Civil and Administrative Tribunal

New South Wales

Case Name:	The Owners – Strata Plan No 63731 v B & G Trading Pty Ltd
Medium Neutral Citation:	[2020] NSWCATAP 202
Hearing Date(s):	1 June 2020
Date of Orders:	30 September 2020
Decision Date:	30 September 2020
Jurisdiction:	Appeal Panel
Before:	T Simon, Principal Member G Curtin SC, Senior Member
Decision:	(1) Appeal allowed. (2) The orders made by the Tribunal are set aside. (3) In lieu thereof, order the respondents to restore the common property the subject of the work referred to at [10] of the Tribunal's reasons at first instance to the condition it was in prior to the commencement of those works on or before 1 February 2021. (4) If any party desires to make an application for costs of the appeal: (a) that party is to so inform the other parties within 14 days of the date of these reasons; (b) the applicant for costs is to lodge with the Appeal Panel and serve on the respondent to the costs application any written submissions of no more than five pages on or before 14 days from the date of these reasons; (c) the respondent to any costs application is to lodge with the Appeal Panel and serve on the applicant for costs any written submissions of no more than five pages on or before 28 days from the date of these reasons; (d) any reply submissions limited to three pages are to

	be lodged with the Appeal Panel and served on the other party within 35 days of the date of these reasons; (e) the parties are to indicate in their submissions whether they consent to an order dispensing with an oral hearing of the costs application, and if they do not consent, submissions of no more than one page as to why an oral hearing should be conducted rather than the application being determined on the papers.
Catchwords:	LAND LAW – strata title – by-laws – whether by-law was a common property rights by-law – whether "special privileges" in s 142(2) of the Strata Schemes Management Act 2015 (NSW) includes purported exemption from compliance with the obligations imposed by s 108 – by-law cannot provide exemption from obligations imposed by s 108 – s 111 of the Strata Schemes Management Act 2015 (NSW) subordinate to s 108 - difference between "validity" and "of no force or effect"
Legislation Cited:	Interpretation Act 1987 (NSW), s 30(1)(c) Strata Schemes Management Act 1996 (NSW), ss 43(4), 65A Strata Schemes Management Amendment Act 2004 (NSW), Schedule 1, cl 11 Strata Schemes Management Act 2015 (NSW), ss 108(2), 109, 110, 111, 136(2), 142(b), 153(1), Schedule 3 cl 4(2)
Cases Cited:	Alphapharm Pty Ltd v H Lundbeck A/S [2014] HCA 42; (2014) 254 CLR 247 C v W [[2015] NSWSC 1774 CIC Insurance Ltd v Bankstown Football Club Ltd [1997] HCA 2; (1997) 187 CLR 384 Moloney v Taylor [2016] NSWCA 199 Noon v The Owners - Strata Plan No. 22422 [2014] NSWSC 1260 Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28; (1998) 194 CLR 355 Re R [2000] NSWSC 886 Singh bhnf Ambu Kanwar v Lynch [2020] NSWCA 152 Stolfa v The Owners - Strata Plan 4366 [2009] NSWSC 589 Stolfa v Hempton [2010] NSWCA 218 White v Betalli [2006] NSWSC 537; (2006) 66 NSWLR

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Texts Cited:	D C Pearce and R S Geddes, Statutory Interpretation in Australia, 8th ed., LexisNexis Butterworths, 2014
Category:	Principal judgment
Parties:	The Owners – Strata Plan No 63731 (Appellant) B & G Trading Pty Ltd (First Respondent) The Bunker 2017 Pty Ltd (Second Respondent) SRSJ Management Pty Ltd (Third Respondent)
Representation:	Counsel: Dr C J Birch SC, D Meyerowitz-Katz (Appellant) T Lynch SC, B Bradley (Second and Third Respondents) Solicitors: Grace Lawyers Pty Ltd (Appellant) Wilshire Webb Staunton Beattie (Second and Third Respondents)
File Number(s):	AP 20/05842
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Citation:	N/A
Date of Decision:	7 January 2020
Before:	G Sarginson, Senior Member
File Number(s):	SC 18/13363

REASONS FOR DECISION

1 The appellant appeals from the Tribunal's decision dismissing its application for orders that the respondents remove certain building work done to the common property by them, to reinstate the common property and for certain other collateral and consequential orders including compensation.

2 The proceedings before the Tribunal, and this appeal, concern the deceptively simple questions whether the work done to the common property, on the proper construction of various provisions of the *Strata Schemes Management Act 2015* (NSW) (the "2015 Act"), was and could be authorised by by-law 32.

3 The provisions we are called upon to construe have not, so far as the parties or we have been able to ascertain, been the subject of judicial consideration.

4 For the reasons that follow we are of the opinion that the 2015 Act, on its proper construction, does not allow by-law 32 to provide authorisation for the work done to the common property.

Relevant Facts

5 The appellant is the owners corporation established under the strata scheme legislation to manage the strata scheme of a property at Milsons Point, NSW.

6 The strata plan was registered on 2 November 2000. By-law 32 was one of the original by-laws registered at that time.

7 The strata scheme consists of a high-rise building complex containing a mixture of residential and commercial lots. There is a tower on the eastern side of the complex and a tower on the western side. The tower on the eastern side has 27 levels, the tower on the western side has 18 levels. There are eight levels below ground. 140 lots in the strata scheme are used for residential purposes. Two commercial lots are used for retail purposes. Levels 2 to 8 comprise mainly car parking spaces.

8 Level 1 contains two lots, being Lots 147 and 148. Lot 147 contains a swimming pool and gymnasium which is used by residential lot owners and tenants. Lot 148 is adjacent to Lot 147.

9 Between the year 2000, when the strata plan was registered, and 2017, Lot 148 was unused. By early 2017 rough-in stud work, fire safety equipment, electrical writing and lighting had been installed in Lot 148, and water and sewerage connections made.

10 When these proceedings were commenced the first respondent was the owner of Lot 148, the second respondent had an option to purchase Lot 148 from the first respondent, and the third respondent was the lessee of Lot 148.

11 Since that time the option to purchase has been exercised and the second respondent is now the owner of Lot 148. The third respondent remains the lessee of the Lot. The first respondent did not appear on the appeal, although it did appear before the Tribunal at first instance. Even though various rights and obligations under the strata scheme legislation distinguish between owners and lessees of lots, there is no need to do so in this case as the parties were content to treat the respondents as a group. Therefore, for ease of expression we shall not differentiate between the respondents unless necessary.

12 In about 2017 the respondents formed the desire to fit-out Lot 148 for use as offices. Undertaking that fit-out required, on the respondents' case, some necessary work done to adjacent or nearby common property. The respondents believed they were authorised to undertake that work to common property (as part of their fit-out work) under the terms of by-law 32 and without the consent of the appellant. The or near adjacent appellant took the opposite view. Notwithstanding that opposition, the fit-out and common property work was undertaken between December 2017 and August 2018.

13 The work done to the common property as part of the fit-out work consisted of:

(1) Trenching in the floor slab of Lot 1 48, and laying pipes in those trenches to connect toilets and sinks, refilling those trenches and restoring the slab.

(2) Tiling works to the floor slab in the vicinity of the bathroom facilities on Lot 148 including installation of a waterproof membrane in the wet areas before screeding and the affixing of porcelain tiles.

(3) Installation of wall cladding around the foyer and entrance to Lot 148.

(4) Installation of internal partitions to create office workspace which included affixing steel channels to the floor slab and soft battens to common property walls by power fixed screws.

(5) Installation of further fire retention sprinklers.

(6) Changing the direction of a pool gate between Lot 147 and Lot 148 so that it swung inwards towards the pool in order to facilitate egress from Lot 148 through Lot 147 to a fire exit.

14 It is this work done to the common property which is at the centre of this dispute.

15 In the proceedings at first instance there were disputes of fact as to the extent to which the appellant was given notice of the proposed work.

16 The Tribunal found that the appellant did not realise that there would be significant cutting into the slab to perform the trenching work until 20 February 2018. The Tribunal found that the appellant had not been notified of the full scope of work, it was never given any clear prior written notice of the trenching work and it was that trenching work that involved the most substantial interference with common property.

17 The appellant commenced proceedings in the Tribunal in March 2018 seeking orders that the respondents remove the work done to the common property, to restore the common property to its previous state and certain other consequential and collateral orders.

18 The Tribunal said that there was no doubt that the respondent had performed work that affected common property, the appellant had not given written consent to the work and no resolution approving that work had been passed at (or put to) a general meeting of the owners corporation before or after the work had been done.

19 The Tribunal held that the work to common property did not interfere with the structural integrity of the building (per by-law 32.4), and that any damage done to the common property caused by the carrying out of the work had been repaired (per by-law 32.5).

The By-Laws

20 The relevant by-law is by-law 32, although by-law 17 has some relevance.

21 By-law 32 refers to Commercial Lot 1. Clause 1 of the Consolidated By-laws registered number AM518193V defines Commercial Lot 1 as Lot 148.

22 At first instance the respondents also argued that the work done to common property was authorised by by-law 17. The Tribunal, having decided that by-law 32 authorised the work, said it did not need to decide whether by-law 17 also authorised the work. There is no point raised by the respondents on this appeal that if the appeal is successful, we should otherwise hold that by-law 17 authorised the work.

23 There is no formal procedure in the Appeal Panel for a notice of cross-appeal which would be ordinarily be filed, for example, in the NSW Court of Appeal if a

respondent wished to argue a point not decided at first instance. But this formality would be no obstacle to raising such a point (as long as due notice was given) as the Appeal Panel is required to conduct itself with minimum formality and to reach decisions according to the substantive merits of the case, and not by reference to legal form or technicalities - *Moloney v Taylor* [2016] NSWCA 199 per the Court at [30]. Nevertheless, whether by-law 17 authorises the work has not been raised as an issue on this appeal, although that fact may have no significance given our decision in relation to by-law 32 and the construction of the 2015 Act which we prefer.

24 By-law 32 says:

> 32. Special Privilege for Commercial Lot 1
>
> 1. The owner of Commercial Lot 1 has the special privilege to carry out works on the lot without first obtaining the consent of the owners corporation to the alteration of the common property in connection with those works.
>
> 2. The owner must give the corporation at least 7 days written notice of the intention to carry out works under this by law. The notice should give sufficient details of the works to be carried out to allow the owners to determine if the intended works are in compliance with this by law.
>
> 3. Any works carried out under this by-law involving disruption to the access to the car space Lots to be carried out between 8:30 am-5:30 pm Monday-Friday only.
>
> 4. Any works carried out under this by-law must not interfere with the structural integrity of the Building.
>
> 5. The owner must repair any damage to the common property caused by the carrying out of the works under this by-law.
>
> 6. The owner of Commercial Lot 1 is responsible for the maintenance and repair of any common property altered as a result of work carried out under this by-law.

The Structure of the Dispute

25 At first instance the appellant's case was that the work done to the common property was not authorised and was prohibited by ss 108(2) and 111 of the 2015 Act.

26 Section 108 says:

> **108. Changes to common property**
>
> (1) **Procedure for authorising changes to common property**
>
> An owners corporation or an owner of a lot in a strata scheme may add to the common property, alter the common property or erect a new structure on

common property for the purpose of improving or enhancing the common property.

(2) Any such action may be taken by the owners corporation or owner only if a special resolution has first been passed by the owners corporation that specifically authorises the taking of the particular action proposed.

(3) **Ongoing maintenance**

A special resolution under this section that authorises action to be taken in relation to the common property by an owner of a lot may specify whether the ongoing maintenance of the common property once the action has been taken is the responsibility of the owners corporation or the owner.

(4) If a special resolution under this section does not specify who has the ongoing maintenance of the common property concerned, the owners corporation has the responsibility for the ongoing maintenance.

(5) A special resolution under this section that allows an owner of a lot to take action in relation to certain common property and provides that the ongoing maintenance of that common property after the action is taken is the responsibility of the owner has no effect unless:

(a) the owners corporation obtains the written consent of the owner to the making of a by-law to provide for the maintenance of the common property by the owner, and

(b) the owners corporation makes the by-law.

(6) The by-law:

(a) may require, for the maintenance of the common property, the payment of money by the owner at specified times or as determined by the owners corporation, and

(b) must not be amended or repealed unless the owners corporation has obtained the written consent of the owner concerned.

(7) Sections 143 (2), 144 (2) and (3) and 145 apply to a by-law made for the purposes of this section in the same way as they apply to a common property rights by-law.

Note. A new by-law or other changes to the by-laws for a strata scheme must be approved by a special resolution of the owners corporation (see section 141).

27 Section 111 says:

111. Work by owners of lots affecting common property

An owner of a lot in a strata scheme must not carry out work on the common property unless the owner is authorised to do so:

(a) under this Part, or

(b) under a by-law made under this Part or a common property rights by-law, or

(c) by an approval of the owners corporation given by special resolution or in any other manner authorised by the by-laws.

28 The appellant submitted that s 108(2) allowed for the alteration to common property "only if" the owners corporation had passed such a special resolution, and it was an agreed fact that no special resolution of the type referred to had been obtained.

29 The appellant submitted that s 111 also prohibited the work unless one of the authorisations provided for in sub-s 111(a)-(c) had been given, no such authorisation had been given and so s 111 also prohibited the work.

30 In response, the respondents submitted that they did have authorisation, namely a common property rights by-law of the kind referred to in s 111(b). The respondents submitted that by-law 32 was a common property rights by-law as defined in s 142(b) of the 2015 Act.

31 Section 142 says:

> **142. Common property rights by-law**
>
> For the purposes of this Act, a common property rights by-law is a by-law that confers on the owner or owners of a specified lot or lots in the strata scheme:
>
> (a) a right of exclusive use and enjoyment of the whole or any specified part of the common property, or
>
> (b) special privileges in respect of the whole or any specified part of the common property (including, for example, a licence to use the whole or any specified part of the common property in a particular manner or for particular purposes),
>
> or that changes such a by-law.

32 The respondents submitted that by-law 32 fell within s 142(b) because it conferred the special privilege of being authorised to undertake common property work in connection with the works on Lot 148 without having to obtain the passing of a special resolution as required by s 108(2). The respondents submitted the special privilege was in relation to the whole of the common property or, in the alternative, a specified part of the common property (being the part that fell within the description "in connection with" the Lot 148 work).

33 In reply, the appellant made three submissions.

34 First, it submitted that on the proper construction of by-law 32, the only work authorised by that by-law (assuming all other things in favour of the respondents) in relation to common property was minor interference (such as

the erection of a ladder on common property) and not significant alteration to common property such as trenching. It submitted that the words “on the lot” in by-law 32.1 meant “within” the lot.

35 Second, it submitted that by-law 32 was not a common property rights by-law because exemption from the requirements of s 108 could not be a “special privilege” within the meaning of that term in s 142(b). The appellant submitted that one could not, by a by-law, exempt a party from statutory obligations and restrictions. Alternatively, the appellant submitted that the identified special privilege was not in respect of the whole of the common property per s 142(b), and, alternatively, was not in respect of any specified part of the common property. Accordingly, even if the by-law did confer a special privilege, it failed to satisfy the second half of s 142(b). If those submissions were accepted, by-law 32 would not have satisfied the definition in s 142(b) and would not therefore have fallen within the authorisation provided for by s 111(b).

36 The appellant’s third submission was that if by-law 32 was a common property rights by-law within the definition of s 142(b), it was inconsistent with s 108 of the 2015 Act, and to the extent of that inconsistency, had no force or effect pursuant to s 136(2) of the 2015 Act.

37 Section 136 says:

> **136. Matters by-laws can provide for**
>
> (1) By-laws may be made in relation to the management, administration, control, use or enjoyment of the lots or the common property and lots of a strata scheme.
>
> (2) A by-law has no force or effect to the extent that it is inconsistent with this or any other Act or law.

38 The appellant submitted that the authorisation purportedly conferred by-law 32 to undertake work on the common property without first obtaining the passing of a special resolution by the owners corporation to that effect was inconsistent with s 108 of the 2015 Act and in particular s 108(2), and was thus of no force or effect to the extent of that inconsistency.

The Tribunal’s Decision

39 The Tribunal held that, on the proper construction of by-law 32, the words “on the lot” encompassed the alteration or interference with common property to

the extent reasonably necessary to fit-out Lot 148, the work undertaken by the respondents to the common property fell within that description and thus was within by-law 32, and the Tribunal rejected the appellants submission that "on the lot" was restricted to, for example, the erection of a ladder on common property for the purpose of facilitating the fit-out works.

40 In coming to that decision the Tribunal referred to and applied the principles applicable to the construction of by-laws set out in the judgment of McColl JA in *The Owners – Strata Plan 3397 v Tate* [2007] NSWCA 207 at [71]-[72].

41 There is no appeal from that finding other than in relation to a pool gate (but on a different basis) which is wholly physically situated on Lot 147.

42 The Tribunal held that by-law 32 was a special privileges by-law within the definition provided in s 142(b). It held that the special privilege was the right to perform fit-out works to the Lot and any common property in connection with those works irrespective of whether the owners corporation consented to the works and (in respect of work beyond cosmetic works altering common property) did not require the further passing of a by-law, either by way of general resolution (minor renovations) or special resolution (renovations beyond minor renovations).

43 The Tribunal held that there was no inconsistency between by-law 32 and s 108. We pause to note that neither s 108 nor s 11 are directed to by-laws per se, but are directed to work (which in this case was done pursuant to a by-law). There is, of course, a distinction between the two, and that distinction should not be overlooked.

44 The Tribunal said that the appellant had submitted that there were two inconsistencies:

(1) that by-law 32 bypassed the right of the owners corporation to have prior notice of proposed alterations to common property and the requirement for the passing of a special resolution; and

(2) by-law 32 did not refer to the alterations to common property with sufficient specificity.

45 The Tribunal reasoned that the point of the provisions of the 2015 Act providing for the making of common property rights by-laws was to allow for the granting

of special privileges over common property inconsistent with the usual rights of lot owners to use common property. Thus, it was the 2015 Act itself, the Tribunal reasoned, which allowed the respondents to alter common property in connection with the Lot 148 works. In that way, the Tribunal reasoned, it was the Act itself which allowed for the work done.

46 That holding included the unstated holding that s 108(2) was subordinate to s 111(b), which, for reasons to which we will come, we think is incorrect. Rather, we consider s 111(b) to be subordinate to s 108(2).

47 The second alleged inconsistency was said to be that the general authority purportedly provided by by-law 32 was inconsistent with the requirement in s 108 for specific authorisation for the taking of the particular action proposed.

48 The Tribunal considered the decision of Brereton J (as his Honour then was) in *Stolfa v The Owners - Strata Plan 4366* [2009] NSWSC 589 and the appeal from that decision, *Stolfa v Hempton [2010] NSWCA 218*. Those decisions concerned the predecessor to s 108, being s 65A of the *Strata Schemes Management Act 1996* (NSW) (the "1996 Act"), which was in similar but not identical terms to s 108 of the 2015 Act.

49 The Tribunal said that those decisions were authority for the proposition that the words "specifically authorises the taking of the particular action proposed" in s 65A [which words also appear in s 108(2)] meant that the question of whether a special resolution was adequately specific for the purposes of the 1996 Act would include considerations of common sense and reasonableness in order to avoid overly general or overly pedantic resolutions which would frustrate the intent of the section. There needed to be a degree of specificity, but there did not have to be, for example, final plans presented when the special resolution was passed.

50 The Tribunal said that it was not persuaded that by-law 32 lacked sufficient specificity to be inconsistent with s 108(2). That is, by-law 32 was sufficiently specific as to the authorisation it purported to grant to not be inconsistent with the degree of specificity s 108(2) would have required of a special resolution if such a special resolution was sought and obtained.

51 The Tribunal turned to the notice provision in by-law 32.2. The Tribunal found there had been a breach of by-law 32.2 in relation to notice but declined to grant any relief in relation to that breach.

52 The Tribunal said that if it were wrong on its construction of by-law 32, and the works fell outside the terms of that by-law, then it would have ordered the respondents to restore the common property to the same condition it was in prior to the commencement of the fit-out work.

53 The Tribunal further said that, if it were wrong on its construction of by-law 32, or if it were wrong in its conclusion that by-law 32 was not invalid, and it ordered the respondents to restore the common property, it would have allowed the respondents a sufficient opportunity (meaning time) to put forward a motion at a general meeting of the owners corporation seeking retrospective approval for the works undertaken.

The Appeal

54 The appellant appealed on the following grounds.

(1) The Tribunal erred in finding that by-law 32 was a common property rights by-law within the meaning of that term in s 142(b) of the 2015 Act.

(2) The Tribunal erred in finding that by-law 32 was not inconsistent with s 108 of the 2015 Act and erred in not finding that, to the extent of the inconsistency, it was of no force or effect.

(3) The Tribunal erred in finding that the work to the pool gate fell within the terms of by-law 32.

55 Without any disrespect to the detailed and cogent submissions of the parties, their submissions may be summarised as follows.

56 The appellant first submitted that satisfaction of the conditions of s 108 was a precondition for the doing of any work which added to, altered or erected new structures on common property. Second, it submitted that a common property rights by-law could not, as a matter of statutory construction, confer a special privilege amounting to exemption from a provision of the 2015 Act. This point was correctly said to be closely related to the first question. If those submissions were accepted, the by-law was (to the extent it applied to work on common property) inconsistent with the Act and thus of no force or effect. The

third point was that the pool gate was not "connected with" the Lot 148 work within the meaning of that term in by-law 32.

57 The respondents submitted that s 111(b) provided an alternative source of authorisation to s 108(2), the by-law was a common property rights by-law as referred to in s 111(b) and as defined by s 142(b), the special privilege being the exemption from the need to obtain a s 108(2) special resolution. It submitted that the by-law was in respect of the whole of the common property, or alternatively a specified part, being the part of the common property which required alteration in connection with the Lot 148 work. They submitted that as the by-law was valid under the 1996 Act so it was valid under the 2015 Act.

Validity

58 The words valid, validity, void and the like were used by both parties from time to time in relation to by-law 32, but we do not consider that concept to be relevant to the issues in this appeal. We shall first explain how the issue arose and then provide our reasons for coming to the conclusion that the validity of by-law 32 is not in issue in this appeal.

59 By-law 32 was one of the original by-laws registered in November 2000, being a time when the 1996 Act was in operation. The 2015 Act, with which this appeal is concerned, did not commence, and did not repeal the 1996 Act, until 30 November 2016.

60 The 2015 Act's transitional provisions, found in Schedule 3 to that Act, provide in cl 4(2) that:

> Despite any other provision of this Act, a by-law continued in force by this Act is taken to be a valid by-law if it was a valid by-law immediately before the commencement of this clause.

61 There is no issue that by-law 32 continued in force pursuant to s 134(2) of the 2015 Act.

62 The respondents submitted that, because of that transitional provision, if under the 1996 Act by-law 32 authorised the doing of the work (even though the work had not been done), it continued to authorise the doing of that work under the 2015 Act irrespective of ss 108, 136 and 142 of the 2015 Act. They submitted

that only if by-law 32 was not valid under the 1996 Act did the matter of its "efficacy" under the 2015 Act arise.

63 The respondents submitted that there was no difference between "validity" and "force or effect". If something was valid, it had force or effect. If invalid, it did not.

64 The respondents submitted that, at the time the privilege contained within by-law 32 was conferred, s 65A of the 1996 Act provided that an owners corporation or a lot owner could add to, alter or erect a new structure on common property for the purpose of improving or enhancing the common property but only if a special resolution had first been passed at a general meeting of the owners corporation that specifically authorised the taking of the particular action proposed. They submitted that by-law 32 intended to privilege the owner by removing the need for the owner to obtain the special resolution mentioned in s 65A. They submitted that there was nothing in the 1996 Act which limited the scope of the by-law making power, and thus by-law 32 was a valid by-law.

65 In response, the appellants submitted, correctly, that s 65A was not in operation in November 2000 when the by-laws (of which by-law 32 was part) were first registered. Section 65A of the 1996 Act was not introduced until 2004 – *Strata Schemes Management Amendment Act 2004* (NSW), Schedule 1, cl 11.

66 Nice questions might arise as to what effect the introduction of s 65A might have had on by-law 32 because of the general presumption against retrospectivity - see D C Pearce and R S Geddes, *Statutory Interpretation in Australia*, 8th ed., LexisNexis Butterworths, 2014, at [10.15] and s 30(1)(c) of the *Interpretation Act 1987* (NSW) which is to the effect that the amending or repeal of an Act does not affect any right, privilege, obligation or liability acquired, accrued or incurred under the Act.

67 But we do not consider that we need to deal with those issues, nor did either party suggest otherwise, because the validity (as distinct from the force or effect) of the by-law is not in issue in the proceedings.

68 The basis of Ground 2 of the appeal, the inconsistency ground, is the alleged inconsistency between by-law 32 and s 108 of the 2015 Act. Reliance was placed on s 136(2) of the 2015 Act. In terms, s 136(2) says that a by-law "has *no force or effect* to the *extent* that it is *inconsistent*" with the 2015 Act, any other Act or law. The words "valid", "validity", "void" and the like do not appear in s 136.

69 We do not accept the respondents' submission that there is no difference between "validity" and "no force or effect". In our opinion there is a distinct difference between something being invalid and something being of no force or effect. Of course, if something is invalid it will not have any force or effect, but not having force or effect does not necessarily make something invalid, either wholly or partly.

70 White J, as his Honour then was, noted the distinction between validity on the one hand, and the *operation* of a by-law on the other, in *White v Betalli* [2006] NSWSC 537; (2006) 66 NSWLR 690 at [53] (an appeal from his Honour's decision was dismissed). His Honour said:

> "However, the by-law is not inconsistent with s 49(1). The first reason is that s 49(1) only limits the operation of a by-law. It does not strike at the validity of a by-law. That is to say, by-law 20 may not be capable of preventing the owner of lot 2 from granting an easement over the watercraft storage area in favour of a third party. That does not mean that the by-law is invalid. Rather, it is not capable of having that operation."

71 Section 49(1) of the 1996 Act referred to by his Honour was in the following terms:

> **49 Restrictions on by-laws**
>
> (1) **By-law cannot prevent dealing relating to lot** No by-law is capable of operating to prohibit or restrict the devolution of a lot or a transfer, lease, mortgage, or other dealing relating to a lot.

72 Although his Honour was dealing with the difference between "validity" and "operation", rather than "validity" and "force or effect", we do not perceive any substantive difference between "operation" and "force and effect". Nor did Darke J in *Noon v The Owners - Strata Plan No. 22422* [2014] NSWSC 1260 who referred to White J's distinction with approval, at [65], when his Honour was directly concerned with the difference between validity and force or effect.

73 That view, that force or effect are different to validity, is consistent with the fact that s 136(2) says that a by-law only has no force or effect *to the extent* that it is inconsistent with the Act. By necessary implication, to the extent a by-law is consistent with the Act then it will have force and effect. Where inconsistent (and only to that extent), to adopt White J's wording, the by-law would simply not have the operative effect it purports to have.

74 As by-law 32 provides both for work on Lot 148 and work on common property, and the work on Lot 148 is not said to fall foul of s 136(2), the by-law would have force and effect at least to that extent.

75 As we understand the appellant's case, both on appeal and at the hearing before the Tribunal, the appellant does not challenge the *validity* of by-law 32 even though it does use the words valid, validity and void from time to time. But that is simply a forgivable looseness of language in this non-simple case. The appellant's case is founded on s 136(2) which, in terms, concerns inconsistency and not validity.

76 Therefore, in our opinion, the questions whether by-law 32 is valid under the 1996 Act or valid under the 2015 Act are not relevant to the issues in this case.

The Principles Applicable to Statutory Construction

77 The principles applicable to statutory construction are settled.

78 In CIC Insurance Ltd v Bankstown Football Club Ltd [1997] HCA 2; (1997) 187 CLR 384 Brennan CJ, Dawson, Toohey and Gummow JJ said at 408 (footnotes omitted):

> "It is well settled that at common law, apart from any reliance upon s 15AB of the Acts Interpretation Act 1901 (Cth), the court may have regard to reports of law reform bodies to ascertain the mischief which a statute is intended to cure. Moreover, the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses "context" in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy. Instances of general words in a statute being so constrained by their context are numerous. In particular, as McHugh JA pointed out in Isherwood v Butler Pollnow Pty Ltd, if the apparently plain words of a provision are read in the light of the mischief which the statute was designed to overcome and of the objects of the legislation, they may wear a very different appearance. Further, inconvenience or improbability of result may assist the court in preferring to the literal meaning an alternative

> construction which, by the steps identified above, is reasonably open and more closely conforms to the legislative intent.

79 A year later, in *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355, McHugh, Gummow, Kirby and Hayne JJ said (footnotes omitted):

> **[69]** The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined 'by reference to the language of the instrument viewed as a whole'. In Commissioner for Railways (NSW) v Agalianos, Dixon CJ pointed out that 'the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed'. Thus, the process of construction must always begin by examining the context of the provision that is being construed.
>
> **[70]** A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions. Reconciling conflicting provisions will often require the court 'to determine which is the leading provision and which the subordinate provision, and which must give way to the other'. Only by determining the hierarchy of the provisions will it be possible in many cases to give each provision the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme.
>
> **[71]** Furthermore, a court construing a statutory provision must strive to give meaning to every word of the provision. In Commonwealth v Baume Griffith CJ cited R v Berchet to support the proposition that it was 'a known rule in the interpretation of statutes that such a sense is to be made upon the whole as that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent'."

80 The pre-existing law and legislative history may be relevant to construing statutory provisions. In *Alphapharm Pty Ltd v H Lundbeck A/S* [2014] HCA 42; (2014) 254 CLR 247 the plurality said at [42] (footnotes omitted):

> "The pre-existing law and the legislative history should not deflect the court from its duty to resolve an issue of statutory construction, which is a text-based activity. However, both parties recognised that the task of statutory construction in this case required some appreciation of the pre-existing law and the legislative history of relevant provisions. Undoubtedly, questions of policy can inform the court's task of statutory construction."

81 In *Singh bhnf Ambu Kanwar v Lynch* [2020] NSWCA 152 Basten JA, with whom Leeming and Payne JJA agreed, said at [33] (footnotes omitted):

"… Nevertheless, as explained in *Project Blue Sky Inc v Australian Broadcasting Authority*:

> "The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute."

That mandate is, of course, consistent with the requirement of s 33 of the *Interpretation Act* to prefer a construction that would promote the purpose or object underlying the Act to one which would not. Nevertheless, the purpose or object should not be derived extraneously, excluding consideration of the language of a critical provision (whether a defined term or not) and then applied to construe that provision. The correct approach is that set out in *Independent Commission Against Corruption v Cunneen*:

> "[35] … The best that can be done is to reason in terms of relative consistency – internal logical consistency and overall consistency in accordance with the principles of statutory interpretation adumbrated in *Project Blue Sky* – to determine which of the two competing constructions of [the term in question] is more harmonious overall."

Pre-Existing Law and Legislative History

82 Section 108 is expressed in broadly equivalent terms to those found in s 65A of the 1996 Act.

83 Section 65A said:

> **65A Owners corporation may make or authorise changes to common property**
>
> (1) For the purpose of improving or enhancing the common property, an owners corporation or an owner of a lot may take any of the following action, but only if a special resolution has first been passed at a general meeting of the owners corporation that specifically authorises the taking of the particular action proposed:
>
> (a) add to the common property,
>
> (b) alter the common property,
>
> (c) erect a new structure on the common property.
>
> (2) A special resolution that authorises action to be taken under subsection (1) in relation to the common property by an owner of a lot may specify whether the ongoing maintenance of the common property once the action has been taken is the responsibility of the owners corporation or the owner.
>
> (3) If a special resolution under this section does not specify who has the ongoing maintenance of the common property concerned, the owners corporation has the responsibility for the ongoing maintenance.
>
> (4) A special resolution under this section that allows an owner of a lot to take action in relation to certain common property and provides that the ongoing maintenance of that common property after the action is taken is the responsibility of the owner has no effect unless:

(a) the owners corporation obtains the written consent of the owner to the making of a by-law to provide for the maintenance of the common property by the owner, and

(b) the owners corporation makes such a by-law.

(5) A by-law made for the purposes of this section:

(a) may require, for the maintenance of the common property, the payment of money by the owner concerned at specified times or as determined by the owners corporation, and

(b) must not be amended or repealed unless a special resolution has first been passed at a general meeting of the owners corporation and the owners corporation has obtained the written consent of the owner concerned.

(6) The provisions of sections 52 (3), 54 (2) and (3) and 55 apply to a by-law made for the purposes of this section in the same way as those provisions apply to a by-law to which Division 4 of Part 5 of Chapter 2 applies.

84 Section 65A was introduced into the 1996 Act in 2004 as part of a package of reforms proposed by the Department of Fair Trading's National Competition Policy Review into the 1996 Act. In that Report, at section 5.5 headed "Owners corporation use of empowering by-laws" it was said:

> "While the Act says that an owners corporation has the responsibility for the control, management and administration of the common property of the strata scheme for the benefit of the owners (section 61(1)), it does not specifically provide that common property can be altered or added to. It has been common practice over the years for owners corporations to pass by-laws to allow the alteration or adding to of common property, by granting exclusive use of certain common property to the person involved (eg a lot owner who wishes to add an awning to a balcony). Such by-laws have been known as "empowering" by-laws.
>
> Under discussion through the Issues Paper, was the possible need for the Act to clarify the powers of the owners corporation in areas where there are uncertainties such as alteration of common property. Also raised during the consultation process was the possibility of the Act placing some boundaries around the powers of owners corporations generally in an attempt to avert the use of by-laws to improperly grant themselves inappropriate powers. While the Act does contain some provisions outlining situations which by-laws cannot address (eg the banning of a guide dog or hearing dog), there is no overriding provision which prevents owners corporations using by-laws in attempting to deal with clearly inappropriate or illegal matters.
>
> While a by-law which provided for a matter which involved an illegal activity (eg that vehicles parked on common property without approval of the owners corporation would have their wheels removed), would be unenforceable, the situation would be improved if owners corporations were specifically prohibited from making by-laws which went outside the Strata Schemes Management Act or any other legislation.
>
> In regard to the uncertainty over the owners corporation's power to add to or alter common property (or to give lot owners permission to do so), this is

> clearly an area of the Act which would benefit from being clarified. The Act curiously provides (at section 140) that an Adjudicator may make an order requiring an owners corporation to consent to work proposed to be carried out to common property by a lot owner, yet the Act does not make any specific provision for approving such work in the first place. Also, there is no guidance on the type of resolution needed (ordinary, special or unanimous).
>
> Findings of review It appears to be clear that the uncertainties over this area should be removed as far as possible and that it would be appropriate for the owners corporation to have a specific power to alter or add to common property, to improve the common property, and to permit lot owners to do so. The type of resolution required could be a special resolution (a resolution where no more than 25% vote against it) in keeping with the required vote for the passing of a by-law. There should be a requirement for the owners corporation to specify the ongoing maintenance responsibilities for the alterations and additions."

85 In the Second Reading Speech the Minister said:

> "The bill makes it clear that the owners' corporation has the necessary power to add to, alter, or erect new structures on common property or allow others to do so. This previously uncertain area has often resulted in by-laws being devised to overcome the doubtfulness of the situation. The powers of the owners' corporation and the responsibility for ongoing maintenance of common property affected in this aspect of strata life will now be made clear to all concerned."

86 And:

> "The bill also deals with some essential by-law issues. Many owners' corporations use by-laws to deal with matters specific to their own complexes. By-laws are intended to enhance and utilise the laws that are already in place so that the circumstances of a particular scheme can be accommodated. They are not able to change fundamentally what the general law already provides. It is recognised that some owners' corporations may attempt to stretch by-laws further than their intended limit, and the bill contains a provision that will stress that by-laws cannot be used in an endeavour to go beyond the provisions of the Strata Schemes Management Act or any other relevant law. It is also made clear that by-laws that conflict with any existing law are invalid."

87 Thus, the problem identified arose from the use of by-laws in relation to the alteration or adding to common property, and a perceived gap in the then provisions of the 1996 Act. The result was, inter alia, the introduction of s 65A and s 43(4). Section 43(4) was the predecessor to s 136(2) of the 2015 Act and said:

> A by-law has no force or effect to the extent that it is inconsistent with this or any other Act or law.

88 Section 65A received judicial consideration in *Stolfa*.

89 At first instance Brereton J held that s 65A applied to all work which was not repairs and maintenance work (at [65]).

90 At [82] his Honour said:

> "… Section 65A is concerned with controlling and regulating alterations and additions to common property, other than repairs and maintenance which the Owners Corporations are bound to effect under s 62. Its effect is to provide that alterations and additions may be made, for the purpose of improving or enhancing (as distinct from repairing and maintaining) the common property, **if and only if specifically authorised. Absent such authorisation, alterations and additions (beyond repairs and maintenance) cannot be made**."
>
> (Our emphasis)

91 At [97] his Honour said:

> "… Within the scheme created by the *Strata Schemes (Freehold Development) Act* (which vests title to common property in the owners corporation) and the *Strata Schemes Management Act* (which imposes duties upon the owners corporation in key management areas including, relevantly, the management of common property), **the voting requirements in s 65A serve a public policy function of protecting the beneficial proprietary rights of lot owners in common property**. Works which alter, add to, or erect a new structure on common property may be carried out 'only if' the voting requirements in s 65A are satisfied. **The choice of words used evinces a legislative intention that there be only one method for authorising such work, namely that provided in s 65A**; the provision is 'essentially prohibitory' in that it expressly precludes any other method for authorising the carrying out of those categories of works, and thus precludes estoppels …"
>
> (Our emphasis)

92 The correctness of those passages was not challenged on the appeal.

93 Further reform occurred with the passing of the 2015 Act which repealed and replaced the 1996 Act.

94 Section 65A was replaced by s 108, s 43(4) became s 136(2), and various additional provisions were added. Amongst the provisions added (in the sense that they had no equivalent in the 1996 Act) were ss 109-111.

95 In the Second Reading Speech the Minister said this:

> "The bill introduces a more sensible framework that consists of a three-tiered approach. The main premise of this reform is that if the renovation or work will not affect other residents and does not interfere with the structural, waterproofing or external appearance of the building then a full special resolution—that is, 75 per cent—is not required to undertake the work. Approval will not be required for cosmetic work, which includes installing picture hooks, carpet, painting and filling minor holes and cracks. The next level is minor renovations, which will require only a general resolution at a meeting—a simple majority. This includes work such as kitchen renovations, as long as the waterproofing is not affected; replacing cupboards; installing cabling or wiring; and, importantly, installing timber or other hardwood floors.

> Lot owners will need to provide adequate information on minor renovations, such as work plans, timing and contractors' details. The owners corporation will be able to place reasonable conditions on the work, such as ensuring the removal of waste or requiring the work be carried out by a licensed tradesperson. Once provided with information, the owners corporation will not be able to unreasonably refuse minor renovations. To enforce this, the tribunal is being given the power to make orders to that effect. Importantly, owners corporations will be able to make by-laws that deem certain types of work to be cosmetic or minor renovations for the purposes of their scheme, as long as the by-law is consistent with the Act. Major work, such as moving structural walls or enclosing a veranda, will require approval by special resolution of the owners corporation, as is currently required. This three-tiered approach allows owners corporations to tailor a process to suit their circumstances and needs."

96 How ss 108 and 111 work together is a central question in this appeal, but ss 109 and 110, also found in the same Part 6 as ss 108 and 111, are centrally relevant to that question as well because of their content and because statutory provisions are construed in the context of the whole statute and not in isolation.

97 Section 109 says:

> **109 Cosmetic work by owners**
>
> (1) The owner of a lot in a strata scheme may carry out cosmetic work to common property in connection with the owner's lot without the approval of the owners corporation.
>
> (2) Cosmetic work includes but is not limited to work for the following purposes:
>
> (a) installing or replacing hooks, nails or screws for hanging paintings and other things on walls,
>
> (b) installing or replacing handrails,
>
> (c) painting,
>
> (d) filling minor holes and cracks in internal walls,
>
> (e) laying carpet,
>
> (f) installing or replacing built-in wardrobes,
>
> (g) installing or replacing internal blinds and curtains,
>
> (h) any other work prescribed by the regulations for the purposes of this subsection.
>
> (3) An owner of a lot must ensure that:
>
> (a) any damage caused to any part of the common property by the carrying out of cosmetic work by or on behalf of the owner is repaired, and
>
> (b) the cosmetic work and any repairs are carried out in a competent and proper manner.

(4) The by-laws of a strata scheme may specify additional work that is to be cosmetic work for the purposes of this section.

(5) This section does not apply to the following work:

(a) work that consists of minor renovations for the purposes of section 110,

(b) work involving structural changes,

(c) work that changes the external appearance of a lot, including the installation of an external access ramp,

(d) work that detrimentally affects the safety of a lot or common property, including fire safety systems,

(e) work involving waterproofing or the plumbing or exhaust system of a building in a strata scheme,

(f) work involving reconfiguring walls,

(g) work for which consent or another approval is required under any other Act,

(h) any other work prescribed by the regulations for the purposes of this subsection.

(6) Section 108 does not apply to cosmetic work carried out in accordance with this section.

98 Section 110 says:

110 Minor renovations by owners

(1) The owner of a lot in a strata scheme may carry out work for the purposes of minor renovations to common property in connection with the owner's lot with the approval of the owners corporation given by resolution at a general meeting. A special resolution authorising the work is not required.

(2) The approval may be subject to reasonable conditions imposed by the owners corporation and cannot be unreasonably withheld by the owners corporation.

(3) Minor renovations include but are not limited to work for the purposes of the following:

(a) renovating a kitchen,

(b) changing recessed light fittings,

(c) installing or replacing wood or other hard floors,

(d) installing or replacing wiring or cabling or power or access points,

(e) work involving reconfiguring walls,

(f) any other work prescribed by the regulations for the purposes of this subsection.

(4) Before obtaining the approval of the owners corporation, an owner of a lot must give written notice of proposed minor renovations to the owners corporation, including the following:

(a) details of the work, including copies of any plans,

(b) duration and times of the work,

(c) details of the persons carrying out the work, including qualifications to carry out the work,

(d) arrangements to manage any resulting rubbish or debris.

(5) An owner of a lot must ensure that:

(a) any damage caused to any part of the common property by the carrying out of minor renovations by or on behalf of the owner is repaired, and

(b) the minor renovations and any repairs are carried out in a competent and proper manner.

(6) The by-laws of a strata scheme may provide for the following:

(a) additional work that is to be a minor renovation for the purposes of this section,

(b) permitting the owners corporation to delegate its functions under this section to the strata committee.

(7) This section does not apply to the following work:

(a) work that consists of cosmetic work for the purposes of section 109,

(b) work involving structural changes,

(c) work that changes the external appearance of a lot, including the installation of an external access ramp,

(d) work involving waterproofing,

(e) work for which consent or another approval is required under any other Act,

(f) work that is authorised by a by-law made under this Part or a common property rights bylaw,

(g) any other work prescribed by the regulations for the purposes of this subsection.

(8) Section 108 does not apply to minor renovations carried out in accordance with this section.

Note. Section 132 enables rectification orders to be made against owners of lots for damage caused by work done by owners.

99 Section 108 is in essentially similar terms to s 65A.

100 Prior to the 2015 Act, there were, essentially, two forms of work recognised: repairs and maintenance on the one hand, and work which added to, altered or erected new structures on common property on the other.

101 The 2015 Act introduced two additional types of work: cosmetic work (s 109) and minor renovation work (s 110), both of which authorised owners of lots (but not the owners corporation) to do certain defined work.

102 Importantly, both s 109 and s 110 each contain a sub-section which says that s 108 does not apply to work done under either s 109 or s 110, namely sub-ss 109(6) and 110(8). No equivalent provision appears in s 111.

103 Sections 109 and 110 (also in contradistinction to s 111) contain detailed descriptions of the type of work with which they are concerned, detailed descriptions of the type of work to which the sections do not apply and both sections permit by-laws to be passed which may specify additional work (presumably not including the work expressly excluded in each section) as cosmetic or minor renovation work.

104 Under the 2015 Act the passing of by-laws – a change to the by-laws - requires the passing of a special resolution by the owners corporation – s 141. A resolution of an owners corporation is a special resolution if it is passed at a properly convened general meeting, and not more than 25% of the value of votes cast are against the resolution – s 5.

105 Therefore, one can perceive from the text of ss 109 and 110 a legislative intention to carve out from s 108 certain work. That work, which is expressly excluded from the need to obtain the passing of a special resolution per s 108(2), is described in some detail. Work which ss 109 and 110 do not apply is described in some detail. Allowance is made for by-laws (passed by special resolution) to specify additional cosmetic or minor renovation work.

106 Thus, parliament applied its mind in specific detail to work to which s 108 was not to apply. The same cannot be said for s 111(b) on the respondents' construction.

107 Section 111 is also directed to lot owners to the exclusion of the owners corporation, just as ss 109 and 110 do.

108 Section 111 commences with prohibitory language – an owner "must not" carry out work – followed by the words "unless … authorised to do so".

109 The section then provides that the authorisation may be given under one of the three categories which followed those opening words.

110 The first is an authorisation under that Part, being Part 6, and seems an obvious reference to a s 108 special resolution, the doing of cosmetic work under s 109 (which does not require the consent of the owners corporation) or minor renovation work under s 110 (which requires the passing of a general resolution by the owners corporation).

111 The third is an authorisation given a special resolution of the owners corporation (which is either a s108 special resolution or the same type of resolution but being under s 111) or in some other manner authorised by the by-laws. We do not need to explore the limits of the latter but suffice to say for present purposes that, whatever other manner may be authorised by the by-laws, it has to result in an approval given by the owners corporation.

112 The second category of authorisation, being that found in s 111(b), provides for authorisation under a by-law made under Part 6 or a common property rights by-law.

113 As to the former, Part 6 refers to by-laws "made under this Part" and under which work may be done in ss 108(5) and (6), 109(4) and 110(6). We have already considered ss 109 and 110 above.

114 Section 108(5) (quoted at [26] above) says that a s 108 special resolution (which provides that a relevant lot owner shall be responsible for the maintenance of the subject common property) will have no effect unless a by-law is made to that effect. It then provides, in sub-s (7) that ss 143(2), 144(2) and (3) and 145 apply to such a by-law in the same way they apply to a common property rights by-law.

115 Section 143(2) refers to the imposition of conditions to be specified in the by-law. Section 144(2) refers to the payment of money. Section 144(3) refers to a discharge of the owners corporation from its obligation to maintain and repair that common property and s 145 makes clear that such a by-law continues to operate for the benefit of, and is binding on, the owners from time to time of the

lot or lots specified in the by-law. None of those sub-sections enlarge the field of operation of any by-law.

116 That leaves the authorisation under s 111(b) provided by a common property rights by-law and whether that authorisation can have the effect of allowing an owner to perform work on common property not otherwise authorised under the provisions we have just mentioned, but without the passing of a special resolution as required by s 108(2).

117 Against the background of ss 109 and 110 being detailed carve outs from s 108, and the particular provisions in s 111(a), (c) and the first part of s 111(b) as we have discussed above, we do not think s 111(b) was intended to provide a further carve out from s 108 by way of special privileges conferred on a lot owner by way of a common property rights by-law.

118 Expressed another way, in our opinion the appellant is correct in submitting that the expression "special privileges" in s 142(2) does not, on its proper construction, include exemption from the requirements of the 2015 Act. Our reasons are as follows.

119 First, ss 108 – 110 are detailed provisions concerned with the doing of work. In contradistinction, if the respondents' construction of "special privileges" were correct, the work that could be authorised under such a common property rights by-law is not the subject of any detailed provision (unlike ss 109 and 110) and is, in substance, unconstrained by any statutory limits. This would seem an odd result.

120 Second, ss 109 and 110 expressly provide that s 108 does not apply to the work referred to in those sections. Neither s 111(b) nor s 142 include any like provision.

121 Third, we would think s 108 has the same purpose as s 65A as described by Brereton J in *Stolfa*, namely that its voting requirements serve a public policy function of protecting the beneficial proprietary rights of lot owners in common property.

122 That public policy function is replicated, in our opinion, in the 2015 Act in s 108, with the specific and detailed carve outs provided by ss 109 and 110. In our

opinion, it is not likely that the legislature would allow for unspecified and undetailed carve outs by way of a common property rights by-law in the absence of express words to that effect.

123 It is true that any change to by-laws to pass a common property rights by-law would require a special resolution under s 141 if that common property rights by-law did not already exist. But Parliament could be taken to know that by-laws for many strata schemes already existed at the time of the passing of the 2015 Act, and thus its provisions would apply to by-laws already in existence such as by-law 32 in this case, and that such by-laws may not have become applicable by the passing of special resolutions.

124 Further, even if a common property rights by-law was put forward, and required a special resolution for it to become a by-law, there is no statutory requirement that the by-law specify in some degree of detail what the work contemplated would be. For example, s 108(2) requires a resolution *specifically* authorising the taking of the *particular action* proposed. Sections 109 and 110 detail what is and is not allowed. Yet no such statutory restriction applies to "special privileges".

125 Fourth, we do not think the text and context of the expression "special privileges" admits of a meaning which includes a privilege from compliance with the 2015 Act. Section 142(a) refers to rights of exclusive use and enjoyment, and (b) expressly refers to a licence. Exemption from the provisions of the Act is, it seems to us, a markedly different concept to use, enjoyment and licences. Therefore, we would read down "special privileges" to mean use, enjoyment and licences or other things which may be ejusdem generis with those matters.

126 That approach seems to us to be consistent with the express reference to use and enjoyment in s 143(2), and the absence of any other provision touching and concerning common property rights by-laws which refer to exemptions from the provisions of the Act.

127 Of course, s 111(b) does authorise some work to common property under a common property rights by-law, but the general purpose and policy of these provisions, their consistency and fairness, seems to us to point in the direction

of that work being confined to maintenance and repair work which a common property rights by-law must, pursuant to s 144 of the 2015 Act, expressly make provision for (to be done either by the owners corporation or a particular owner or owners) and not to whatever work to common property as may be specified in the common property rights by-law.

128 Fifth, to prefer the respondents' construction would allow for conflict between the owner exercising rights under by-law 32 on common property and the owners corporation. For example, the lot owner may undertake work on common property that creates a danger to persons or property.

129 When asked about this during oral argument the respondents submitted that this could not happen because their work was subject to development consent (the conditions of which would ensure safety), and s 153 provided protection to the owners corporation.

130 Section 153(1) says:

> **153 Owners, occupiers and other persons not to create nuisance**
>
> (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
>
> (b) use or enjoy the common property in a manner or for a purpose that interferes unreasonably with the use or enjoyment of the common property by the occupier of any other lot (whether that person is an owner or not) or by any other person entitled to the use and enjoyment of the common property, or
>
> (c) use or enjoy the common property in a manner or for a purpose that interferes unreasonably with the use or enjoyment of any other lot by the occupier of the lot (whether that person is an owner or not) or by any other person entitled to the use and enjoyment of the lot.

131 As can be seen, s 153 only applies to nuisances or hazards arising from use and enjoyment and does not include, at least in terms, nuisances or hazards arising from work done to common property. Indeed, the presence of the protection afforded by s 153, and the absence of a similar provision which would apply to nuisances or hazards arising from work done under by-law 32 (on the respondents' submissions) would seem to be a further indicator that the

legislature did not intend ss 111(b) and 142(b) to have the operation for which the respondents contend.

132 As to the submission that development consent would ensure safety, we would say two things. First, not all work that could conceivably be done under the auspices of by-law 32 would necessarily require development consent and thus not all possible work would be subject to oversight from the approving authority.

133 Second, to the extent such work would require development consent, we would regard it as improbable that parliament would have intended that safety issues concerning common property were to be taken out of the hands of the body corporate and left in the hands of those providing development consent.

134 If the work had to be approved by way of a special resolution per s 108, the owners corporation would have the opportunity to examine such work and take advice in order to satisfy itself as to any potential dangers the work might create (on completion) and would have the option of refusing to pass the special resolution if those issue arose or were not dealt with to the owners corporation's satisfaction.

135 Sixth, there is no equivalent requirement [in relation to the work the respondents says is authorised per s 111(b) and 142(b)] to that provided by ss 109(3) and 110(5), namely that any damage caused to any part of the common property by the carrying out of cosmetic work or minor renovations by or on behalf of the owner is repaired, and that the cosmetic work, minor renovations or any repairs are carried out in a competent and proper manner.

136 It is true that by-law 32.5 provides that the owner must repair any damage caused by the carrying out of the work, but the by-law does not include an obligation that the work itself, or any repair work, be done competently and properly. Thus, in terms of statutory construction, the absence of any similar provision which may apply to common property by-law work (on the respondent's construction) is another indicator that parliament did not intend s 111(b) and 142(b) to be construed as widely as the respondents submit.

137 If our construction of the provisions is correct, then parliament has preserved the protection Brereton J referred to in relation to s 65A, but with the express and limited carve outs for cosmetic and minor renovation work, the introduction of those carve outs being designed to overcome the mischief of requiring special resolutions for all common property work other than repairs and maintenance including mere cosmetic or minor renovation work.

138 On their face, and if the respondent's contention is correct, s 108 and s 111(b) combined with s 142(b) are in conflict. One says that work to common property (by the owners corporation or a lot owner) can "only" be done if a special resolution is passed, and the other says that an owner "must not" carry out work on the common property unless authorised by (in this case) by a common property rights by-law.

139 *Project Blue Sky* says that we must construe the provisions on the prima facie basis that the provisions are intended to give effect to harmonious goals. That harmony is achieved, in our opinion, by reading "special privileges" in s 142(b) to be confined to matters such as use, enjoyment and licences, and does not extend to exemptions from statutory obligations or restrictions.

140 In our view s 108 is the leading provision, and s 111 the subordinate provision which must give way to the requirements of s 108 (per *Project Blue Sky*).

141 Lot owners may always seek approval to conduct work on common property, which is not cosmetic or minor renovation work, pursuant to s 108. However, we do not think the text of ss 111(b) and 142(b), read in the context of the pre-existing law and legislative history, admits of a meaning freeing the owner of Lot 148 from the protections s 108 provides for the beneficial proprietary rights of lot owners in common property.

142 If that is right, then these provisions of the 2015 Act achieve the three-tiered approach the Minister referred to in the Second Reading Speech (quoted at [95] above). To prefer the respondents' construction would be, in substance, to find that there was a fourth tier.

143 Therefore, in our opinion, by-law 32 does not confer the special privilege contended for. It follows that there is no authorisation for that common property work under s 111(b).

144 If we were wrong about that, in our opinion a special privilege amounting to an exemption from the requirements of s 108(2) would be inconsistent with the Act and would therefore be of no force or effect.

145 As those holdings are dispositive of the appeal we need not decide the remaining matters. But since they were argued we would express our reasons in relation to those matters in short terms.

146 In our opinion by-law 32, on its proper construction, does not confer any special privilege in respect of the *whole* of the common property. That submission, if accepted, would mean that as long as the lot owner could establish a "connection" with the Lot 148 work, that lot owner could perform work to any of the common property in this two tower complex with 27 levels on the eastern side and 18 levels on the western side. The submission amounts to saying the owner could, for example, conduct work on the roof of either tower if some connection could be made with the Lot 148 work. Of course, such may be most unlikely, but it is not excluded by the respondents' construction.

147 We also do not think by-law 32 confers any special privilege in relation to "a specified part" of the common property. We think the words "specified part" require something more than being able to say the common property works are "connected with" the Lot 148 work.

148 Although not identical to the words "the particular action proposed" in s 108 as construed in *Stolfa*, we think, applying common sense and reasonableness, some greater specificity would be required to meet the description "in respect of … any *specified part* of the common property" than a mere "connection". "Specified part" has the flavour of identification of a geographical description. If so, and we think this is the meaning of "specified part", then that would serve the public policy function of notifying interested parties (such as potential purchasers of lots), with reasonable precision, the particular common property which may later be the subject of work.

149 In relation to the pool gate, the appellant submitted that it was not "connected with" the work on Lot 148. The connection contended for by the respondents was one relating to use. That is, the work to the pool gate was required to allow the owner of Lot 148 to use Lot 148 as it wished, rather than, for example, being required as some form of physical necessity for the Lot 148 work to perform as required. An example of the latter might the connection of water and sewerage.

150 In this regard we prefer the appellant's submissions. The words "in connection with" in by-law 32 have the flavour of physical necessity or physical connection rather than a connection arising from how Lot 148 was to be used.

Leave to Appeal

151 We should note that grounds 1 and 2 involve questions of law and leave to appeal is not required. Ground 3, the pool gate issue, involves the proper construction of the equivalent to vital agreements or contracts, which are questions of law - *Re R* [2000] NSWSC 886 at [25], cited with approval in *C v W* [[2015] NSWSC 1774 at [48]. Accordingly, leave is not required.

152 Had leave been required, we would have granted it as the matter was fully argued and there is value in attempting to quell all controversies between these parties.

Conclusion

153 The Tribunal, correctly and helpfully, set out what orders it would have made were it in error, as we have found it was. At [157]-[158] of its reasons the Tribunal said that if it were wrong about by-law 32 and a special resolution was required to authorise the work done by the respondents to the common property, the Tribunal would have ordered that the common property be restored to the same condition it was in prior to the commencement of the work.

154 The respondents submit (at [12.4] of their submissions dated 7 May 2020) that any success for the appellant would entail a re-exercise of the discretion to refuse the appellant relief notwithstanding that the work done was not authorised. Specific reference was made to [159]-[169] of the Tribunal's reasons. Those passages do not relate to the exercise of the discretion to

order restoration of the common property, but to whether time should be given to the respondents to allow them the opportunity to obtain a retrospective s 108 special resolution (assuming such retrospective authorisation is available, and upon which we express no view). The appellant does not challenge those alternative orders on appeal. The Tribunal said that it would have ordered that the restoration of the common property be completed within four months from the date of the Tribunal's decision.

155 We do not agree that the appellant's success would entail a re-exercise of the discretion referred to. The Tribunal addressed its mind as to how it would have exercised its discretion if it had found that a s 108 special resolution was required. No cross-appeal (as matter of substance) has been brought in relation to that decision as to how the discretion should be exercised, and therefore we do not think we can or should disturb it.

156 Therefore, we propose to make the orders foreshadowed by the Tribunal.

157 We have not heard the parties as to costs. We shall make provision in our orders for the making of any application for costs if so desired.

Orders

158 We make the following orders:

(1) Appeal allowed.

(2) The orders made by the Tribunal are set aside.

(3) In lieu thereof, order the respondents to restore the common property the subject of the work referred to at [10] of the Tribunal's reasons at first instance to the condition it was in prior to the commencement of those works on or before 1 February 2021.

(4) If any party desires to make an application for costs of the appeal:

(a) that party is to so inform the other parties within 14 days of the date of these reasons;

(b) the applicant for costs is to lodge with the Appeal Panel and serve on the respondent to the costs application any written submissions of no more than five pages on or before 14 days from the date of these reasons;

(c) the respondent to any costs application is to lodge with the Appeal Panel and serve on the applicant for costs any written submissions of no more than five pages on or before 28 days from the date of these reasons;

(d) any reply submissions limited to three pages are to be lodged with the Appeal Panel and served on the other party within 35 days of the date of these reasons;

(e) the parties are to indicate in their submissions whether they consent to an order dispensing with an oral hearing of the costs application, and if they do not consent, submissions of no more than one page as to why an oral hearing should be conducted rather than the application being determined on the papers.

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