capacity on appeal to decide the correctness of *Halpin v SCC* (2000) 110 LGERA 464). However, the force of these observations of his Honour and the persuasiveness of the analysis is not affected by his Honour's dissent in the result in that case.

67 The function of consenting to a development application is not a function conferred by the Act nor by the EP & A Act. As such it is not amenable to orders under s 138(1)(a) of the Act.

91 The relevant provision in the SSMA 1996 was s 138 which relevantly

provided:

138 General power of Adjudicator to make orders to settle disputes or rectify complaints

> (1) An Adjudicator may make an order to settle a dispute or complaint about:
>
> an exercise of, or a failure to exercise, a function conferred or imposed by or under this Act or the by-laws in relation to a strata scheme, or
>
> > (b) the operation, administration or management of a strata scheme under this Act.

> (2) For the purposes of subsection (1), an owners corporation or building management committee is taken to have failed to exercise a function if:
>
> (a) it decides not to exercise the function, or
>
> (b) application is made to it to exercise the function and it fails for 2 months after the making of the application to exercise the function in accordance with the application or to inform the applicant that it has decided not to exercise the function in accordance with the application.

92 There was no provision in the SSMA 1996 equivalent to s 232(6) of the

SSMA.

93 The other relevant difference between s 138 of the SSMA 1996 and s 232 of the SSMA is the inclusion of s 232(1)(f), which empowers the Tribunal to make orders for the settlement of disputes about an exercise of, or failure to exercise, a function conferred or imposed on an owners corporation "under any other Act".

94 The Explanatory Memorandum to the Strata Schemes Management Bill 2015 (NSW) described the changes and additions made by s 232 in the following terms:

> (d) jurisdiction is conferred on the Tribunal to deal with complaints or disputes about agreements under the proposed Act, agreements relating to strata schemes between the owners corporation and owners, mortgagees and covenant chargees and the failure of an owners corporation to exercise a function under another Act (proposed section 232)

95 It is clear in my view that it was intended by the drafters of the SSMA that the extension of the Tribunal's power make orders to settle disputes about the failure of an owners corporation to exercise a power "conferred or imposed under any other Act" would encompass the failure or refusal of an owners corporation to give consent to a development application under the EPAA. Section 232(6) would otherwise be superfluous and its inclusion in the SSMA inexplicable.

96 I note that Rothman J in *Pham* expressed the view that giving consent to a development application affecting common property was not a function conferred by the EPAA. However, that observation was obiter dicta and was made in the context of s 138 of the SSMA 1996, not in the context of s 232 of the SSMA.

97 In this case s 232(6) of the SSMA requires me to give consideration to the interests of the applicants in the use and enjoyment of their lot and the common property, and consideration to the interests of the other lot owners in the use and enjoyment of their lots and the common property.

> 98 I do not accept the applicants' submission that the Owners Corporation is obliged to consent to any use fairly fitting within the description “retail”.
>
> 99 It is clear in my view that s 232(6) requires more detailed consideration in that it requires the interests of other lot owners in the use and enjoyment of their lots and the common property to be taken into account.

25 The Tribunal then considered whether or not it ought to require the Respondent to consent to the development application pursuant to s 232(6) of the SSMA. The Tribunal stated that s 232(6) requires a balancing exercise to assess whether the Applicants' interest in the use and enjoyment of their lot and the common property outweighs any detrimental effects which the proposed use of lot 12 will have upon the other lot owners' use and enjoyment of their lots and the common property: at [102].

26 The Tribunal stated that it was required to have regard to any respect in which the proposed development will impact upon the other lot owners' use and enjoyment of their lots and the common property: at [104].

27 One factor to be taken into account was the extent to which the proposed use is consistent with the intention expressed in the original development proposal and approval: at [105].

28 The Tribunal did not accept that the original intended use of the premises was as a Domino's Pizza restaurant. The original intended use of the premises was described as “retail”. The Tribunal did not accept that, in the context of the original plans which identify another lot as “restaurant”, the word “retail” should be given the exceptionally broad connotation given to the term “retail shop” in Schedule 1 to the *Retail Leases Act 1994* (NSW): at [106].

29 The Tribunal then went through the potential issues raised by the Respondent and other lot owners which covered the following matters: potential for odours; noise; safety; use of common property; garbage; traffic; and visual impact upon the Strata Plan.

30 The Tribunal concluded that the interests of the Appellants in obtaining the Respondent's consent to operate a Domino's Pizza restaurant from lot 12 in accordance with the development application delivered to the Respondent on

11 December 2018 were outweighed by the adverse impact of the proposal on the interests of the other lot owners in the use and enjoyment of their lots and use of common property: at [145].

31 The Tribunal then addressed the issue of the orders sought by the Appellants directing the Respondent to provide them with keys to: the front foyer (by means of a fob key for after-hours access), the level B2 basement area, the communal toilets, the loading dock, the rubbish bins and "access to gas, electricity and water". The Respondent's evidence was that Mr Dehsabzi had been advised on 14 August 2019 that he could order a commercial master key from the committee which would grant the Appellants access to the ground floor communal toilets, the loading dock, and the commercial garbage area but there was no response to this correspondence and no application was made for the delivery of such a commercial master key: at [148].

32 The evidence was that Mr Dehsabzi had never asked for keys and they would have been issued to him if he would have asked: at [148].

33 The Respondent, however, denied that the Appellants were entitled to keys to access the front entrance door to the ground floor foyer, the level 2 basement area or to the "utility rooms" which holds the gas, electricity and water meters: see [150].

34 The evidence was that "during usual business hours on weekdays" there is no restriction of access to the ground floor foyer by the front entrance door, but outside those hours and on weekends, access through that door is controlled through a fob key.

35 The evidence was that lot 12 upon receipt of a commercial master key would enjoy access to the ground floor foyer by the rear side door of lot 12, by the back door of the foyer, using the commercial master key, and thirdly via lifts 1 and 2 from basement level 1: see [154].

36 The evidence continued that if lot 12 was given fob keys for broader access they would have access to the residents secure parking area as well as the 3 residential floors and that would compromise the security interests of

residential owners contrary to the relevant conditions of the development consent for the building: see [154].

37 The conclusion of the Tribunal with respect to the application for an order for keys was as follows:

> 164 I am not persuaded on the evidence before me that it is appropriate to make the order relating to keys sought by the applicants or any lesser orderregarding keys.
>
> 165 I accept the uncontradicted evidence of Mr Fowler and Ms Cave that the Owners Corporation will provide a copy of the commercial master key to the applicants upon application and that the reason the applicants do not have a copy of that key is they have not made application. In those circumstances there is no warrant for an order from the Tribunal. The evidence does not support the proposition that the applicants have been denied a commercial master key to which they are entitled.
>
> 166 In relation to the fob key to the front door to the foyer, in the absence of evidence that fob keys can be differentially coded so that a fob key can be issued to the applicants which permits access through the front foyer door only and not to other areas in the building, I accept the Owners'submission that it is not appropriate that the applicants be provided with a fob key.
>
> 167 I note that the applicants have access to the foyer through the rear door to lot 12 and through the lift from the level B1 parking area and that, if they obtain a commercial master key, they will also have access through the rear door to the foyer and through the loading dock.
>
> 168 I accept that Condition 97 of the original conditions of consent requires thatthe owners of commercial lots not be given access to the residential levels or the residential lifts, all of which would be accessible if the applicants were provided with a standard fob key.
>
> 169 I am not persuaded that it is necessary that the applicants have access to level B2 in order to connect lot 12 to the grease trap, assuming that by-law 11.2 permits them to do so (which I do not need to decide). I am also not persuaded that it is appropriate or necessary that the applicants have their own key to the gas, electricity and water meters.
>
> 170 It is not unusual for an Owners Corporation to restrict access to service areas and require contractors to arrange access through the Owners Corporation. There is no suggestion in the evidence that any work, permitted under a relevant development consent, which the applicants or their contractors may seek to undertake, either in relation to the grease trap or in relation to connections to electricity, gas or water, will not be permitted to be scheduled with the co-operation of the Owners Corporation and the holders of the relevant keys.

> 171 To the extent that the applicants are concerned that it may be necessary to have urgent access to the utility meters to cut off supply in an emergency, I am not persuaded that the applicants are, in that regard, in a situation any different to any other lot owner, commercial or residential. No evidence was put before me to suggest that the applicants could not install separate shut off valves for water and gas and a circuit breaker for the electricity supply within lot 12. If the applicants are concerned that they do not have immediate access to the utility rooms, they can protect themselves by providing the means of disconnection within lot 12.
>
> 172 Accordingly, I will dismiss the applicants' application for orders relating to the provision of keys.

The Notice of Appeal

38 The Appellants did not seek leave to appeal which is required if the Appellants sought to appeal other than on a question of law: see s 80(2) *Civil and Administrative Tribunal Act 2013* (NSW) (NCAT Act).

39 The grounds of appeal were as follows:

> 1. The Tribunal erred in its application of the Law as set out in the case of *The Owners-Strata Plan 50411 v Cameron North Sydney Investments*.
>
> 2. The Tribunal erred in determining that the Tribunal had a discretion whether to order an Owners Corporation to consent to a development application involving common property on the basis that the Tribunal had to have regard to the interests of all the owners of the lots in the strata scheme in the use and enjoyment of their lots and the common property.
>
> 3. In relation to the keys, as an owner of Lot 12, the Applicant is entitled to all the keys that service that property as a matter of Law.
>
> 4. The decision was not fair and equitable.
>
> 5. The decision was against the weight of the evidence.

40 In *Prendergast v Western Murray Irrigation Ltd* [2014] NSWCATAP 69 the Appeal Panel set out at [13] a non-exclusive list of questions of law:

> (1) Whether there has been a failure to provide proper reasons;
>
> (2) Whether the Tribunal identified the wrong issue or asked the wrong question;
>
> (3) Whether a wrong principle of law had been applied;
>
> (4) Whether there was a failure to afford procedural fairness;
>
> (5) Whether the Tribunal failed to take into account relevant (i.e., mandatory) considerations;

(6) Whether the Tribunal took into account an irrelevant consideration;

(7) Whether there was no evidence to support a finding of fact; and

(8) Whether the decision is so unreasonable that no reasonable decision-maker would make it.

41 In order to amount to an error of law, it must be demonstrated that there was no evidence to justify the conclusion of the Tribunal or, alternatively, that no reasonable tribunal could have come to the conclusion that it did: see *John Prendergast & Vanessa Prendergast v Western Murray Irrigation Ltd* [2014] NSWCATAP 69 at [13](7) and (8).

42 Further, in respect of whether or not the Tribunal failed to take into account a relevant (i.e., mandatory) consideration, the Appeal Panel in *Director-General, Department of Finance and Services v Porter* [2014] NSWCATAP 6 at [28] stated the following:

> "Whilst the question of weight is one for the Tribunal, the Tribunal will not have given adequate attention to relevant consideration where its process is merely a formulaic reference: see *Azriel v NSW Land & Housing Corporation* [2006] NSWCA 372 at [49] per Basten JA (with Santow and Ipp JJA agreeing), instead what is required can be described as a proper, genuine and realistic consideration of the relevant consideration: *Bruce v Cole* (1998) 45 NSWLR 163 at 185-6 per Spigelman CJ. However, as Basten JA warned in *Azriel* at [51] referring to Spigelman CJ in *Bruce* at 186, assessing whether the decision-maker has given a proper, genuine and realistic consideration to a mandatory manner must be approached with caution, with care to avoid any impermissible reconsideration of the merits of the decision."

43 An alleged failure to give 'sufficient weight' to evidence does not identify a question of law: *AHB v HSW Trustee and Guardian* [2017] NSWCATAP 79; *House v R* (1936) 55 CLR 499.

44 We note that grounds 4 and 5 do not involve any questions of law. Accordingly, we reject these grounds. In any event, these grounds did not feature in the submissions made by the Appellants as separate and distinct grounds from grounds 1-3.

45 We turn then to the remaining grounds of appeal.

Ground 1

Appellants' submissions

46 The Appellants repeated their submissions below that the law in respect of the requirement to obtain consent from the owners corporation to the lodgement of a development application for their lot is summarised by the NSW Court of Appeal in *The Owners Strata Plan No 50411 v Cameron North Sydney Investments Pty Ltd* (2003) NSWCA 5 where Hayden JA gave the lead judgment.

47 In that judgment His Honour expressed the view that an owners corporation did not have a statutory power to withhold its consent, or to veto, the lodging of a development application by a lot owner.

48 His Honour expressed the view that the ability to object to the development after it has been lodged points against the existence of a statutory power to withhold consent: at [150].

49 The Appellants contended that this decision is precisely in point. The owners of all other lots will be given the opportunity to put forward their views on the development application in Council's consideration of the development application. They have the right to object at that point in time. But they have no right to withhold consent due to the development application being sent to the Council on the basis of s 232(6) of the SSMA.

Respondent's submissions

50 The Respondent submitted that the Court of Appeal Decision in *Cameron North Sydney* can be distinguished as it was decided before enactment of the SSMA.

51 In particular, s 232(6) of the SSMA sets out express criteria for determining whether an owners corporation should be required to give consent to a development application. There was no equivalent provision in the 1996 Act under consideration in *Cameron North Sydney*.

52 The Respondent submitted that the law is now crystal clear that an owners corporation's consent to a development application may be withheld if this was

warranted in balancing the interests of all the lot owners pursuant to s 232(6) of the SSMA.

Consideration

53 We agree with the conclusion of the Tribunal below for the reasons given by it that *Cameron North Sydney* can be distinguished on the basis of the new legislative provisions now in force. In particular, there was no provision in the SSMA 1996 equivalent to s 232(6) of the current SSMA. Further, s 138 of the SSMA 1996 contained no equivalent of s 232(1)(f) which empowers the Tribunal to make orders for the settlement of disputes about the exercise, or failure to exercise, a function conferred or imposed on an owners corporation under any other Act.

54 In our view, where a development application relates to common property the Tribunal has power to make orders to settle any dispute about a failure of an owners corporation to give consent to such a development application under the *Environmental Planning & Assessment Act 1979* (NSW).

55 Further, we agree with the conclusion of the Tribunal that where the development application relates to the common property there would be a requirement for the owners corporation to give consent as a lot owner does not have ownership of such common property.

56 Accordingly, we dismiss this ground of appeal.

Ground 2

Appellants' submissions

57 Ground 2 is in the following terms:

> The Tribunal erred in determining that the Tribunal had a discretion whether to order an owners corporation to consent to a development application involving common property on the basis that the Tribunal had to have regard to the interests of all the owners of the lots of a strata scheme in the use and enjoyment of their lots and the common property.

58 The Appellants raised four matters as demonstrating the errors of the Tribunal under this ground in their submissions. The first two matters were expressed as follows:

(a) An error as to the legal meaning to be given to the wording "Retail" as related to the Appellants' lot 12 of Strata Plan 3556.

(b) An error as to the application and meaning of section 232(6) of the SSMA.

59 The central thrust of the Appellants' submission in this regard was as follows:

(1) In the plans prepared prior to construction of the building, lot 12 is described as "retail" and the development consent refers to this lot as a retail tenancy while unit 13 is identified as "restaurant" and unit 15 as a "medical centre".

(2) The word "retail" should be given a meaning consistent with the term "retail shop" in Schedule 1 to the *Retail Leases Act* and this includes restaurant such as the proposed Domino's Pizza restaurant.

(3) Further, utilising lot 12 as a Domino's Pizza restaurant is a use that is allowed under the relevant zoning law and would be approved by the Council.

(4) The owners corporation is obliged to give its consent to any development application which is for a use of the property, lot 12, in a manner consistent with the use allowed under the relevant zoning law, and a use that would be approved by Council, which in this case includes the proposed Domino's Pizza restaurant.

(5) The Tribunal misconstrued s 232(6) of the SSMA in conducting a balancing exercise of considering the interests of all the owners of lots in the strata scheme in the use and enjoyment of the lots and the common property in determining whether to make an order relating to the proposed development application when it was obliged to give its consent to any use that was allowed under the zoning laws and a use that would be approved by Council.

60 As the Appellants simply put it:

> Section 232(6) of the SSMA does not give a discretion to the Tribunal to determine that the proposed use of the lot by the Appellants "is in the most commercially advantageous manner consistent with the other lot owners' use and enjoyment of their lots and the common property." The role of the Tribunal is to ensure that the proposed use is the use allowed under the zoning and conforms with one of the uses in schedule 1 of Retail Leases Act.

61 The Appellants relied upon the reasoning of Hayden JA in *The Owners Strata Plan 50411 v Cameron North Sydney Investments Pty Ltd* [2003] NSWCA 5 to support the proposition that if the Appellants' proposed use is allowed under Schedule 1 of the *Retail Leases Act* and is a use that would be accepted by Council there is no discretion given to the Tribunal or the Respondent to decline to consent to such a development application.

62 Further, the Respondent submitted that the Tribunal and the Respondent are not in the best position to weigh up such things as noise, or other matters that are best left to Council to consider with the Respondent and lot owners being left to their ordinary rights to object to the development.

63 The next error was described by the Appellants as follows:

> An error in the interpretation and application of by-laws 11.1 and 11.2 of the By-Laws of the Strata plan 83556 as they applied to the lots 12 and 13 with respect to exclusive use of the shop front and to the commercial properties with respect to the exclusive use of sewer, grease waste and ventilation.

64 The Appellants contended that by reason of by-laws 11.1 and 11.2 the Respondent had no further role in being able to reject a development application that sought to alter the common property if that common property fell within the domain of the exclusive use rights granted to the owner of lot 12 pursuant to by-laws 11.1 and 11.2. It was contended that this was the case in respect of the proposed development application in question.

65 Further, it was contended that the proposed development application, where it sought to connect to the grease trap this was consistent with the definition of Works provided for in by-law 11.2. However, when it came to the proposed alterations for the air-conditioning or ventilation, it was conceded that the proposal in the development application went beyond the definition of Works in by-law 11.2 and the exclusive use rights in the relevant by-laws.

66 In this regard, the Appellants at the Tribunal orally submitted that it intended to amend the proposed plans and development application to restrict the works in relation to ventilation or air-conditioning so that only common property the subject of exclusive use rights would be affected. It was submitted that the Tribunal erred in not accepting this contention

67 At the hearing before the Appeal Panel the Appellants sought to tender new plans for works for the ventilation/air-conditioning that was said to now be wholly contained in lot 12.

68 We pointed out that there may be a difficulty in the Appeal Panel having jurisdiction to deal with such a new development application as there had not been a refusal or deemed refusal by the Respondent so as to enliven the

Tribunal's jurisdiction pursuant to s 232 of the SSMA. In particular, s 232(2)(b) refers to a failure to exercise the relevant function for a period of two months after the making of the application being a deemed failure to exercise the function.

69 The Appellants then withdrew their application to rely upon this new evidence and instead exclusively relied upon their submissions summarised above.

70 The last submission put by the Appellants in respect of this ground was that the Tribunal erred, based on the available evidence, as to when the Appellants confirmed that the development application delivered by the Appellants to the owners corporation on 11 December 2018 was a complete development application.

71 The Appellants submitted that the Tribunal erred in not accepting that the development application delivered to the Respondent was complete as early as 14 December 2018 rather than on 28 June 2019 as found by the Tribunal at [32]. It was contended that such a decision was against the weight of the evidence.

Respondent's submissions

72 The Respondent submitted that the law as provided in s 232 of the SSMA is clear. Where the application involved relates to the common property the Respondent's consent is required. If this is not granted the Tribunal's role pursuant to s 232(6) is to conduct a balancing exercise and consider the interests of all lot owners. The Tribunal is not obliged to require the Respondent to give its consent instead of performing such a balancing exercise.

73 The Tribunal is entitled to take into account all of the matters that the Tribunal did take into account as they rightly go to the question of the owners' use and enjoyment of their lots and the common property.

74 The Respondent submitted that the development application involves common property beyond the areas the subject of the by-laws.

75 Further, and in any event, any exclusive right to use common property is not equivalent to ownership, as the Tribunal found at [73]–[74]. A right to use common property does not give any right to carry out works to alter it.

76 The Respondent pointed to the Appellants' concession in the hearing before the Tribunal that at least the ventilation ducts involved alteration to the common property not covered by the by-laws 11.1 and 11.2.

77 The Respondent submitted that the Senior Member was not in error in not taking into account the "unsubstantiated statement from the bar" that the plans would be altered so that the ventilation duct would exist through the shopfront rather than through the western wall.

78 In respect of the oral submission that the plans for the ventilation duct would be amended, the Respondent submitted that the Senior Member was correct not to take account of such a bold assertion from the bar table in the absence of: any plan of how this could physically be done; any evidence of whether it would work; any evidence as to its feasibility; and any evidence showing considerations of what consequential impacts might follow, including for persons who enter the building from the front foyer, or on passing pedestrians.

Consideration

79 We shall deal firstly with the proposition that the Respondent is obliged to consent to any use coming within the description "retail" under the *Retail Leases Act* and being a use permitted by the planning laws applicable to lot 12 of Strata Plan 83556.

80 We reject this submission as being contrary to the effect of s 232 and, in particular, s 232(6) of the SSMA. It is plain that pursuant to s 232(6) the Tribunal has a discretion as to whether to make an order that an owners corporation consent to a development application "relating to common property". There is no doubt that the development application here relates to common property.

81 We note that at [71] the Tribunal stated, "[i]t is clear that the proposed shop fit out will involve the construction of a connection to the grease trap in the basement two floors below and the penetration of the external walls of lot 12 in

two places for the installation of the ventilation duct." Such works must relate to the common property. There was no appeal against this conclusion.

82 Second, in determining whether to make such an order under s 232(6) the Tribunal is required to have regard to "the interests of all the lot owners in the Strata scheme in the use and enjoyment of their lots and the common property."

83 Accordingly, we do not accept that the Tribunal was obliged as a matter of law to order the Respondent to consent to the development application merely because it was in respect of a use allowed under the relevant planning laws.

84 We point out that a different situation would pertain if the development application did not relate to common property. In that regard section 232(6) would not apply. Further, the decision in *Cameron North Sydney Investments* would generally be applicable such that the consent of the owners corporation to such a development application would not be needed in order for the owner of the lot to seek approval to a development application that only relates to the premises the subject of the strata lot. In such a case the rights of the other lot owners and the owners corporation would be confined to submitting objections to the development applications to the relevant Council.

85 We note that this is not a matter upon which we need express any concluded views given that such a question arises under the *Environmental Planning & Assessment Act* and the remedy for a Council which fails to act on such a development application will lie elsewhere.

86 We turn next to consider the submission related to by-laws 11.1 and 11.2. We reject the Appellants' submissions and instead we agree with and adopt the reasons of the Tribunal at [72]–[75].

87 The two by-laws in question raise essentially two distinct issues: the first involves the entitlement of the Appellants to the exclusive use of some parts of the common property, being the shopfront, and, the other involves the right to perform "Works" set out in by-law 11.2. The rights of the Appellants are different under these two provisions.

88 Dealing with the entitlement to the exclusive use of some parts of the common property, we agree with the proposition that the grant of the right of exclusive use to a part of the common property does not involve a right or entitlement to change that part of the common property. We agree with the Tribunal's remarks that an exclusive use right is not equivalent to ownership. Further, the Respondent remains the owner of the common property over which the right of exclusive use has been granted.

89 As a consequence, if the owners of lot 12 wish to pursue a development application which seeks to alter any of the common property, including property the subject of an entitlement to exclusive use, the Respondent has a right to withhold consent to such a development application.

90 Further, the Tribunal will then have a discretion as to whether or not to order the Respondent to grant its consent to such a development application pursuant to s 232(6) of the SSMA.

91 The situation is different where the development application concerns alterations to the common property that are covered by or encompassed by the definition of "Works" set out in by-law 11.2.

92 If a proposed development application seeks to alter the common property but only consistently with the definition of "Works" in by-law 11.2, then in our view the Respondent would be obliged to give its consent. We did not understand the Respondent to dispute this proposition. Instead it relied upon the fact that the development application, at least when it came to the alterations to the common property to permit the intake for the ventilation shaft, went beyond any definition of the "Works".

93 The Appellants did not dispute this proposition on appeal. We note the attempt to tender new plans on appeal which overcame this hurdle were withdrawn by the Appellants. In addition, as remarked upon previously, the Appellants did not place before the Appeal Panel the plans the subject of the proposed development application which was served upon the Respondent. Accordingly, we are not in a position to judge the extent to which the works the subject of this proposed development application was consistent with, or varied from, the definition of "Works" in by-law 11.2.

94 Further. we note at [75] the Tribunal found that the Appellants' development application involves the penetration of the western wall of lot 12 for the installation for the intake of the ventilation shaft. The Tribunal then stated that the Appellants did not point to any bases upon which it could be said that this penetration does not involve a change to common property.

95 We understand this to be a finding that the development application that was submitted to the Respondent involved a change to common property beyond both the definition of "Works" and the exclusive use rights provided for in by-laws 11.1 and 11.2. This finding was not challenged on appeal.

96 We agree with the submissions of the Respondent that the Tribunal did not err in failing to act upon a mere oral submission as to an intention to in the future lodge an amended development application. This is particularly so in the absence of any written documentation being placed before the Tribunal, so as to afford the Respondent the opportunity to respond meaningfully to any such amended development application.

97 Accordingly, we reject the submission that the Respondent was obliged to consent to the development application that was served upon it by reason of by-laws 11.1 and 11.2.

98 We note that there was no ground of appeal challenging the Tribunal's exercise of its discretion under s 232(6). The contention was that the Tribunal erred in determining that it had a discretion whether or not to order the Respondent to consent to the Appellants' development application.

99 Next, we consider the submission that the Tribunal failed to give sufficient weight to evidence led so that it erred in its finding as to when the development application was complete or sufficient. This ground does not involve an error of law and there was no leave to amend the notice of grounds of appeal to raise this question. Accordingly, we object to the attempt to raise this matter within ground 2 of the Notice of Appeal.

100 In any event, in our view, this finding did not play any ultimate role in the conclusion reached by the Tribunal. The Tribunal found that the development application was sufficiently complete by the date of the hearing. Accordingly,

we would not be satisfied that any error in the finding as to when in the past the development application was complete or sufficient caused the Appellants any substantial prejudice or amounted to a substantial miscarriage of justice so as to entitle the Appellants to leave to appeal: see *Collins v Urban* [2014] NSWCATAP 17 at [76].

101 For the reasons given above, we reject this ground of appeal.

Ground 3

Appellants' submissions

102 Ground 3 was as follows:

> In relation to the keys, as an owner of lot 12 the Appellants are entitled to all the keys that service that property as a matter of law.

103 The Appellants relied upon by-law 9.4 which provides as follows:

> **9.4 Security Keys**
>
> The Owners Corporation will make available to each Owner and Occupier not less than 2 sets of Security Keys necessary to enable each Owner and Occupier to access their Lot and, for that purpose, to pass over Common Property necessary to access their Lot. The Owners Corporation may charge a fee for the provision of any additional Security Keys or devices. Each Owner and Occupier must:
>
> (a) exercise a high degree of caution and responsibility in making Security Keys available for the use by other persons;
>
> (b) not duplicate or permit any Security Key to be duplicated;
>
> (c) take all reasonable steps to ensure that Security Keys are not lost;
>
> (d) immediately notify the Owners Corporation if a Security Key is lost, stolen or damaged; and
>
> (e) pay replacement costs to the Owners Corporation of any lost, stolen or damaged Security Key.

104 In particular, the Appellants relied upon the provision in by-law 9.4 that the Respondent will make available to each owner not less than two sets of Security Keys necessary to enable each owner to access their lots and for that purpose to pass over common property necessary to access their lot. The Appellants contended that the by-law did not impose on a lot owner a restriction as to where they can access their lot from.

105 Their submission continued to the effect that if a property has a front entrance, a back entrance, a side entrance and an entrance which involves the owner walking through a front foyer to a lot then by-law 9.4 imposes the obligation on the Respondent to make available to each owner Security Keys such as would enable each owner to access their lots “from all access points unrestricted as to the point of entry”.

106 Accordingly, it was contended that in withholding a key permitting after hours access to the front entrance of the Foyer from the Appellants the Respondent was in breach of by-law 9.4.

107 Second, the Appellants submitted that it was entitled to have a key which gave access to basement level 2, which is used for the residents’ parking, because it is at basement level 2 that the existing grease trap is located which is the subject of rights under by-law 11.2. It also was contended that it was necessary that the Appellants have their own key to the gas, electricity and water meters located at this level.

108 The Appellants referred to new evidence in the form of an affidavit of Mr Dehsabzi dated 30 May 2020 and referring to some emails and correspondence in order to call into question the finding of the Tribunal that the commercial master key would be made available to the Appellants but there had been no request for this key.

109 Third, the Appellants submitted that the restriction on after hours access for commercial lot owners to the street front common area door was unlawful having regard to the fact that there was no by-law in place creating such a restriction.

Respondent’s submissions

110 The Respondent submitted that by-law 9.4 is limited to any Security Key to common property that is necessary to access their lot. In this regard, provision of the commercial master key enables the Appellants to have access to the lot other than through street front common area door to the foyer by having access to the door located at the rear south-west corner of the lot, including after business hours on weekdays and on weekends and on public holidays by the rear door of the building which the commercial master key unlocks.

111 The Respondent objected to the new evidence. It submitted that the submission based on the new evidence was to invite the Appeal Panel to revisit and reconsider some of the factual evidence that was before the Tribunal and to make different findings.

112 This, it submitted, was not appropriate on a question of law.

113 Lastly, the Respondent submitted that the complaint made that there has been some unauthorised restrictions on after hours access to the building was being made for the very first time on appeal and should not be admitted or considered in an appeal. Further, and in any event, this cannot change the conclusion reached by the Tribunal at [164] and following where there is no challenge to the evidence referred to in the Decision at [147]-[148].

Consideration

114 We agree with the Respondent's submissions. We also agree with the Tribunal's reasons and conclusions in respect of the application for orders relating to security keys.

115 The Appellants have not demonstrated that the Tribunal fell into any error of law.

116 We disagree with the proposition that by-law 9.4 imposes an obligation on the Respondent to make available to each owner not less than two sets of Security Keys to enable each owner to access their lots from all access points and unrestricted as to the point of entry.

117 The Tribunal found at [167] that the Appellants have access to the foyer through the rear door of lot 12 and through the lift from the level B1 parking area and that, if they obtained commercial master keys, they would also have access through the rear door to the foyer and through the loading dock. This finding has not been challenged on appeal.

118 By-law 9.4 imposes an obligation on the Respondent to provide keys "necessary to enable each owner and occupier to access their lot, and for that purpose pass over common property necessary to access their lot". In our view, provided the keys provide at least an access to a lot, by-law 9.4 is complied with. The provision of keys to allow access to the lot by more than

one entrance to the lot is not “necessary” in order for the owner merely to have access to the lot in question.

119 This construction is supported by the fact that condition 97 of the original condition of consent requires that the owners of commercial lots not to be given access to the residential levels or the residential lifts, all of which would be accessible if the Appellants were provided with a standard fob key granting after hours access to street front common area door: see [168] of the Decision.

120 We turn then to the submission that the Respondent ought to have provided a key to the Appellants to enable them to have continuous access to level B2 by reason of the fact that by-law 11.2 gives the owner of lot 12 the right to install a grease trap or additional sewerage, drainage, ventilation or air-conditioning necessary for the use of the lots and exclusive use rights in respect of any such works undertaken.

121 We note in this regard that by-law 9.4 does not apply. By-law 9.4 only relates to access to the lot and not areas beyond the lot in question, such as areas of common property where a lot owner might have exclusive use rights. We also note that at present the Appellants have not undertaken the works the subject of by-law 11.2. Hence, the Appellants do not currently enjoy any exclusive use rights pursuant to by-law 11.2.

122 Accordingly, the question is whether nevertheless the Respondent ought to provide keys to give unrestricted access to the utility services at level B2. This was dealt with by the Tribunal at [170]-[171] as follows:

> 170 It is not unusual for an owners corporation to restrict access to service areas and require contractors to arrange access through the owners corporation. There is no suggestion in the evidence that any work, permitted under a relevant development consent, which the Applicants or their contractors may seek to undertake, either in relation to the grease trap or in relation to connections to electricity, gas or water, will not be permitted to be scheduled with the corporation of the owners corporation and the holders of relevant keys.
>
> 171 To the extent that the Applicants are concerned that it may be necessary to have urgent access to the utility meters to cover supply in an emergency, I am not persuaded that the Applicants are, in that regard, in a situation any different to any other lot owner, commercial residential. No evidence was put before me to suggest that the Applicants could not install separate shut off valves for water or gas and

> a circuit breaker for the electricity supply within lot 12. If the Applicants are concerned that they do not have immediate access to the utility rooms, they can protect themselves by providing the means of disconnection of lot 12.

123 We are not persuaded that there was any error of law in the approach and conclusion of the Tribunal in this regard.

124 We decline to grant the Appellants leave to rely upon the affidavit of Mr Dehsabzi dated 30 May 2020. There is no explanation as to why this was not obtained in the original hearing and we note that some of the correspondence dates back to 2018. In our view, to admit such evidence would cause prejudice to the Respondent and we are not persuaded that such evidence is relevant to any question of law. Accordingly, the evidence should not be admitted: see *Ros v Commissioner of Police* [2020] NSWCATAP 70 at [28]-[34]**.**

125 We note that the submission that not providing the commercial lot owners with access by way of a fob key which residential lot owners have is unlawful without a relevant by-law, was not the subject of any submission to the Tribunal below. Pursuant to the well-known principles set out by the High Court in *Coulton v Holcombe* (1986) 162 CLR 1 at 7 we do not think it is appropriate to deal with this issue on appeal for the first time. Further, such complaint does not relate to this ground of appeal and there has been no application for leave to amend the notice of appeal.

126 Accordingly, we reject this ground of appeal.

Costs

127 The Respondent submitted that the appeal should be dismissed, and the Respondent should have an order for the costs of this appeal. It contended, whilst no order of costs was made by the Tribunal in the original application, the appeal has no tenable basis in fact and in law, and is misconceived and lacking in substance (in terms of paragraphs (c) and (e) of s 60(3) of the NCAT Act).

128 The contention that an appeal has no tenable basis in fact and in law and is misconceived and lacking in substance is a high hurdle to meet.

129 We are not satisfied that the appeal can be so described. We are not satisfied that there exists any other special circumstance. We are not persuaded that the ordinary rule that each party pay their own costs pursuant to s 60 of the NCAT Act should not apply.

130 We will order that each party shall pay their or its own costs.

Orders

131 The orders of the Tribunal shall be as follows:

(1) The appeal is dismissed.

(2) Each party shall pay their or its own costs.

****

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