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Civil and Administrative Tribunal

New South Wales

Case Name:	Macey's Group Pty Ltd v Owners – Strata Plan No 33591
Medium Neutral Citation:	[2021] NSWCATAP 7
Hearing Date(s):	15 September 2020
Date of Orders:	18 January 2021
Decision Date:	18 January 2021
Jurisdiction:	Appeal Panel
Before:	M Harrowell, Deputy President J Kearney, Senior Member
Decision:	(1) The appeal is allowed, orders 1 and 2 made 12 May 2020 are set aside and the application is dismissed. (2) Subject to order 3, each party is to pay their own costs of the proceedings at first instance and on appeal. (3) In the event either party contends a different costs order should be made in the proceedings at first instance or on appeal, the following directions apply: (a) Within 14 days from the date of these orders, the applicant for costs (costs applicant) is to file and serve evidence and submissions in support of that application, including a list of the orders sought (costs application). (b) Within 28 days from the date of these orders, the respondent to the costs application is to file and serve any evidence and submissions in reply. (c) Within 35 days from the date of these orders, the cost applicant is to file and serve any submissions in response. (d) The submissions are to include submissions about whether an order should be made under s 50(2) of the Civil and Administrative Tribunal Act 2013 dispensing with a hearing of the costs application.

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	(e) Upon the making of a costs application under direction 3(a), order 2 shall, as the case may be, cease to have effect in respect of costs of the proceedings at first instance, the costs of the appeal proceedings or both proceedings.
Catchwords:	STRATA TITLES LAW – Repeal of by-law – enforcement of settlement agreement reached at mediation under Part 12 Division 2 of the Strata Schemes Management Act 2015 – resolution to repeal by-law in consequence of settlement agreement – refusal by lot owner to consent to the repeal – power of Tribunal to make an order under s 149 of the Strata Schemes Management Act 2015 – whether refusal was unreasonable ADMINISTRATIVE LAW – power of the Tribunal under s 58 of the Civil and Administrative Tribunal Act to impose conditions
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) Strata Schemes Management Act, 1996 (NSW) Strata Schemes Management Act 2015 (NSW)
Cases Cited:	Ainsworth v Albrecht [2016] HCA 40 Owners Corporation Strata Plan 7596 v Risidore & Ors [2003] NSWSC 966 Reen v Owners Corporation SP 300 [2008] NSWSC 1105 The Owners – Strata Plan No 69140 v Drewe [2017] NSWSC 845
Texts Cited:	Nil
Category:	Principal judgment
Parties:	Macey's Group Pty Ltd (Appellant) The Owners - Strata Plan No 33591 (Respondent)
Representation:	Counsel: D Hand (Appellant) Solicitors: Catenate Consultant Lawyers (Appellant) Strata Title Lawyers (Respondent)

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File Number(s): AP 20/25730

Publication Restriction: Nil

Decision under appeal:

Court or Tribunal: Civil and Administrative Tribunal

Jurisdiction: Consumer and Commercial Division

Citation: N/A

Date of Decision: 12 May 2020

Before: G K Burton SC, Senior Member

File Number(s): SC 19/32320

REASONS FOR DECISION

Introduction

1 This appeal concerns orders made by the Tribunal under s 149 of the Strata Schemes Management Act 2015 (NSW) (SSMA) to repeal a common property rights by-law in Strata Plan 33591 (strata scheme).

2 The appellant, Macey's Group Pty Limited, is the owner of Lot 40 in the strata scheme. The appellant acquired the lot in mid-2018.

3 In purchasing the lot, the appellant also purchased a marina business operated on adjoining land owned by the State of New South Wales (Crown). The right to use this adjoining land and marina was pursuant to a lease from the Crown that had been assigned to the appellant. Originally, the lease had been entered into between the Crown and the appellant's predecessors in title, Warren and Carol Hollis. The lease is dated 26 August 2008. The lease is for a period of 20 years commencing 13 June 2007 (Lease). There is no option to renew the lease nor is there an option to purchase the property, the subject of the lease.

4 The owner of Lot 40 had in its favour two special by-laws concerning common property rights. One is in respect of "24 car and/or trailer parking spaces" being presently known as Special By-Law 8. The other is Special By-Law 11 –

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Common Property Rights – Business Premises. Those by-laws were in the following terms:

> Special By-Law 8. Lot 40. Common property rights (car/trailer spaces)
>
> *(Created by Dealing No. 7523644. Former by-law 20.)*
>
> The owner of lot 40 in SP 64978 shall be entitled to exclusive use and enjoyment of that part of the common property comprising 24 car and/or trailer parking spaces lying to the east of the Amenity Block and coloured green in the plan titled "Overall Plan View" in the Development Statement incorporated in the Strata Scheme and initialled by the Chairman of the general meeting of owners on 23 July 1993, on the following terms:
>
> (a) such car and/or trailer parking spaces shall be used only for the purpose of parking motor vehicles, trailers and boats; and
>
> (b) the owner of lot 40 shall be responsible for the proper maintenance and keeping in a state of good repair of the said care and/or trailer parking spaces.
>
> Special By-Law 11. Lot 40. Common property rights - business premises
>
> *(Paragraph 1 created by Dealing No. 7523644. Paragraph 2 created by Dealing No. M982782. Previously Special By-Law 30.)*
>
> 1. The owner of lot 40 in SP 64978 shall be entitled to the exclusive use and enjoyment and special privileges of that part of the common property designated (x) on strata plan 33591, and may operate upon lot 40 and upon the common property designated (x) such lawful business activities as may be permitted by the local council Including retail activities associated with the adjoining marina and the storage of boats and equipment on condition that said owner shall be responsible for properly maintaining and repairing the common property so designated.
>
> 2. This by-law does not apply to the area shown cross hatched on the attached Plan B.

5 Shortly after the appellant purchased Lot 40, its directors were approached by members of the Strata Committee of the respondent/owners corporation (Owners Corporation). The Owners Corporation wished to discuss removing Special By-Law 8.

6 Other issues had also arisen between the parties including in respect of the marina's water supply that was connected to the appellant's lot. There was also a toilet block in the strata scheme that was made available as a public facility to boat owners using the marina and there were disputes concerning proposals by the appellant to expand the marina operations.

7 Apparently, it had been proposed at an Annual General Meeting in January 2018 that the Owners Corporation pass a resolution to seek to have declared

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invalid Special By-Law 8 under section 150 of the SSMA because the by-law was asserted to contravene section 139 (1) of the SSMA. This section provides:

> **139 Restrictions on by-laws**
>
> (1) **By-law cannot be unjust** A by-law must not be harsh, unconscionable or oppressive.

8 The proposal was not proceeded with by the Owners Corporation. Rather, the parties continued with discussions regarding a proposal to change the by-law. In those discussions, the Owners Corporation sought the appellant's consent to its removal.

9 Because there was no agreement, mediation took place between the parties pursuant to Part 12 Division 2 of the SSMA. That mediation resulted in the parties signing an agreement dated 1 May 2019 (Agreement). The Agreement is found in the Appeal Bundle (AB) at page 438. Item 1 of the Agreement concerned water metering and payment by Lot 40 for that water. Item 2 of the Agreement related to a purported agreement by which the appellant is said to have agreed to an extraordinary general meeting being held to rescind Special By-Law 8 on terms that a "special commercial lease agreement" would be entered into between the appellant and the Owners Corporation.

10 Paragraphs 2 and 3 of the Agreement were in the following terms:

> "2. A motion will be put to an EGM, within 8 weeks, outlining the following matters:
>
> > (a) To rescind Special By-Law 8. (b) In its place a special commercial lease agreement between WPM and SP3359. The new lease will grant access to 24 car parking/trailer spaces. The lease will include entitlement to use the access road. (c) A contribution of $150 p.w for the first year, $250 2nd year, $350 3rd year, $450 4th year to 2c. $500, 5th year. All to increase annually by CPI.
>
> 3. The above will include access and maintenance of parking spaces and access road."

11 Following mediation, the Owners Corporation gave notice of an extraordinary general meeting to take place by pre-meeting electronic voting only. The notice was dated 7 June 2019 (notice of meeting). The proposed motion was headed "Rescind by-law and new lease agreement *Special Resolution". The proposed resolution was in the following terms:

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"That the Owners Corporation Specially Resolved:

(a) To rescind Special By-Law 8 (exclusive use of 24 car/trailer parking spaces in northern car park to unit 17 Lot 40) and agree that in its place, agree that:

(b) A commercial lease agreement between Macey's Group Pty Ltd & Owners Corporation SP 33591 be executed to grant access to 24 car/trailer parking spaces and use of the access road and that

(c) A contribution of

$150 p.week for the 1st Year plus CPI

$250 p.week for the 2nd Year plus CPI

$350 p.week for the 3rd Year plus CPI

$450 p.week for the 4th Year plus CPI

$500 p.week for the 5th Year plus CPI

$500 p.week for further years plus CPI"

12 The notice of meeting was accompanied by a document titled Notes Regarding Northern Carpark Motions (AB527) from the Strata Committee of the Owners Corporation. This document said:

> Mediation was carried out on 1st May 2019 between the owners of Lot 40, Unit 17 and Strata Committee members representing the Owners Corporation SP33591 regarding Special By-Law 8 (exclusive use of 24 car/trailer parking spaces in the Northern Carpark) and WPM usage of SP33591 water.
>
> A Settlement Agreement was reached under the Strata Schemes Management Act 2015 and signed by: Robyn Dowse, Lyn Grimwood and Brian Hewett, representing the Owners Corporation SP33591 and Warren Macey and Susan Macey, owners of Lot 40, Unit 17. A copy of the Settlement Agreement is attached to the agenda.
>
> The Macey's stated that a meter had been installed on the water line to WPM and they would send a photograph of the meter with the current reading and would send further readings when requested by Strata Manager and pay for the water usage.
>
> It was agreed to put forward the motions as detailed in the Settlement Agreement and set out in motions in the EGM agenda for voting by Special Resolution.
>
> We wish to thank Mr & Mrs Macey for their cooperation in this matter and urge all owners to vote and pass the resolutions.

13 The special resolution was passed and the minutes of the meeting (minutes) record the following:

> RESOLVED BY SPECIAL RESOLUTION that the owners corporation:
>
> Rescind Special By-Law 8 (exclusive use of 24 car/trailer parking spaces northern car park to unit 17 lot 40) and in its place, agree that

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A commercial lease agreement between Macey's Group Pty Ltd & Owners Corporation SP 33591 be executed to grant access to 24 car/trailer parking spaces and use of the access road, and that

A contribution of

$150.00 per week for the 1st year plus CPI

$250.00 per week for the 2nd year plus CPI

$350 .00 per week for the 3rd year plus CPI

$450.00 per week for the 4th year plus CPI

$500.00 per week for the 5th year plus CPI

$500.00 per week for further years plus CPI

For: 667 ue\ Against 44 ue

Note to Motion: At the time of the meeting the owner of lot 40 has advised that they do not consent to rescinding the by-law or the lease agreement. Until such consent form is signed by the lot owner the owners corporation cannot register the change. The strata committee to consider further action.

14 Although the special resolution had been passed, as the minutes record, the appellant did not consent to the motion to rescind Special By-law 8 being registered on the title. Consequently, on 11 July 2019, the Owners Corporation filed application SC 19/32320 in the Tribunal (application). The application sought an order under section 230(1) of the SSMA which provides:

> "The Tribunal may make orders to give effect to any agreement or arrangement arising out of a mediation session."

15 The application was heard by the Tribunal on 11 February 2020. During the hearing of the application, the Owners Corporation was granted leave to amend its claim to also seek an order under section 149(1)(b) of the SSMA. This permits the Tribunal to make an order prescribing a change to a by-law, including its repeal, where an owner of a lot has "unreasonably refused to consent to the terms of a proposed common property rights by-law, or to the proposed amendment or repeal of a common property rights by-law". In connection with the application under section 230, the Tribunal determined that the mediation agreement was void for uncertainty. However, the Tribunal made an order under section 149 that Special By-Law 8 be repealed. The orders were made on 12 May 2020 (decision). They included the following orders:

> 1. Order under s 149 of the Strata Schemes Management Act 2015 (NSW) that Special By-Law 8 is repealed on condition of the offer (in the form of a registrable instrument of lease executed by the applicant) of the grant by the applicant to the respondent of a registered lease of the area the subject of

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Special By-Law 8 for a term coincident with the duration (including any exercise of option, renewal or new grant) of the Crown lease to the respondent in respect of the jetty, wharf, boat ramp and surrounding area adjacent to the scheme on the terms as to rental contained in the mediation agreement dated 1 May 2019 between the applicant and the respondent together with such further terms concerning duties, consequence of default and other matters that are consistent with the foregoing terms of lease and a term that the applicant pays the costs of preparation of the lease and stamp duty on the lease.

2. Order the applicant promptly to do all acts necessary to record the removal of Special By-Law 8 pursuant to s 246 of the Strata Schemes Management Act 2015 (NSW), and to register the lease between the applicant and the respondent described in order 1 if such lease is executed by the respondent, with suchremoval of by-law to be recorded as having operation on and from date of registration of the said lease, or if the respondent does not execute such lease within 14 days after the registrable instrument of lease executed by the applicant is tendered to the respondent, then as having operation on the expiration of 14 days after that tender date.

16 In addition, the Tribunal made directions to permit the parties to make submissions concerning the question of costs of the proceedings before it. These were orders 3 to 5 inclusive (Directions). The Tribunal also noted an agreement between the parties concerning the installation and maintenance of a water meter recording “the water usage and charges attributable to the Wyee Point Marina as per Hunter Water Rates”.

17 The Tribunal provided written reasons for its decision (Reasons).

18 The appellant appealed the decision. The Notice of Appeal was filed 15 June 2020. The appeal appears to have been filed out of time, the last date to lodge the appeal being 9 June 2020. While there was discussion at the hearing of the appeal as to whether an extension of time was required (the appeal also having been lodged electronically – a matter said to be permitted by Procedural Directions 6 of this Tribunal), ultimately the Owners Corporation did not oppose an extension of time. Consequently the Appeal Panel made an order extending the time to lodge the appeal until 15 June 2020.

Grounds of appeal and orders sought

19 The appellant raised six grounds of appeal. These were:

1. The Tribunal erred (at [103]) in applying an improper construction of section 58 of the Civil and Administrative Tribunal Act 2013, as being a provision that gave the Tribunal the power to order that it be a condition of the repeal of the parking by law that the Owners Corporation offer the applicant a lease for a term that was coincident with the duration of the Crown lease of the

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marina, including any renewal thereof, unless tenure was ended for default or otherwise on the terms found in commercial leases.

2. The Tribunal erred in determining (at [105]) that the by law was not for the direct benefit of the applicant's lot.

3. The Tribunal erred in determining (at [106]) that in assessing the quality of reasonableness or otherwise of the applicant's refusal to consent to the repeal of the parking by-law, the Tribunal was not required to have regard to the basis on which the applicant purchased the marina lease and the business integrated with its lot.

4. The Tribunal erred in determining (at [107]) that the 1 May 2019 mediation document operated as a conditional consent by the applicant, such condition being the grant of a lease for a term coincident with the term of the Crown lease (including any exercise of option, renewal or new grant) on which the marina business was conducted together with other lease terms concerning duties, consequences of default and other matters that were consistent with such terms.

5. The Tribunal erred in determining (at [107]) that it had the power to grant relief in the nature of rectification in respect of the mediation agreement.

6. The Tribunal erred in determining that the applicant had unreasonably refused to consent to the repeal of the parking by-law.

20 The appellant sought orders that the appeal be allowed, the orders of the Tribunal be set aside and that the application be dismissed.

21 We should note that order 6 was in fact a notation of the Tribunal of an agreement between the parties. It was not an order of the Tribunal. Consequently, it is inappropriate to make any orders in connection with this agreement, it being noted that no submissions have been made to us on this topic. In relation to the Directions concerning costs, we will deal with the issue of costs below.

22 The Owners Corporation filed a Reply to Appeal. The Owners Corporation denied any error was made in connection with the construction of section 58 of the Civil and Administrative Tribunal Act 2013 (NSW) (NCAT Act) and that the conditional orders 1 and 2 were appropriate. The Owners Corporation said, in so far as leave to appeal was sought by the appellant it should be refused and that the appeal should be dismissed.

Submissions

23 The parties filed written submissions and made oral submissions at the hearing of the appeal.

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24 Neither party challenged the finding of the Tribunal that the Agreement was void for uncertainty. Rather, the challenge centred around whether the appellant had unreasonably refused consent to the repeal of Special By-law 8 and whether the Tribunal could make an order to repeal the by-law on the condition imposed.

Appellant's submissions

25 The appellant's submissions can be summarised as follows.

26 First, the appellant submitted that the power to make orders on condition, found in s 58 of the *Civil and Administrative Tribunal Act 2013 (NSW)* (NCAT Act), did not extend to making an order on terms that required "the Owners Corporation to 'offer' the appellant a lease as a condition of its order repealing the parking by-law, or to make it a condition that such a lease be for a certain or uncertain maximum duration, or that it contain further terms concerning duties, consequent of default and other matters". In this regard the appellant said that s 58 "did not confer on the Tribunal jurisdiction to grant relief in the nature of rectification", it being an equitable remedy.

27 Otherwise, s 149 of the SSMA did not confer such power on the Tribunal.

28 Secondly, the appellant said the Tribunal was in error in concluding that the appellant had unreasonably refused to consent to the repeal of Special By-law 8. The appellant submitted that the Tribunal's reasoning process was erroneous. Having found that the Agreement was unenforceable for uncertainty it was not open to the Tribunal to conclude that "the appellant had agreed to accept a lease for an undetermined duration ('on terms that were missing a component') in return for the giving of its consent to the repeal of the parking by-law". Further, the terms of the lease required to be proffered by the Owners Corporation in accordance with the condition imposed were themselves void for uncertainty.

29 Consequently, the failure to agree to the extinguishment of its existing rights under Special By-law 8 could not be said to be unreasonable.

30 Thirdly, in connection with the Tribunal's reasoning at [105]-[107], the appellant said the Tribunal incorrectly assessed the benefit conferred on the owner of Lot

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40 by Special By-law 8, failed to have regard to the interrelationship between the benefit conferred by the by-law and the operation of the marina under the lease with the Crown and inappropriately sought to grant relief in the nature of rectification by treating the Agreement as a "conditional consent" to the lease ordered by the Tribunal.

Respondent's submissions in reply

31 The respondent's submissions can be summarised as follows:

(1) In respect of ground one, the imposition of a condition was not beyond the power of the Tribunal. The power to impose conditions in s 58 of the NCAT Act is broad and should be construed in the context of the guiding principle found in s 36 of the NCAT Act, the obligation to act "according to equity, good conscience and the substantial merits of the case" found in s 38 (4) of the NCAT Act and the broad powers given to the Tribunal under ss 232, 240 and 241 of the SSMA.

(2) The "real beneficiary" of Special By-law 8 was "the marina", not the appellant. The appellant derives its rights as a lot owner in the strata scheme. The Tribunal was required to weigh all relevant evidence when making a determination under s 149 of the SSMA. Having done so, there was no need to enquire any further as to whether the appellant's refusal to consent was unreasonable.

(3) As to the appellant's assertion in ground 3 that the Tribunal was required to have regard to the basis upon which the appellant purchased the marina lease and the business integrated with its Lot, the respondent says that the appellant was "always at risk of repeal [of the by-law] by the majority of the Owners Corporation". The Tribunal dealt with the appellant's understanding of the basis upon which it acquired the lot at [106] of the Reasons. The SSMA contemplates that a by-law can be repealed by special resolution and, in these circumstances, "it could not be said that lot owners in Strata title enjoy indefeasibility over their title".

(4) In relation to ground 4 and the Tribunal making a finding that the appellant had provided conditional consent by signing the Agreement, the respondent said that the use of this expression by the Tribunal at [107] of the Reasons must be understood in context. The respondent referred to passages in the Reasons where the Tribunal set out the benefits that might accrue to the respondent and/or the operator of the marina if the by-law were repealed and a lease put in place. At 3.17 of the submissions the respondent then continued:

> The appellants must well remember the operation of the word "conditional" in the term "conditional consent" meaning that the consent was always hypothetical and based on the future conduct of the Owners Corporation. Quite rightly, if the Owners Corporation had not offered a lease with security of alternative tenure, the appellant would be entitled to withhold its consent to the repeal of the parking By-Law.

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(5) In relation to ground 5, that the Tribunal had determined it had power to grant relief in the nature of rectification of the Agreement, the respondent says that the Tribunal did not do so. Rather, the decision of the Tribunal was to give effect to the conditional consent. In this regard, the respondents relied on the fact there had been a mediation process and said that following completion of the mediation process "settlement agreements should not be lightly set aside, and certainly not without good reason". In doing so the respondent submitted:

> … that the Appeals Panel ought not to gravitate towards the appellant's position without considering the overall justice, equity, fairness and good conscience of the matter, as the [NCAT Act] requires, and the overall injustice, in equity, unfairness and bad conscience that would result should the appellant be permitted to escape this agreement, which is of its own making, and the signature of the appellant which is from its own pen.

(6) As to the challenge in ground 6 that the Tribunal erred in finding the appellant had unreasonably refused to consent to the repeal of Special By-law 8, the respondent says that the appellant has sought to resile from the Agreement and has sought "to undo the settlement agreement executed between the parties". Reference is made to various decisions of the Tribunal determining applications based on unreasonable refusal under the SSMA and the now repealed *Strata Schemes Management Act, 1996 (NSW)* (repealed) (1996 Management Act).

32 In addition to the above, the respondent said the issues raised require leave to appeal and that leave should be refused. This is because the substantial challenge is to to the factual question of whether or not the appellant unreasonably refuse to consent to the repeal of Special By-law 8. A resolution of this issue raises no question of principle or general public importance. The respondent says the appellant did not file a cross-claim "to undo the terms of the settlement agreement" the appellant has not shown any factual error has been made and "ultimately the Tribunal's decision is fair and equitable and applies a balanced assessment of the evidence".

Appellant's reply submissions

33 In reply, the appellant made the following submissions.

34 It was the Appellant who was found to have offered its implicit and conditional consent to the repeal of the Special By-law 8 on the basis that it be provided with a substituted property right. It was against that "implicit consent" that the Tribunal in turn mistakenly proceeded to assess the purported unreasonableness of the Appellant's refusal to consent to the repeal of the

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Special By-law 8. The Tribunal erred in adopting that approach for the reasons contained in its submissions in chief.

35 The Appeal Panel should reject the Owners Corporation's submission that the Tribunal was "vested with incredibly wide powers to settle disputes" and that the powers conferred by section 58 of the Civil and Administrative Tribunal Act 2013 must be construed in that light. The Tribunal is a creature of statute. It is through the proper and principled interpretation of the applicable statutory provisions that the scope of the Tribunal's powers is to be determined.

36 The Appeal Panel should reject the Owners Corporation's submission that the real beneficiary of the Special By-law 8 was the marina. The party that derived the benefit of the by-law was the registered proprietor of Lot 40 in the Strata Plan – that is, the Appellant. As previously submitted, that was implicitly acknowledged by the Tribunal when it determined that it was necessary for the Appellant (and not "the marina") to be offered a substituted property right.

37 The point is also acknowledged by the Owners Corporation when it very candidly (and properly) concedes that unless the Appellant (and not "the marina") was offered a lease on appropriate terms (with a "term" that was certain as to both commencing date and duration), then the Appellant was entitled to withhold its consent to the repeal of Special By-law 8. It follows that any refusal by the Appellant to consent to the repeal of the Special By-law 8 in such circumstances could not be unreasonable.

38 The Owners Corporation's submission on this point demonstrates the errors in the Tribunal's reasoning and in its findings.

CONSIDERATIONS

39 Leave to appeal is not sought, the appellant contending that the issues raised are questions of law for which there is a right of appeal: s 80(2)(b) of the NCAT Act.

40 The substantive issues in this appeal are whether the Tribunal was correct:

(1) in concluding that the appellant had unreasonably refused to consent to the revocation of Special By-law 8; and

(2) making an order to repeal the by-law on the condition contained in order 1 made 12 May 2020.

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41 The facts about which there is no dispute are as follows:

(1) Special By-law 8 has been in place since 3 July 1993, although it’s numbering has been changed from time to time. It was put in place at the time when the developer of the strata scheme controlled the Owners Corporation and the marina: Reasons at [4].

(2) Special By-law 8 was one of three by-laws in favour of the owner from time to time of Lot 40. The others related to exclusive use of common property around Lot 40 and access through a local reserve which was leased by the Owners Corporation from a statutory authority: Reasons at [6]-[7].

(3) While there was no initial or ongoing payment for the grant of the three by-laws, Special By-law 8 required the owner of Lot 40 to properly maintain and keep in a good state of repair the parking spaces to which the by-law applied: Reasons at [8].

(4) The appellant wished to purchase the marina business and it was a condition of that purchase that it also purchase Lot 40, which had attached to it Special By-law 8: Reasons at [24].

(5) The marina was the subject of development consent granted on 12 May 1986. It included a condition that the boat ramp was not to become a public boat ramp and that the launching of vessels from the ramp and overnight berthing was to be restricted to those vessels under the control of persons resident in the strata scheme. The marina lease was required to incorporate a similar term: Reasons at [25].

(6) The Owners Corporation sought to negotiate an agreement with the appellant to revoke Special By-law 8 and replace it with a lease over the parking spaces. On 1 May 2019, a document was signed following mediation under the SSMA: Reasons at [17].

(7) An extraordinary general meeting on 28 June 2019 passed a resolution to revoke Special By-law 8 and to agree to enter into a lease with the appellant for access to various common property and use of the car spaces. However, the appellant did not consent: Reasons at [18]-[19].

The Tribunal’s conclusions and reasoning

42 It appears the Tribunal decided it should not make an order under s 230 of the SSMA to give effect to the Agreement. At [90] and 92 [92] the Tribunal said:

> 90 The Tribunal has power to grant such specific enforcement relief under SSMA s 241 such as the OC sought in respect of the written signed document alleged to be an agreement at the mediation on 1 May 2019. However, I consider such a claim cannot succeed in the terms that it was brought.
>
> …
>
> 92 The difficulty for the OC lies in the fact that a component of the alleged agreement, if it was sought to be enforced as an agreement, was too uncertain, namely, the term of the lease to be granted; the parties and the price, and the subject of the grant, were sufficiently certain (sic).

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43 On one view, the Tribunal conflated the order making power found in s 241 with that found in s 230. However, as no challenge has been made to this aspect of the decision it is unnecessary to consider this matter further.

44 Despite finding that the Agreement was void for uncertainty, the Tribunal made an order under s 149 of the SSMA. It did so on the basis the Agreement contained implied consent to repeal Special By-law 8.

45 At [93]-[95] the Tribunal said:

> 93 However, the alleged agreement contained, by its execution of the alleged agreement, an at least implied written consent by the [appellant] to the repeal of the parking by-law if it was passed by the required special majority at the EGM on a specified basis, namely, the passage by the required ordinary majority at the EGM of authority to grant a lease to the [appellant] on terms that were missing a component but contained other essential components.
>
> 94 The quality and basis of that consent are highly relevant to the amended relief sought by the OC, namely, that the owners refusal to consent ought to be considered unreasonable and set aside under SSMA s 149(1)(b).
>
> 95 The consent was given in a document signed on behalf of [the appellant] by its directors. It was up to the [appellant] to seek to set aside the document and any consent it contained if it was thought to be made binding on the owner. No such relief was sought by way of a properly-constituted cross-application.

46 At [96] and following, the Tribunal then considered the "substance of the challenge to the quality of the document and the [appellant's] written consent that it contained" in the context of the failure of the appellants to call evidence about what happened at the mediation, including from the mediator and a "business advisor", the general nature of the proposal at the mediation to alter the obligations and benefits of each party and the change in the development consent provided in 2017. The Tribunal concluded at [98] that the proposal:

> … gave the potential for the [appellant], as operator of the commercial facility with leased parking for and access to that facility, to seek to broaden the development consent conditions concerning daytime use of the boat ramp and parking spaces, and potentially birthing at the marina, following the 2017 change in the development consent for the use of the [strata schemes].

47 The Tribunal continued at [99]:

> Once the attack upon the quality of the consent in the document fails, it has potential force as the required consent for repeal of the parking by-law and potentially removes the need for relief under SSMA s 149(1)(b).

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48 Having noted at [100] that the consent in the Agreement "was on a specific basis – the grant of a lease of the parking spaces covered by the parking by-law" and that the Agreement lacked "an essential specified element, being the term of the lease" the Tribunal then said at [101]-[103]:

> 101 In my view this does not remove the potential force of the consent. Rather, it emphasises what would be the basis for defeating an application under SSMA s 149(1)(b) that the owner unreasonably refuse consent to the repeal of the parking by-law, namely that an integer in the consent was not being reasonably offered by the OC being reasonable security of alternative tenure. Such a reasonable alternative would be the grant of a term of the lease coincident with the duration of the Crown lease of the marina including any renewal thereof, unless tenure was ended for default or otherwise on the terms found in commercial leases.
>
> 102 Refusal to consent if that term of tenure was offered would in my view be unreasonable given what had already been consented to, namely, a substitute property right with other essential terms agreed, and would justify an order for removal of the parking by-law under s 149(1)(b). The [appellant] already had consented to the change of property right tenure (reflecting the [appellant's] assessment of what it would trade for its rights and reasonable expectations under the parking by-law) and the basis of that consent was being perfected by the OC as part of the compromised by other owners of their interest in the use and enjoyment of the lots and common property.
>
> 103 An offer of the OC to grant a lease containing such a term of tenure would in my view be an appropriate condition to impose under [NCAT Act] s 58 on relief that ordered the removal of the by-law. If the offer was taken up by the [appellant's] execution of the lease then the consent of the owner to removal of the parking by-law would be present and the by-law would be removed by force of the SSMA operating on the special resolution to remove the by-law. If the offer was not taken up by the [appellant's] execution of the lease then the [appellant's] refusal to complete the consent given in the 1 May 2019 document would be unreasonable and the by-law would be removed under SSMA s 149(1)(b).

49 The Tribunal then concluded at [104] that:

> … reasonable security of alternative tenure has already effectively been offered by the OC and, if the OC reneged on offering that alternative, the parking by-law would remain". There is provided an appropriate form of compensation to the owner, in the alternative tenure and other advantages outlined in the preceding paragraphs, including the removal of the maintenance obligation in return for rental.

50 In reaching this conclusion the Tribunal said:

(1) Special By-law 8 "was not for the direct benefit of [Lot 40] to which it was attached but, rather, for the commercial benefit of property and a business outside the scheme: Reasons at [105];

(2) The "only basis for the parking by-law was the [appellant's) lot which in itself was not otherwise tied to the marina lease or business": Reasons at [105];

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(3) "If, for example, the Crown lease was not renewed or the business fail, or both, there would be no reasonable basis to retain the parking by-law for the [appellant's] lot with the attendant burden of maintaining the parking spaces": Reasons at [105].

(4) The understanding of the appellant in purchasing Lot 40 and the rights attached thereto was not relevant to assessing the question of whether refusal was unreasonable. In this regard, the appellant would have had an opportunity to "obtain advice on criteria by which [the common property by-laws] could be altered: Reasons at [105].

(5) The consent in the document executed 1 May 2019 "operated as a conditional consent by the [appellant] to the removal of the parking by-law by the appropriate special majority of the contemplated EGM, the condition being the grant of the lease on the terms in that document together with the lease term coincident with the term of the Crown lease (including any exercise of option, renewal or new grant) on which the marina business was conducted together with other lease terms concerning duties, consequence of default and other matters that were consistent with the foregoing terms of a lease". In addition, a consistent term would be that the Owners Corporation "pay the costs of preparation of the lease and stamp duty on the lease": Reasons at [107].

Analysis

51 Special By-law 8 is a "common property rights by-law". As stated above, s 149(1)(b) of the SSMA permits the Tribunal to make an order for repeal of the by-law if the appellant has unreasonably refused to consent to its repeal. Relevantly, s 149 provides:

> 149 **Order with respect to common property rights by-laws**
>
> (1) The Tribunal may make an order prescribing a change to a by-law if the Tribunal finds—
>
> > …
> >
> > (b) on application made by an owner or owners corporation, that an owner of a lot, or the lessor of a leasehold strata scheme, has unreasonably refused to consent to the terms of a proposed common property rights by-law, or to the proposed amendment or repeal of a common property rights by-law, or
> >
> > …
>
> (2) In considering whether to make an order, the Tribunal must have regard to—
>
> > (a) the interests of all owners in the use and enjoyment of their lots and common property, and
> >
> > (b) the rights and reasonable expectations of any owner deriving or anticipating a benefit under a common property rights by-law.

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52 The language of s 149(1)(b) is that the Tribunal may make an order to repeal a common property by-law where “an owner of a lot … has unreasonably refused to consent”.

53 Section 58 of the NCAT Act permits the Tribunal to make such an order on condition. That section provides:

> 58 **Power to impose conditions**
>
> A power of the Tribunal to make an order or other decision includes a power to make the order or other decision subject to such conditions (including exemptions) as the Tribunal specifies when making the order or other decision.

54 In making a determination under subs 149(1)(b), s 149(2) requires the Tribunal to have regard to the interests of all lot owners and to the rights and reasonable expectations of the owner deriving a benefit under a common property rights by-law. This involves balancing the competing interests in determining whether the relevant refusal is unreasonable: *Reen v Owners Corporation SP 300* [2008] NSWSC 1105 at [57]-[58] (which dealt with the equivalent s158 found in the 1996 Management Act); *Ainsworth v Albrecht* [2016] HCA 40 at [49].

55 Whether the reasonableness of any refusal is to be assessed having regard to circumstances that existed at the time the resolution is passed or whether events occurring after that time may be taken into consideration is unnecessary to decide, that issue not being raised on appeal. Having regard to decisions such as *Owners Corporation Strata Plan 7596 v Risidore & Ors* [2003] NSWSC 966 at [13] and *The Owners – Strata Plan No 69140 v Drewe* [2017] NSWSC 845 at [27], both of which dealt with the refusal of an owners corporation to consent to a work order under s 140 of the 1996 Management Act (now s 126 of the SSMA), the better view would seem to be that reasonableness must be assessed by reference to circumstances known prior to the passing of the relevant resolution. In part, this is because whether consent is unreasonably withheld to a resolution to repeal by-law needs to be determined in the context of what, if any, compensation is being offered to a party adversely affected by the removal of any exclusive use rights or special privileges and the reasonable expectations that affected party may have concerning the enforceability of such compensation.

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56 Be that as it may, what is clear from the language of s 149(1)(b) is that any refusal must have occurred before the Tribunal makes an order.

57 The Tribunal found the lease proposed in the Agreement was void for uncertainty and therefore unenforceable. In doing so, the Tribunal determined there was "an implied written consent". This consent, the Tribunal found, was given in the context of an agreement by the appellant to relinquish the common property rights by-law attached to lot 40 in exchange for a lease.

58 Despite concluding the Agreement was unenforceable, Tribunal analysed the nature of the consent, in part, in the context of the appellant failing to call evidence of what occurred at the mediation.

59 On the issue of evidence, the Tribunal did not appear to consider the effect of s 223 (1) of the SSMA which makes "evidence of anything said or of any admission made in a mediation session" inadmissible in tribunal proceedings unless consent is provided under s 223(3). Again, it is unnecessary to consider this matter which was not raised in this appeal.

60 The Tribunal used the "implied written consent" to justify the making of an order to repeal by-law on condition that the parties enter into a lease on terms imposed by the Tribunal.

61 The Tribunal said at [101]-[102] that if the Owners Corporation offered a lease "for a term … coincident with the duration of the Crown lease" and if the appellant refused to accept such a lease, such a refusal "would (emphasis added) … be unreasonable given what had already been consented to, namely, a substitute property right with other essential terms agreed, and would (emphasis added) justify an order for removal of the parking by-law under s 149(1)(b)". The Tribunal then said at [104]:

> … reasonable security of alternative tenure had already effectively been offered by the OC and, if the OC reneged on offering that alternative, the parking by-law would remain.

62 On this basis, in making an order to repeal the by-law, the Tribunal sought to impose on the parties as a condition under s 58 of the NCAT Act a requirement that they enter a lease on terms which the Tribunal thought appropriate.

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63 At this point we should note, in respect of the condition in the order repealing the Special By-law 8, that the Owners Corporation accepted in oral submissions that the condition imposed obligations on both parties which had not been agreed.

64 In our view, the approach of the Tribunal and the orders made demonstrates a number of errors.

65 First, insofar as there was if fact an “implied written consent” to the repeal of the Special By-law 8, it was not open to the Tribunal to conclude consent had been unreasonably refused. If consent is in fact given, the Tribunal has no authority to make an order under s 149(1)(b) of the SSMA because there has been no refusal. An exception might be if consent was given conditionally and the condition was unreasonable. However, that is not the position here.

66 Secondly, and in any event, we do not accept there was an “implied written consent” of the type which the Tribunal described so as to justify the making of the conditional order.

67 The Tribunal found that the Agreement was void for uncertainty. Consequently, the special resolution purporting to repeal Special By-law 8 on terms the Owners Corporation approved the entry into an unenforceable lease proposed by the Agreement was ineffectual. Any consent to repeal the Special By-law 8 contained in the Agreement (express or implied) could have no continuing operation as the consideration for the appellant’s consent to repeal the by-law failed. To construe the consent differently is to make good an unenforceable agreement by way of rectification or to impose on the parties an arrangement to which they have not agreed.

68 Thirdly, the appellant could not be said to have unreasonably refused to consent to the repeal of a by-law on the basis it should accept a lease:

(1) on terms different to that contained in the Agreement,

(2) which had not been offered, let alone approved, by the Owners Corporation; and

(3) about which it had no knowledge at the time the resolution to repeal Special By-law 8 was passed.

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69 Fourthly, on the Tribunal's own analysis, any refusal to consent to the repeal of the by-law could only occur at a time when the appellant was proffered and refused to sign any lease offered in consequence of the condition. It follows that such refusal could not yet be said to have occurred. As such, the terms of s 149(1)(b) are not engaged because it could not be said the appellant "has (emphasis added) unreasonably refused to consent to the … repeal of a common property rights by-law".

70 Fifthly, the Tribunal said at [105] that Special By-law 8 "was not for the direct benefit of [lot 40] to which it was attached but, rather, for the commercial benefit of the property and a business outside the scheme".

71 We do not agree.

72 It is a right attached to lot 40, which survives whether or not the owner of lot 40 operates the marina business. Having regard to the nature of the right, namely exclusive use of parking spaces for cars and trailers that access the marina facilities, it is valuable in the hands of an entity that owns both lot 40 and the marina business and in the hands of the owner of Lot 40 even if the business of the marina and the Crown lease become detached. Further, for reasons explained below, it provides a right which might not otherwise be preserved by the repeal of the by-law and its replacement with a lease.

73 Sixthly, the lease proposed by the condition in the order made by the Tribunal is itself void for uncertainty. This is because the period of the lease proposed by the Tribunal was "a term coincident with the duration (including any exercise of option, renewal or new grant) of the Crown lease to the respondent in respect of the jetty, wharf, boat ramp and surrounding area adjacent to the scheme". As stated above, the Crown lease is for a term of 20 years and continues until 2027. There is no option to renew. The grant of any new lease, which might be made by the Crown, is for a presently indeterminate period. Consequently, the period of the lease proposed in the conditional made by the Tribunal is uncertain and the condition is, in any event, incapable of compliance.

74 Further, such a lease is not a substitute for the rights conferred by Special By-law 8. The by-law benefits the owner of lot 40 indefinitely, unless it is repealed.

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A lease can only be for a definite period of time. Consequently, if a new lease with the Crown is entered into upon expiry of the current Crown lease, the appellant will continue to have the benefit of the rights granted by the by-law without the need for any negotiation with the Owners Corporation as to the terms on which it might use and occupy the parking spaces to which the by-law relates. While circumstances might change, for instance if the marina business is owned by an entity or person other than the owner of Lot 40, this has not yet occurred.

75 Against this background, in our view it could not be said that the refusal to consent to the repeal of the by-law was unreasonable

76 The Tribunal was required to weigh up the interests of all owners in the use and enjoyment of their lots and common property and the rights and reasonable expectations of the appellant.

77 In relation to the use of the common property contemplated by the parking spaces, it was not proposed that these would be made available for lot owners if the by-law was repealed. To the contrary, a lease granting exclusive possession was proposed on terms that the Owners Corporation would enjoy the benefit of rent. While the obligations to repair and maintain might have been adjusted, there was no direct benefit in terms of use of the common property being conferred on the other lot owners. In addition, repeal of the by-law would confer on the Owners Corporation the potential to commercialise the use of the parking on different terms when any lease with the appellant expired, and/or permit the Owners Corporation to make available the parking spaces for use by all lot owners (subject to any necessary Council approval).

78 On the other hand, the same commercial opportunities would benefit the owner of lot 40, whether or not the owner also operated the marina business and had the benefit of the Crown lease.

79 Having regard to the above and the unchallenged critical finding that the lease contemplated by the special resolution was unenforceable, the refusal to consent to the repeal of the by-law was not unreasonable within the meaning of s 149(1)(b) of the SSMA.

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Conclusion

80 It follows from the above that we are satisfied that grounds of appeal 2, 5 and 6 are made out. In respect of each of these grounds they raise a question of law. Consequently there is a right of appeal without leave.

81 As to ground 1, the nature and extent of the power under s 58 of the NCAT Act to make orders on condition, we have doubt this power permits the Tribunal to do what occurred here, namely to impose a commercial agreement on the parties on terms which neither have agreed. However, in light of our reasons above it is unnecessary to resolve this question. It is also unnecessary to resolve the issues raised by grounds 3 and 4.

Costs

82 It would appear s 60 of the NCAT Act applies to costs of this appeal and proceedings at first instance. That is, ordinarily each party is to pay their own costs unless there are special circumstances.

83 In the event the parties contends an order for costs should be made in either or both the proceedings at first instance and in this appeal, will make orders to permit an application to be made.

Orders

84 The Appeal Panel makes the following orders:

(1) The appeal is allowed, orders 1 and 2 made 12 May 2020 are set aside and the application is dismissed.

(2) Subject to order 3, each party is to pay their own costs of the proceedings at first instance and on appeal.

(3) In the event either party contends a different costs order should be made in the proceedings at first instance or on appeal, the following directions apply:

(a) Within 14 days from the date of these orders, the applicant for costs (costs applicant) is to file and serve evidence and submissions in support of that application, including a list of the orders sought (costs application).

(b) Within 28 days from the date of these orders, the respondent to the costs application is to file and serve any evidence and submissions in reply.

(c) Within 35 days from the date of these orders, the cost applicant is to file and serve any submissions in response.

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(d) The submissions are to include submissions about whether an order should be made under s 50(2) of the Civil and Administrative Tribunal Act 2013 dispensing with a hearing of the costs application.

(e) Upon the making of a costs application under direction 3(a), order 2 shall, as the case may be, cease to have effect in respect of costs of the proceedings at first instance, the costs of the appeal proceedings or both proceedings.

****

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

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