Civil and Administrative Tribunal

New South Wales

Case Name:	The Owners Strata Plan No 74698 v Jacinta Investments Pty Ltd
Medium Neutral Citation:	[2021] NSWCATAP 387
Hearing Date(s):	24 November 2020
Date of Orders:	30 November 2021
Decision Date:	30 November 2021
Jurisdiction:	Appeal Panel
Before:	M Harrowell, Deputy President J Kearney, Senior Member
Decision:	(1) The appeal is allowed in part. (2) Orders 3(a) and (b) made 2 June 2020 are set aside and in lieu thereof the following orders are made: Pursuant to Part 7 Divisions 1 and 2 of the Strata Schemes Management Act 2015, the respondent (The Owners – SP 74698) is to take all necessary steps to convene a general meeting, pass a special resolution and register a common property rights by-law in respect of common property in favour of the applicant (Jacinta Investments Pty Ltd) and the owners from time to time of lot 83 on the following terms: a) Exclusive use and enjoyment is to be granted to the owner of lot 83 in respect of the common property being the ground floor area depicted in the survey of SJ Dixon Surveyors Pty Ltd dated 9 July 2019 found in the Appeal Bundle at AB 1078. b) The owner of lot 83 is responsible for all costs and expenses in relation to the preparation and registration of the by-law by the owners corporation;

c) The owner of lot 83 has permission to install a glass awning the cleaning, repair and maintenance for which it was responsible;
d) In using the common property area, the owner of lot 83 is, at its cost, responsible for:

I. keeping all security and fire doors closed on the ground floor;
II. cleaning and maintaining the ground floor common property and lobbies;
III. not permitting loud noise or any disturbances to residents in the building as follows:

i. on Monday, Tuesday, Wednesday, Thursday and Sunday from 8:30 pm onwards;
ii. on Friday night from 10:00 pm onwards; and
iii. on Saturday nights from 12:00 am onwards.

(3) Order 2 made 20 June 2020 is set aside and in lieu thereof the following order is made concerning the order for payment of damages:

The respondent (The Owners – SP 74698) is to levy all lot owners, other than the applicant (Jacinta Investments Pty Ltd) in respect of the award for damages payable by the respondent to the applicant pursuant to Order 1 that 1 June 2020, such levy is to be in proportion to the unit entitlements of each lot owner other than the applicant.

(4) The parties have liberty to apply to the Tribunal in the proceedings at first instance in connection with any dispute about the implementation of order 2.

(5) In respect of costs of the proceedings at first instance and of this appeal and on the question of whether an order of the type in order 3 above should be made in respect of such costs, the following directions apply:

(a) within 14 days from the date of this decision any applicant for costs (costs applicant) is to file and serve

evidence and submissions in support of that application (costs application).
(b) Within 28 days from the date of this decision, the respondent to the costs application is to file and serve evidence any submissions in response.
(c) Within 42 days from the date of this decision the costs applicant is to file and serve any submissions in reply.
(d) The submissions are to include submissions about whether an order should be made dispensing with a hearing.

(6) Save as provided above, the appeal is dismissed.

Catchwords:

LAND LAW – Strata Scheme – subdivision and transfer of common property – agreement to transfer – common property – agreement to grant of exclusive use rights – enforceability of agreement – certificate issued under Strata Schemes Development Act – conclusive evidence – when certificate operates – power of Tribunal to determine dispute concerning transfer of common property – power of Tribunal to make orders for the registration of an exclusive use by-law.

LAND LAW – Strata schemes –power of the Tribunal to make order under the Strata Schemes Management Act excluding a successful lot owner from being levied in respect of an award of damages and costs – operation of ss 90 and 104 of the Strata Schemes Management Act – scope of power under s 232 of the Strata Schemes Management Act.

Legislation Cited:

Agricultural Tenancies Act 1990 (NSW)
Civil and Administrative Tribunal Act, 2013 (NSW)
Civil and Administrative Tribunal Rules, 2014 (NSW)
Conveyancing Act 1919 (NSW)
Interpretation Act 1987 (NSW)
Limitation Act 1969 (NSW)
Real Property Act 1900 (NSW)
Strata Schemes and Development Act 2015 (NSW)
Strata Schemes (Freehold Development) Act 1973 (NSW) (repealed)
Strata Schemes Management Act 1996 (NSW) (repealed)

	Strata Schemes Management Act 2015 (NSW)
Cases Cited:	Australian Broadcasting Commission v Australian Performing Right Association Ltd [1973] HCA 36; 129 CLR 99 Black v Garnock [2007] HCA 31; (2007) 230 CLR 438 Breskvar v Wall [1971] HCA 70; 126 CLR 376 Briginshaw v Briginshaw [1938] HCA 34; 60 CLR 336 Collins v Urban [2014] NSWCATAP 17 Coulton v Holcombe (1986) 162 CLR 1; [1986] HCA 33 County Securities Pty Ltd v Challenger Group Holdings Pty Ltd [2008] NSWCA 193 Deane v The City Bank of Sydney [1904] HCA 44; 2 CLR 198 Ferguson v John Dawson & Partners (Contractors) Ltd [1976] WLR 1213 Glenquarry Park Investments Pty Ltd v Hegyesi [2019] NSWSC 425 Maywood Aust Pty Ltd v Owners SP 85338 (No. 3), SC 1712874 (unpublished) Owners of Strata Plan No 80412 v Vickery (No 2) [2019] NSWCATAP 97 Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28; 194 CLR 355 Steak Plains Olive Farm Pty Ltd v Australian Executor Trustees Limited [2015] NSWSC 289 The Owners – Strata Plan No. 37762 v Pham [2006] NSWSC 1287 Vickery v The Owners – Strata Plan No. 80412 [2020] NSWCA 284
Texts Cited:	Nil
Category:	Principal judgment
Parties:	The Owners Strata Plan No 74698 (Appellant) Jacinta Investments Pty Ltd (Respondent)
Representation:	Counsel: V Kerr SC, N Apkarian (Appellant) B Mason (Respondent) Solicitors: Sachs Gerace Lawyers (Appellant) Ashurst (Respondent)

File Number(s):	2020/00370875 formerly AP 20/28142
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal of New South Wales
Jurisdiction:	Consumer and Commercial Division
Citation:	Not applicable
Date of Decision:	1 June 2020, 29 June 2020, 20 July 2020
Before:	G Burton SC, Senior Member
File Number(s):	SC 19/00024; SC 19/24115

REASONS FOR DECISION

Introduction

1 The appellant is the owner's corporation of Strata Plan No. 74698. The respondent is a lot owner in that strata scheme.

2 The respondent filed Strata proceedings SC 19/00024 seeking damages against the appellant arising from the appellant's failure to comply with its obligations under Section 106 of the *Strata Schemes Management Act 2015 (NSW)* (SSMA). In addition, in those proceedings the respondent claimed it was entitled to orders in connection with the registration of a plan of subdivision and for the transfer to it of certain common property. It also asserted "exclusive use" rights to use common property.

3 The appellant filed application SC 19/24115. In that application the appellant sought orders that the respondent:

(1) remove from common property various chattels; and

(2) remove and make good unauthorised alterations and additions to the common property.

4 The proceedings were heard in October 2019. The Tribunal made orders in respect of the applications on 1 and 29 June and 20 July 2020. Relevantly, these orders were:

1 June 2020

1. Order that the respondent owners corporation (OC) pay the applicant owner/lessor $266,018.80 on or before 42 days after the hearing in order 5.

….

3. Order the OC promptly to do all acts on its part (including the withdrawal of any request not to register or record, the withdrawal of any caveat concerning registration or recording, and answering or facilitating or assisting in the answering of any existing requisition and any further requisition) to record in the Register:

(a) the amended strata scheme the subject of a Strata Plan Administration Sheet concerning "Plan of Subdivision of Lot 83 and Common Property in SP

74698" and a Transfer from the OC to the applicant owner Jacinta Investments PL dated 2 February 2016 with dealing number AK204891V, pursuant to s 246 of the Strata Schemes Management Act 2015 (NSW); and

(b) a common property rights by-law in favour of Lot 84 in the amended strata scheme described in order 3(a) in respect of any areas (if any) that are designated as shaded areas called "Area of encroachment" on the survey drawing in the report of Stewart Dixon dated 9 July 2019 but which are not included within Lot 84, with Lot 84 being responsible under that by-law for the maintenance and repair of the area covered by that common property rights by-law, pursuant to s 246 of the Strata Schemes Management Act 2015 (NSW).

…

29 June 2020

…

2. Confirm as the final order the provisional view expressed in order 2 on 1 June 2020 so that the final order is: “Order, pursuant to ss 90, 104, **229(a),** 232, 240 and **241** of the Strata Schemes Management Act 2015 (NSW), that the amount payable by the OC to the applicant owner/lessor under order 1 made 1 June 2020 and confirmed as to date of payment 29 June 2020, any amount payable by the OC to the applicant owner/lessor in respect of costs of the proceedings, and the costs and expenses of the OC in respect of the proceedings, are not to be paid out of any monies or funds contributed to by the applicant owner/lessor and are to be paid only out of levies against owners other than the applicant owner/lessor”.

20 July 2020

In both proceedings in respect of costs, in addition to existing orders affecting payment of costs:

1. Order that the OC is to pay 80% of the lessor's costs of the two proceedings heard together on the ordinary basis as agreed or assessed.

5 In addition to the above orders, in respect to the appellant's application, orders were made by consent for the respondent to undertake certain removal and remediation works.

6 The Tribunal provided written reasons for its decision (reasons). We will refer to the reasons in respect of the primary decision made 1 June 2020 as the "reasons" and will refer to the subsequent reasons as the "29 June reasons" and the "20 July reasons" respectively.

7 Essentially the appeal is limited to two matters.

8 First, whether the Tribunal was in error in making order 3 on 1 June 2020 which required the appellant to:

(1) withdraw a caveat preventing the registration of:

(a) a plan of subdivision of the strata scheme; and

(b) a transfer to the respondent of certain common property; and

(2) record a common property rights by-law in favour of the respondent.

9 Secondly, whether the Tribunal had power to make order 2 made 29 June 2020 requiring the appellant to levy all lot owners, except the respondent, for contributions for the purpose of paying the damages award, and the respondent's costs and the appellant's costs of the proceedings at first instance.

10 The appellant also seeks a different costs order in the proceedings at first instance, if it is successful on the first two matters and costs of this appeal.

11 The appellant had initially sought to challenge the order for payment of money on the basis the Tribunal had no jurisdiction to determine such a dispute. However, in light of the decision of the Court of Appeal in *Vickery v The Owners – Strata Plan No. 80412* [2020] NSWCA 284 (*Vickery*), this ground of appeal was not pursued.

Background to dispute

12 It is appropriate to set out a brief history of what gave rise to these applications.

13 The respondent is the owner of Lot 83 in Strata Plan SP 74698. This lot constitutes commercial premises on which is conducted a cafe/restaurant business. The lot was acquired in 2006/7. It was leased by the respondent to various operators of the cafe/restaurant business. Around the Lot on two sides was an area of common property. The Tribunal described these areas in its reasons at [5]- [6] in the following terms:

> 5 … The first of those areas comprise parts of a patio between the lot and each street frontage (the patio wrapped around the corner and extended along each street frontage). The second comprised a roughly rectangular area at the rear of the lot bounded by a "storage cage" with some sheeting amid wire surround that was not permanently fixed into the building structure (the storage area).
>
> 6. In respect of the claimed common property, the patio area was enclosed between 2009 and 2014 by [the respondent] and/or by [the respondent's] lessee with [the respondent's] consent. The enclosure comprised clear panels that formed a roof where there was not a balcony immediately above the patio and windows between the external pillars of the building, effectively encompassing the enclosed parts of the patio with the restaurant. A wall between the patio and the restaurant on the southern street side was partially demolished. The storage area was enclosed in the same period.

14 As recorded by the Tribunal in its reasons at [7] and following, the respondent claimed there was an oral agreement in early 2009, followed by resolutions of the appellant on 20 January 2009 and 1 April 2009 by which the respondent was granted exclusive use rights to the claimed common property. Further, the respondent claimed that on 24 December 2014 the appellant passed resolutions which authorised the transfer of the common property referred to above to the respondent. The common property and Lot 83 were to become a new Lot 84 by means of the lodgement of an amended plan of subdivision.

15 Following the initial lodgement of the plan of subdivision, which needed to be uplifted because of requisitions made by the Registrar General, the appellant lodged a caveat in respect of the common property preventing the plan of subdivision being re-lodged for registration.

16 It is the respondent's entitlement to have the plan of subdivision registered so it will become the owner of new Lot 84 and the making of order 3 by the Tribunal on 1 June 2020 which constitutes one of the matters in dispute in this appeal. In this regard, the appellant disputes any entitlement to a transfer of the

common property, denies the respondent has any special use rights over the common property and claims an entitlement to orders requiring the respondent to vacate the common property and make good.

17 The second matter raised by this appeal is a dispute concerning the orders made in consequence of the Tribunal finding that the appellant had failed to comply with its duty to repair and maintain common property and that the appellant was liable to pay the respondent damages of $266,018.80, the claim for damages been brought under s 106(5) of the SSMA. The contravention apparently arose in relation to the need to carry out rectification work to tiling to the building facade and the Tribunal determining the appellant has breached its obligations under s 106(1) of the SSMA: reasons at [4] and [155]-[157].

18 As stated above, initially there was a challenge in this appeal based on whether the Tribunal had power to make an award for damages which was subsequently withdrawn in light of the decision in *Vickery*. However, what remained the subject of challenge in this appeal was the Tribunal making order 2 on 29 June 2020 to the effect that the appellant owners corporation could not levy the respondent for the costs and expenses (including the award of damages under order 1 made 1 June 2020) in order to meet these liabilities. That order was said to be made under ss 90, 104, 229(a), 232, 240 and 241 of the SSMA.

Notice of Appeal

19 The appeal was lodged in time, on 29 June 2020. The Notice of Appeal was subsequently amended, the amended Notice of Appeal being dated 3 August 2020.

20 In respect of order 3 made 1 June 2020, concerning registration of the strata plan of subdivision, the grounds of appeal were as follows:

> **Jurisdiction**
>
> 4 The Tribunal erred at law in finding that it has jurisdiction under section 232(1)(a), (d) or (f) of the Act to order an owners corporation to do all acts on its part to record a strata plan of subdivision in the Register (order 3(a) on 1 June 2020). (Reasons [218] to [223]).
>
> 5 The Tribunal erred at law in finding that it has jurisdiction under section 232(1)(a), (d) or (f) of the Act to order an owners corporation to

do all acts on its part to record a transfer of common property to a lot owner in the Register (order 3(a) on 1 June 20201. (Reasons [216] to [223]).

6 The Tribunal erred at law in ordering an owners corporation to do all acts on its part to record in the Register a strata plan of subdivision and a transfer of common property to a lot owner (order 3(a) on 1 June 2020), the effect of which was to determine title to land other than for the purpose of deciding a matter under the Act in breach of section 239(1) of the Act. (Reasons [221], [229]).

7 The Tribunal erred at law in finding that it has jurisdiction under section 232(1)(a), (d) or (f) or section 240 of the Act to order an owners corporation to do all acts on its part to record a common property rights by-law in the Register (order 3(b) on 1 June 2020). (Reasons [225], [292]).

8 The Tribunal erred at law in finding that it has jurisdiction under section 229(a) of the Act to order an owners corporation to withdraw a caveat that precluded the registration of a strata scheme of subdivision or transfer of common property in the Register (order 3 on 1 June 2020). (Reasons [224]).

9 The Tribunal did not have jurisdiction to make order 3 on 1 June 2020.

Oral agreement; 2009 minutes

10 The Tribunal erred at law in finding that the appellant and respondent entered into an oral agreement pursuant to which the respondent agreed to transfer to the appellant the claimed common property, or any part thereof, in accordance with the Strata Plan of Subdivision and Transfer. (Reasons [241 ff])

11 Alternatively, the Tribunal erred at law in finding that the 2009 minutes constituted;

> a. the creation or disposition of the claimed common property to the respondent by writing signed by the appellant or its agent thereunto lawfully authorised in writing within the meaning of s 23C(1)(a) of the Conveyancing Act 1919 (NSW)
>
> b. a memorandum or note of the oral agreement signed by the appellant or some other person lawfully authorised by the appellant within the meaning of s 54A(1) of the Conveyancing Act 1919 (NSW).

(Reasons [246]).

12 The Tribunal erred at law in finding that the 2009 minutes were sufficient to establish the by--law referred to in order 3(b) on 1 June 2020 as a valid by-law. (Reasons [268], [292])

13 The Tribunal erred at law by failing to finding that the appellant did not, by the resolutions referred to in the 2009 minutes, make the by-law referred to in order 3(b) on 1 June 2020 in accordance with s 52(1) of

the Strata Schemes Management Act 1996 (NSW) (1996 Act), (cf Reasons [268], [292])

2014 meetings Strata Plan Administration Sheet; Transfer

14 The Tribunal erred at law in finding that the respondent was a person entitled by s 28(4) of the Strata Schemes (Freehold Development) Act 1973 (NSW) (SSFD) to rely upon certificates by the appellant dated 24 December 2014 and 14 October 2015 on the Strata Plan Administration Sheet as conclusive evidence of the facts stated therein. (Reasons [233])

15 The Tribunal erred at law in finding that defects concerning the resolutions recorded in the 24 December 2014 minutes (including the lack of a quorum as required by clauses 12(1) and (2) of Schedule 2 of the 1996 Act) are irrelevant. (Reasons [233])

16 The Tribunal erred at law in finding that any resolution recorded in the 24 December 2014 minutes:

a. entitled the respondent to have the claimed common property, or any part thereof, transferred to it in accordance with the Strata Plan of Subdivision and Transfer

b. required the appellant to register the Strata Plan of Subdivision under s 9(1) of the SSFD

c. required the appellant to register the Transfer under s 25(4) of the SSFD

d. was effective to make a common property rights by-law for the claimed common property, or any part thereof, as referred to in order 3(b) on 1 June 2020

e. required the appellant to register a common property rights by-law as referred to in order 3(b) on 1 June 2020 under s 48 of the 1996 Act.

(cf Reasons [239], [269] ff)

17 The Tribunal erred at law by failing to finding that the Strata Plan Administration Sheet does not comply with s 9(3) of the SSFD and thus cannot be registered as a strata plan of subdivision under s 9(1) of the SSFD. (cf Reasons [273]ff)

18 The Tribunal erred at law by failing to finding that the appellant had not authorised the execution of the Transfer by special resolution within the meaning of s 25(1) of the SSFD, with the consequence that the Transfer cannot be registered as a dealing under s 25(4) of the SSFD. (cf Reasons [291])

19/24115 - removal and reinstatement of claimed common property

19 The Tribunal erred at law by failing to order the respondent to remove its belongings from and remediate the claimed common property. (Reasons [295])

21 In respect of order 2 made 29 June 2020 (levying of the respondent) the grounds of appeal were as follows:

> 20 The Tribunal erred at law in finding that "court" in s 90(2) of the Act includes the Tribunal. (Reasons [203])
>
> 21 The Tribunal erred at law in finding that "expenses" in s 104(1) and (2) of the Act includes money orders such as to pay damages or compensation. (Reasons [204])
>
> 22 The Tribunal erred at law in finding that it has jurisdiction under s 232(1)(a)and (e) to make a quarantine order in respect of damages payable by an owners corporation (order 2 on 29 June 2020) whether in aid of ss 90 or 104 of the Act or independent of them. (Reasons [205])
>
> 23 The Tribunal erred at law in finding that it has jurisdiction under s 104 or s 90 to make a quarantine order in respect of costs payable by an owners corporation (order 2 on 29 June 2020). (Reasons [329])

22 In respect of both matters, the appellant said the orders should be set aside and the respondent should be ordered to vacate the common property and carry out remediation work. The appellant also sought costs, both of the proceedings at first instance and in this appeal.

Consideration

23 It is convenient to deal with this appeal under two headings:

(1) The common property dispute:

(2) Power to make orders concerning levying the respondent.

The common property dispute

The Tribunal's decision

24 The Tribunal dealt with the common property dispute in its reasons at [207] and following.

25 The Tribunal noted that there were two parts to this dispute. Firstly, that the respondent claimed it was entitled to a transfer of various common property that, together with the then Lot 83 was to form part of a new Lot 84 proposed to be created by the lodgement of the plan of subdivision said to have been agreed and approved at the extraordinary general meeting of the appellant held 24 December 2014. The plan of subdivision is found at Appeal Bundle (AB) AB 1008 and following, new Lot 84 on the ground floor being depicted at AB 1013. The agreement to transfer was said to have been reached in 2009

and recognised in the resolution passed at the general meeting of the applicant on 1 April 2009.

26 Secondly, the respondent claimed in the alternative that it was entitled to have registered a special by-law for the use of common property in the areas depicted in the survey carried out in 2019 attached to the letter dated 9 July 2019 found at AB 1076 and following. This survey showed areas then occupied by the respondent, which the respondent said was the subject of the agreement in 2009. The resolution of the owners corporation of 1 April 2009 was said to have approved the by-law referred to an attached plan showing the areas the subject of the agreement. However, this plan could not be found and was not in evidence. The by-law said to have been created in 2009 had not been registered. The respondent sought a declaration that there was such a by-law and orders to compel the appellant to take steps to record the by-law.

27 In short, the Tribunal found that there was an agreement to transfer common property to the owner of Lot 83 and thereby create new Lot 84 and an agreement for the creation of a special use by-law in respect of common property in favour of the owner of Lot 83.

28 In consequence of these findings, and in recognition of the fact that the proposed transfer of common property to the owner of Lot 83 recorded in the plan of subdivision did not include the whole of the area for which the special use by-law had been created, the Tribunal made orders 3(a) and 3(b) in favour of the respondent. Order 3(a) related to the transfer of common property and registration of the plan of subdivision to create Lot 84. Order 3(b) was an order that the owners corporation create a special use by-law for that part of the land otherwise the subject of the resolution passed on 1 April 2009 that was not the subject of the plan of subdivision approved on 12 December 2014.

29 In making these orders, the Tribunal reached the following conclusions.

30 First, the Tribunal found that it had jurisdiction to deal with this dispute because it involved the operation, administration or management of the strata scheme, in particular the manner in which the owners corporation deals with its common property, including issues of maintenance, the grant of exclusive use rights and/or the transfer of common property: reasons at [218] and following. In

doing so, the Tribunal found at [221] that it had power under s 239 of the SSMA "to determine questions concerning title to land for the purpose of deciding the matter under the Act". The Tribunal also found jurisdiction because there was a dispute concerning agreements between the owners corporation and an owner which the Tribunal was permitted to deal with pursuant to s 232(1)(d) of the SSMA: reasons at [222].

31 In this regard, an order could be made for the removal of the caveat lodged by the owners corporation. This was an ancillary order made in consequence of the Tribunal having jurisdiction to determine the primary issues, namely whether agreements had been reached and all resolutions passed for the creation of the special use by-law and/or the transfer of common property to the owner of Lot 83 and the registration of the plan of subdivision: reasons at [224].

32 Secondly, the Tribunal found that the certificate given under s 28(4) of the Strata Schemes (Freehold Development) Act 1973 (NSW) (repealed) (1973 Development Act), which accompanied the plan of subdivision lodged for registration, was conclusive evidence of the special resolution having been passed agreeing to the subdivision. The Tribunal said the conclusive evidence effect of the certificate (which it said operated from the giving of the certificate) "could be relied upon as part of effecting the lodgement and registration including removal of any roadblock in that process such as a caveat": reasons at [236]. Consequently, the Tribunal found that the "successful reliance by the [respondent] on the certificates cut the ground from under the [appellant's] reliance upon procedural defects which it was the responsibility of the [appellant] to ensure did not occur". These procedural defects included those relating to the adjournment of the original meeting, the need for sufficient financial base to pass a special resolution and the "alleged absence of allocation of unit entitlement (sic)": reasons at [238].

33 Thirdly, the Tribunal concluded that an oral agreement had been reached in 2009 between a director of the respondent "with the then strata manager" that the respondent "would be given exclusive use of the relevant common property in return for renovating it": reasons at [241]. In doing so, the Tribunal rejected

an argument of the appellant that the agreement was uncertain in that it failed to identify the parties and the common property said to be the subject of the agreement and the date was uncertain: reasons at [242]-[245].

34 Fourthly, the Tribunal rejected an argument that there was a relevant absence of writing the purpose of s 23(1)(c) and s 54A of the *Conveyancing Act 1919 (NSW)* (Conveyancing Act). This is because the 2009 minutes constituted "sufficient writing executed by the appellant or its agent the then strata manager": reasons at [246]. In any event, the Tribunal found that in so far as the 2009 minutes "recorded an agreement that is subject to the grant of an equitable remedy such as specific performance …relief is able to be given under SSMA s 241 to compel execution of the documents required for the statutory gateway": reasons at [247]. Further, there was no need for the minutes to be "sealed or signed under s 238(3) of the then *Strata Schemes Management Act 1996 (NSW) (repealed)* (1996 Management Act), they being "sufficiently attested by the procedures in ss 22 and 102 of the 1996 [Management Act]". In this regard the Tribunal concluded that the "presumption of regularity in compliance with those procedures is not displaced by contradictory evidence and is supported by the existence of the minutes": reasons and [248]. This position was unaffected whether the respondent or its lessee lodged the Development Application in respect of works required in consequence of the use and occupation of the relevant common property and Lot 83: reasons at [250]. The existence and validity of the agreement did not depend on whether it was consistent with any applicable planning requirements: reasons at [251]-[253].

35 In respect of the agreement said to have been reached into 2009, the Tribunal also rejected an argument that it was uncertain because there were no plans attached to the relevant 2009 minutes, despite reference to plans in the minutes. Notwithstanding the absence of the plans, the area had in fact been occupied, there being no evidence of protest or action to stop such occupation and the evidence does not otherwise demonstrate the absence of an agreement: reasons at [255]-[262].

36 Fifthly, the Tribunal referred to the minutes of the annual general meeting on 1 April 2009. Of these minutes the Tribunal said in its reasons at [265] that they:

(1) "provided for installation and maintenance by the lessor of an area greater than the claimed common property": and

(2) also provided that "Unit entitlements are amended accordingly on the plan as levies per quarter for [the lot designated on the attached plan] will need to increase" and that the respondent's lot "would be given approval (attached drawings) to extend the restaurant to the common areas".

37 Consequently, having again referred to various provisions of the Conveyancing Act and the 1996 Management Act, the Tribunal said at [268]:

> In any event, the 2009 documents, despite any formal imperfections, were sufficient to establish a valid by-law or to lay the ground for the 2014 documents.

38 Sixthly, in respect of the general meetings on 12 December 2014 and the adjourned meeting on 24 December 2014, the Tribunal accepted that the relevant but then unsigned plan of subdivision was before the general meeting and that the strata manager was authorised at the extraordinary general meeting to seal all documents required for lodgement of the strata plan with the Council and that the respondent was authorised to lodge the plan with the Council: reasons at [271]. The Tribunal concluded that lodgement for registration of the plan of subdivision "would effect the creation of the new proprietary interest in the new Lot 84 (encompassing the former Lot 83 and the common property shown in the plan) by force of s 9(1) with s 46(1) of the 1973 Development Act. The Tribunal also found that "authorisation of transfer of common property was implicit in what was expressly authorised and was completed in the transfer executed by the [appellant] in early 2016": reasons at [272].

39 In doing so, the Tribunal rejected an argument that the Strata Certificate signed by the Council and/or the plan of subdivision were not, respectively, in compliance with s 9(3)(b)(i) and s 11(a) (which relates to recording unit entitlements) of the 1973 Development Act: reasons at [274]-[280]

40 The Tribunal also rejected arguments concerning Forms 9, 10 and 11 required as part of the process of registration of the plan of subdivision: reasons at

[281]-[286]. Of these formal requirements, the Tribunal said it was for the owners corporation to "perform correctly" the completion and lodgement of the plan of subdivision and that any such deficiencies "would not stand in the way of a grant of relief".

41 Seventhly, the Tribunal concluded at [291] that if it was wrong about the conclusive nature of the certificates concerning the passing of a special resolution, that the respondent had "established a valid special resolution on 24 December 2014 approving in substance what is required for lodgement and registration of the amended plan of subdivision and the associated transfer of common property, and is entitled to the primary relief that it seeks".

42 Eighthly, and in the alternative to its conclusions at [291], the Tribunal found in its reasons at [292] that if it was wrong about the effect of the resolution on 24 December 2014 concerning the registration of the plan of subdivision and the transfer of common property to the respondent then the respondent:

> … has established validity and certainty in respect of what was substantially intended by the 2009 resolutions, being a common property rights by-law in respect of the storage area and the patio area that the [respondent] has occupied. The [respondent] would be entitled to specific relief under SSMA s 240 that the [appellant] prepare and register a common property rights by-law to the substantive effect of the 2009 resolutions which is exclusive use of those areas and which contains a requirement for repair and maintenance of those areas by the [respondent]. …".

43 In reaching this alternative conclusion the Tribunal continued at [292]:

> The reference in the April 2009 resolutions to a change in unit entitlement is not apposite to a common property rights by-law, only to a transfer of common property (which in this assumed basis has been found to be wrong).

44 That is, the Tribunal's primary determination was, in effect, that the 2009 resolution was an approval to transfer or recognition of an agreement reached at that time to transfer to the respondent the common property which had subsequently been occupied by the respondent rather than a resolution to grant a special use by-law.

Appellant's Submissions

45 A list of issues was filed by the appellant pursuant to orders made by the Appeal on 17 November 2020. This list summarised the issues for determination as follows:

(1) Whether, by operation of s 28(4) of the Strata Schemes (Freehold Development) Act 1973 (NSW) (repealed) (1973 Development Act), a certificate relied upon by the respondent was conclusive evidence of the facts stated therein, namely that a relevant special resolution had been passed by the appellant at its general meeting.

(2) Whether the Tribunal erred in finding that the appellant and respondent entered into an oral agreement in about 2009 pursuant to which the appellant was bound to:

  (a) register the subdivision plan;

  (b) transfer common property the subject of order 3(a) 1 June 2020 the respondent; and

  (c) make a common property by-law in favour of the respondent in respect of the common property the subject of order 3(b) made 1 June 2020.

(3) Whether the Tribunal erred in finding the appellant had made a special resolution at one or other of two meetings in 2009 pursuant to which a common property rights by-law in favour of the respondent's Lot in respect of the common property identified in order 3(b) made 1 June 2020 (depicted in the 2019 sketch).

(4) Whether the Tribunal erred in finding that the appellant had passed a special resolution meeting on 24 December 2014:

  (a) consenting to the subdivision of the respondent's Lot and common property;

  (b) agreeing to the individual and aggregate unit entitlements stated in the subdivision plan; and

  (c) agreeing to execute a transfer of common property to the respondent.

(5) Whether the Tribunal erred in finding it had jurisdiction to order the appellant to do all acts on its part concerning the registration of the plan of subdivision and/or the common property rights by-law in favour of the respondent is required by order 3(b) made 1 June 2020.

(6) Whether the Tribunal erred in failing to order the respondent to remove its belongings from and remediate the common property identified in the schedule referred to in order 3(b) made 1 June 2020.

46 Reference was made in the list of issues to the grounds of appeal which we have set out above.

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

48 The certificates referred to by the Tribunal in its reasons at [231]-[239] are not certificates referred to in s 28(4) of the 1973 Development Act and the "conclusive evidence" effect of certificates to which s 28(4) relates "does not … commence until registration of the relevant dealing or plan".

49 This submission had several aspects:

(1) Section 28, found in Division 2 of the 1973 Development Act, did not apply to the registration of a plan of subdivision. It only operates in respect of dealings lodged under that Division. Plans of subdivision are lodged for registration under s 9 of the 1973 Development Act, this section forming part of Division 1. Consequently, a plan of subdivision is not a dealing "encompassed by s 28(4)".

(2) Section 28(4) does not apply to the Forms 11 and 12. The Form 11 and 12 certificates in the plan of subdivision, which concern consent to unit entitlements and subdivision, are not certificates referred to in subsection 28(4)(a).

(3) On the other hand, a transfer is "a dealing falling within s 28(4) as it could be registered under s 25(4)" which is found in Division 2 of the 1973 Development Act. A Form 9 certificate is required for such a dealing.

(4) In the present case, the Form 9 certificate signed by Ms Haidar (from the strata managing agent's company) was dated 14 October 2015. It was signed "almost 4 months prior to the Transfer dated 2 February 2016". The appellant submitted the Tribunal found in its reasons at [231] that the Form 9 certificate related to the Administration Sheet [part of the plan of subdivision], not the Transfer.

(5) The statement in the Form 9 certificate "that on 24.12.14 the OC passed a special resolution agreeing to the execution of the dealing or plan SP 74698" is simply wrong. On 24 December 2014 the appellant did not pass a special resolution either approving Strata Plan 74698 or the transfer of common property to the respondent. Indeed, it does not appear the Tribunal attached any significance to the Transfer other than a reference to the transfer being "ancillary". In this regard, the Tribunal said in its reasons at [231] - [232]:

> 231 In addition to the three minutes from 2009 and 2014, the lessor relied upon a "Strata Plan Administration Sheet" which included certificates sealed and attested by the former strata manager on 24 December 2014 and 14 October 2015. In that document the OC acknowledged as follows: it had passed a special resolution consenting to the subdivision in the attached plan pursuant to s 28(4) of the 1973 Act; the requirements of s 28(3)(a)(ii) of the 1973 Act had been complied with in respect of that dealing; it had passed a special resolution authorising the

individual and aggregate unit entitlements in the attached schedule.

232 Section 28(4) of the 1973 Act (replicated in SSDA s 36(4)) is to the effect that the certificates just mentioned are "conclusive evidence" of the first two matters stated in the certificate including the passage of a special resolution agreeing to the subdivision in the attached plan (to which the transfer of the common property into the newly-created Lot 84 on that plan was ancillary). The Registrar-General and any person taking under the dealing or any person benefiting by the registration of the dealing if it is a plan are entitled to rely on the "conclusive evidence" provision. Clause 3 of Sch 8 to SSMA gives continuing effect under the current legislation to signing of the certificates.

(6) Section 28(4), which provides a certificate "is taken to be conclusive evidence of the facts stated therein in favour of the Registrar-General and any person taking under the dealing", only operates upon registration of the plan of subdivision and not at an earlier time. In this regard:

(a) A person does not take under a dealing or benefit from the registration of a plan until registration, the Torrens system being one of title by registration, not registration of title. Reliance was placed on *Breskvar v* Wall [1971] HCA 70; 126 CLR 376 at 385 per Barwick CJ.

(b) The purpose of the section is to give "indefeasibility protection to a person who acquires an interest in land by the registration of the dealing or plan". It is analogous to s 42 of the *Real Property Act 1900 (NSW)* (RP Act).

(c) A different interpretation would mean a careless or mistaken act of affixing the seal "could bind an owners corporation to a transfer".

50 Consequently, the Tribunal was in error in concluding at [239] of the reasons that the certificates entitled the respondent to the orders made.

51 In relation to the conclusion that there was an oral agreement justifying making the order to transfer common property to the respondent, the appellant made the following submissions:

(1) In its reasons at [241], the Tribunal accepted there was an oral agreement under which the respondent would be given exclusive use of the relevant common property in return for renovating it. At [240] the Tribunal concluded the respondent "would be entitled to succeed on other grounds in respect of either the 2014 amended plan of subdivision and associated transfer or the 2009 exclusive use by-law. The Tribunal did not expressly identify that the oral agreement was an alternative basis upon which the respondent could succeed. However, the

Tribunal's subsequent reference to the Conveyancing Act in its reasons at [246] and [247] only make sense if the Tribunal was considering an oral agreement to create an interest in real property which was the subject of order 3(a).

(2) The agreement was alleged to have been made in 2009. The effect of the agreement was that it required the appellant "either to grant exclusive use of or require the transfer of a significant portion of common property". It is unlikely that a strata manager knowing of the requirements of a special resolution would have made such an agreement. The Tribunal's conclusion there was an oral agreement is not consistent with the minutes of the meetings in 2009. Reference was made to *Briginshaw v Briginshaw* [1938] HCA 34; 60 CLR 336 (*Briginshaw*) at 361-2 per Dixon J. Consequently, the Tribunal ought properly have rejected the evidence of Ms Taouk in the absence of corroborating contemporaneous evidence of which, the appellant said, there was none.

(3) Further, and in any event, the oral agreement did not justify the making of order 3(a) which related to the transfer of common property to the respondent. Rather, any agreement was for the exclusive use of common property, it not being apparent what was meant by the expression "exclusive use". In this regard it was uncertain whether an exclusive use by-law was intended under s 52 of the 1996 Development Act or whether a license was to be granted under s 65B. Alternatively, "some informal arrangement" may have been intended. In either case, there was no basis for concluding there was an agreement to transfer ownership of common property.

(4) In relation to the grant of any exclusive use, the oral agreement did not identify the common property said to be the subject of the grant. In this regard, the Tribunal was not entitled to construe the "meaning of the oral agreement by reference to a document not forming part of the agreement" namely the minutes of the meeting in 2009. Further, even if such a reference to the minutes was permissible, neither of the minutes of the meetings in 2009 had attached to them the relevant plans or drawings. In this regard:

    (a) the Tribunal was wrong to infer the plans did exist;

    (b) the respondent bore the onus of proof and failed to prove what the plans and drawing showed;

    (c) the fact the appellant took no steps to prevent the respondent from using the common property "does not assist with identifying the common property the subject of the oral agreement"; and

    (d) the Tribunal's finding in its reasons at [260] is circular and the observation that the respondent occupied more than that to which it was entitled does not assist in identifying that to which it was entitled.

(5) Further, it was common ground that common property actually occupied by the respondent after 2009 "were the two areas hatched on the 2009

sketch totalling 61.2 m²". This is different to and a smaller area than the area of the common property order to be transferred pursuant to order 3(a). Consequently, the oral agreement would not justify an order in terms of order 3(a).

(6) Finally, three further reasons were advanced as to why order 3(a) should not have been made:

(a) There was no special resolution to transfer common property as required by s 25(1) of the 1973 Development Act. Section 21 prevented a transfer without such a resolution. The strata managing agent, through Ms Haidar, had no authority and could not as agent bind the appellant without such a resolution. While ratification may be possible, the 2009 resolutions did not purport to ratify any earlier agreement.

(b) An action could not be brought for an oral agreement for the disposition of land unless there was a memorandum or note of the agreement signed by the parties or their lawfully authorised agent as required by s 54A of the Conveyancing Act. The minutes of meeting could not constitute sufficient writing, they being concerned with exclusive use and not a transfer of the common property. Further, by their terms, they do not purport to constitute a memorandum or note of any agreement.

(c) An application for an order for specific performance is barred by reason of s 14(1)(a) of the *Limitation Act 1969 (NSW)* (Limitation Act).

52 In relation to the conclusion that there was an oral agreement justifying making the order in connection with a common property rights by-law, the appellant made the following submissions:

(1) The making of such a by-law under s 52 of the 1996 Development Act or the granting of a licence under s 65B required a special resolution. Absent such a resolution, Ms Haidar had no authority to enter into an agreement to grant such a right. Any agreement made prior to such a resolution was required to be ratified.

(2) In its reasons at [244], Tribunal said the absence of an identifiable date did not make the agreement uncertain. However, if the agreement was made before the 2009 resolutions were passed, the resolutions did not purport to ratify the agreement. On the other hand, if the agreement was made after the 2009 resolutions were passed, the terms of the resolutions were not a grant of authority to make any agreement.

(3) Further, the oral agreement did not, by its terms, require the owners corporation to make an exclusive use by-law being the relief granted by the Tribunal in order 3(b). The Tribunal was not entitled to "re-write" the agreement to achieve such a result. As with the submissions made concerning the transfer of property, again the appellant relied upon the lack of certainty due to the failure to identify the common property the

subject of the agreement and said that any claim seeking an order for specific performance of the oral agreement was statute barred.

53 In relation to the 2009 resolutions the appellant made the following submissions:

(1) Insofar as the 2009 resolutions were found by the Tribunal to justify the making of order 3(a), they did not purport to make and were ineffective to make an exclusive use by-law. In short there had been non-compliance with the requirements of ss 47, 48, 51(1)(a), 52(1) and 54 of the 1996 Management Act.

(2) The resolutions did not contain or incorporate the required information. In particular, the terms of the by-law were not specified and the common property to which the by-law related was not identified. There is no evidence the respondent provided written consent. Further, the by-law was not lodged within the 2 year period and cannot now be lodged. In this regard the appellant submitted "it was incumbent on [the respondent] to ensure the [appellant] registered the by-law within the statutory time period".

(3) Further, and in any event:

(a) the respondent "did not seek an order requiring the [appellant] to make a by-law"; and

(b) there is a "disconnect" between the Tribunal's finding in its reasons at [268] that "the 2009 documents … were sufficient to establish a valid by-law" and the order 3(b) which requires the appellant to make a new by-law,

54 In respect of the resolutions made on 24 December 2014 and transfer of the common property the appellant made the following submissions:

(1) The resolutions were not resolutions approving subdivision, lodgement of the plan of subdivision for registration or transfer of the common property. Rather, the resolutions permitted lodgement with Council. The resolution was unambiguous. In this regard there is a distinction between a resolution authorising the lodgement of plans with Council and a resolution consenting to the transaction, the subject of those documents. Reliance was placed on the decision of the Supreme Court in *The Owners – Strata Plan No. 37762 v Pham* [2006] NSWSC 1287 (*Pham*) at [39]-[40] and [60]. A resolution to do one is not a resolution to do the other.

(2) Contrary to the Tribunal's reasons at [271], the point of lodgement with Council was "to determine whether Council will consent to registration of the plan (its consent being a precondition to registration …) and to identify any conditions of consent". These were "matters an owners corporation may wish to know before deciding whether it either can or should move to the next step of authorising lodgement for registration". In any event, as noted in the previous paragraph, terms of the resolution

were unambiguous and should be construed strictly. In relation to this last point reference was made to the *Australian Broadcasting Commission v Australian Performing Right Association Ltd* [1973] HCA 36; 129 CLR 99 per Gibbs J (as he then was) at 109.

(3) Further, the resolutions proposed in the notice of meeting and passed on 24 December 2014 were not expressed to be special resolutions otherwise required to approve a plan of subdivision or transfer of common property. The reasonable inference was that "recipients of that notice [of meeting] assumed they meant what they said – they were motions to lodge plans with Council". It was for a "relatively innocuous purpose" which "may well explain why a quorum did not attend the meeting on 12 December 2014 and why only 10 of 83 owners attended the adjourned meeting on Christmas Eve and then only by proxy".

(4) In any event, there were no motions which authorised the registration of the strata plan of subdivision or a transfer of common property as required by the 1973 Development Act.

(5) As to the certificates signed in consequence of those resolutions, they are "demonstrably false". Consequently the Tribunal should not have made order 3(a). The fact they were false was common ground. In this regard it would have been unnecessary for the respondent to rely on the "conclusive evidence provisions" if the minutes recorded the relevant resolutions.

(6) Finally, the appellant made submissions concerning Ms Haidar being the only attendee in person at the meeting on 24 December 2014 and that she was "off on a frolic of her own in relation to these matters". In making these submissions, the appellants submitted that the "notice of general meeting called in February 2016 seeking to invalidate the 2009 EGM resolution" which followed an exchange of emails and what occurred at this time is evidence from which an inference could be drawn "that had the appellant been more fully aware of Ms Haidar's activities at an earlier point in time then it may have moved sooner to protect its position".

55 The final topic of submissions was jurisdiction of the Tribunal to make the orders in question. These submissions were dealt with under various headings, namely the oral agreement, the 2009 minutes and the 2014 resolutions.

56 In short the appellant submitted the Tribunal "did not expressly link each of the bases for relief upon which [the respondent] relied to the heads of power on which it relied" namely ss 232(1)(a), (d) and (f). Contrary to the Tribunal's statement in its reasons at [227] the Tribunal has no inherent power or "a general supervisory jurisdiction to oversee owners corporation". "The words of s 232(1)(a)-(f) operate as words of limitation". Reference was made to *Pham* at [62]-[63] and other cases to support this proposition.

57 In respect of the power of the Tribunal to make orders in relation to the oral agreement the appellant made the following submissions:

(1) There was no matter under the Act for determination. Rather s 239(1) operated to exclude the Tribunal making a determination in the present case. In this regard the appellant submitted that the "'matter under this Act' referred to in s 239(1) is a matter **other than** determination of the question of title to land".

(2) The Tribunal had no power to grant equitable relief. The Tribunal had no jurisdiction "to determine whether it could, by order under ss 232(1)(d) and 241 together, enforce an agreement for sale of common property".

(3) As to the oral agreement being one to make an exclusive use by-law, the real question is not whether there was such an agreement, but whether the 2009 resolutions were effective to make such a by-law.

58 In respect of the power of the Tribunal to make orders in relation to the 2009 resolutions, the appellant made the following submissions:

(1) If the 2009 resolutions were effective, notification was required to be lodged not more than 2 years after the passing of the resolutions as required by s 48(2) of the 1996 Management Act. It is now too late to do so. Sections (232(1)(a) and 241(1) do not confer jurisdiction under the SSMA to now make such an order.

(2) Further, no relevant application was made in the original claim or in the amended claim. Rather, the appellant submits, all that was sought was an order under s 232(1)(a) and (d). Otherwise orders were sought under ss 149(1)(a) and (b) which relates to the unreasonable refusal of an owners corporation to make or consent to a common property rights by-law.

(3) While the appellant accepted the Tribunal was entitled under s 240 of the SSMA to make a different order to that sought, it should have done so explicitly rather than "mischaracterising [the respondent's] application … as an application for a declaration and order for a diametrically opposite claim, as it did at [reasons [15] and [208]]. Failure to explain why it considered it appropriate to make an order under s 240 and provide reasons for doing so was an error of law. In any event it was inappropriate to proceed in this way, the parties being represented by lawyers and the appellant entitled to proceed on the basis of the claims made by the respondent.

59 In respect of the power of the Tribunal to make orders in relation to the 2014 resolutions the appellant made the following submissions:

(1) The jurisdiction the Tribunal sought to exercise in relation to the 2014 resolutions "is obscure". It is unclear what the appellant is required to do, the form of the resolutions authorising the respondent "to lodge the plan of subdivision, albeit with Council and not the Registrar-General".

(2) In respect of the various powers under s 232 of the SSMA upon which the Tribunal relied the appellant said:

(a) Section 232(1)(a) concerns acts about the operation, management and administration of the strata scheme under the SSMA. No issue of use arises in connection with the 2014 resolutions, they being concerned with the lodgement of documents for registration under the 1973 Development Act or the RP Act.

(b) Section 232(1)(f) concerns the exercise of a function "conferred or imposed on an owners corporation under any other Act". "Function" includes a power, authority or duty. The Tribunal failed to identify a relevant function under another Act as required by s 232(1)(f). In this regard the Tribunal's statement in its reasons at [223] was meaningless. The lodgement of a caveat under s 74F of the RP Act was not a function "conferred or imposed on the owners corporation. Rather, it is a statutory right available to a person who claims to be entitled to a legal or equitable interest in land. Further, Part 7A of the RP Act provides a "complete code" for the lodgement, maintenance, withdrawal and removal of caveats. Reliance was placed on the decision of Callinan J in *Black v Garnock* [2007] HCA 31; (2007) 230 CLR 438 at [78]. Consequently, the Tribunal had no jurisdiction to make orders requiring the appellant "to do acts to record the subdivision plan or the Transfer in the Register or to remove the caveat", whether under ss 232(1)(a), 232(1)(f) or 229(a).

(c) Finally, the Tribunal did not identify the acts which the appellant was required to do in order to comply with order 3. Orders in the nature of mandatory injunctions that leave doubt about what the recipient of the order is required to do are unacceptable and make such an order is an error of law: *Glenquarry Park Investments Pty Ltd v Hegyesi* [2019] NSWSC 425 (*Glenquarry Park*) at [110]-[114].

Respondent's Submissions

60 The respondent first made a general submission that a "substantial part of the [appellant's] defence to this claim depended on its own failings". These failings were said to include uncertain documents, inquorate meetings and minutes of meetings that were not properly signed or attested.

61 In relation to the conclusive effect of various certificates and the application of s 28(4) of the 1973 Development Act the respondents said:

(1) The appellant's submission that s 28(4) only operates in respect of a dealing lodged for registration under Division 2 was not a submission originally made and should not now be permitted.

(2) In any event, the respondents said Division 2 concerns common property. It addresses the vesting of common property (s 18), the acquisition of additional common property (s 19) and the transfer or lease of common property (s 25). In the present case, there was a transfer of common property.

(3) The Form 9 certificate was in respect of this dealing. All that is required of such a certificate is a statement certifying there was a special resolution authorising the execution of the dealing and that the requirements of s 28(3)(a)(ii) were complied with. Any deficiency in the form of the certificate could be addressed by the Tribunal making an order under s 240 to require its proper execution.

(4) In respect of the Form 11 and 12 certificates, having referred to the reasons at [234] and [236], the respondent submits that "the reasons given no indication that the Tribunal relied on the Form 11 and 12 certificates when finding in [the respondent's] favour. In any event, even if the Tribunal did refer to those certificates, the Form 9 certificate "remains unimpaired, and the Tribunal's reasoning cannot be impugned to the extent it relied on them". Further, the Form 11 and 12 certificates comprised "part of the context" when determining the intended meaning of the Form 9 certificate.

(5) A certificate given under s 28(4) operates from the date it is signed, not when the dealing is registered. The certificate must accompany the dealing lodged for registration and must, therefore, be signed before lodgement. It is the act of signing that "confers the certificates with the status of being 'conclusive evidence' of the matters they address". As a matter of statutory construction, the certificate immediately operates in favour of the person taking under the dealing. If s 28(4) operated in the manner suggested by the appellant, it would be a redundant provision because once a dealing is registered "the need for a 'conclusive evidence' stipulation falls away". This is because the Torrens system is title by registration, not registration of title. In this regard a construction of the Act should be preferred "such 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". Reference was made to *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355.

(6) Further, a construction of 28(4) that restricted its application to when a dealing had been lodged, but before the dealing was registered, "would significantly curtail the protection it is intended to provide to the Registrar-General once the dealing is registered. On that interpretation, the Registrar-General could readily be embroiled in claims regarding the appropriateness of registering a dealing on title".

(7) Finally, the appellant's submission concerning the consequences of fraud or careless or mistaken execution of a certificate as supporting its construction of s 28(4) of the 1973 Development Act ought be rejected as there are "comprehensive arrangements" to address these issues such as protection is found in ss 45 and 118 of the RP Act as well as

compensation provisions (ss 120 and 129) and provisions creating indictable offences for fraudulently procuring a recording in the Register (s 141). In addition, an owners corporation retains its claims in contract and tort against a careless strata manager as well as claims for misleading and deceptive conduct.

62 In relation to the oral agreement the respondent made the following submissions:

(1) The Tribunal did not purport to give effect to the oral agreement. Rather, it considered the fact of the agreement when coupled with the resolutions passed by the appellant in general meeting and the minutes of those meetings as sufficient to transfer the common property to the respondent and/or entitle the respondent to an order under s 240 in respect of the common property rights by-law.

(2) There was no error by the Tribunal in its consideration of the evidence given by Ms Taouk. There was no need for this evidence to be corroborated as a precondition to its acceptance and the reference to the decision of the High Court in *Briginshaw* was not a matter raised in the proceedings at first instance and, therefore, is not matter which can be raised in the appeal. Having regard to s 38(2) of the NCAT Act, the fact evidence was hearsay did not otherwise prevent the Tribunal from accepting that evidence and acting accordingly.

(3) Ms Taouk "withstood" cross examination and the appellant did not provide evidence to contradict what she said. There was evidence that Mr John Chahine, Ms Taouk's estranged husband and director of the respondent, lived overseas and visited Australia irregularly. No adverse inference could be drawn arising from the failure to call evidence from him. As to Ms Haidar, the respondent referred to the Tribunal's finding that she "could not be said to have been in [the respondent's] camp". This finding was not challenged and, in any event, the appellant did not call Ms Haidar as a witness.

(4) The oral agreement was not uncertain. The Tribunal was entitled to accept evidence of post-contractual conduct as being admissible to identify the terms of the agreement not fully reduced to writing. Reference was made to the decision of Megaw LJ in *Ferguson v John Dawson & Partners (Contractors) Ltd* [1976] WLR 1213 at 1221 and the decision of Browne LJ in that case at 1229 said to have been adopted in various appellate courts in Australia: *Deane v The City Bank of Sydney* [1904] HCA 44; 2 CLR 198 per Griffiths CJ at 209; *County Securities Pty Ltd v Challenger Group Holdings Pty Ltd* [2008] NSWCA 193 per Spigelman CJ at [7]-[27]. The respondent submits that this principle is engaged in the present case.

(5) There was no reason to conclude that plans were not attached to the 2009 minutes and the appellant's submission that such a finding was "spurious" should not be accepted. The minutes recorded that fact, even if the document could not be found. The absence of evidence concerning searches made by the appellant to locate the plans and the

absence of any direct evidence, for example from the then strata manager, that there were no plans supports the conclusion reached by the Tribunal. Further, the subsequent conduct of the parties provide a "basis for inferring that the plans existed in January 2009 depicting which part of the common property was the subject of the oral agreement". Similarly, the fact the appellant did not protest for 7 years about the respondent occupying the common property is an indicator of the fact of the agreement and the area permitted to be occupied was agreed. Consequently, the inference drawn by the Tribunal that the plan existed in January 2009 "was readily open to the Tribunal".

63 In relation to the 2009 minutes, they were correctly sealed and attested to and did not record any dissent. No objection was raised about the minutes until February 2016, 7 years after the meeting in question. Reliance is placed on s 143(4) of the SSMA, which re-enacts s 52(3) of the 1996 Management Act as to the conclusive presumption "that all conditions and preliminary steps precedent to the making of the by-law were complied with and performed".

64 In relation to the submission concerning s 54A of the Conveyancing Act and that the minutes could not satisfy the writing requirements, no authority was cited for this proposition.

65 As to the submission in respect of the Limitation Act, this was not raised in the proceedings at first instance and no defence was pleaded. In these circumstances no error could be made by the Tribunal in failing to deal with such a defence. Further, such defence cannot now be raised in the appeal.

66 In relation to the 2009 resolutions, in addition to the matters referred to above, the respondent made the following submissions:

(1) The resolution did satisfy the requirements of s 51(1)(a) of the 1996 Management Act as the area of common property was specified in the plans attached to the minutes. In any event, s 51 "does not provide that a by-law has no statutory affect if its requirements are not satisfied". In any event, this issue was not raised in the proceedings at first instance. Further, the Tribunal concluded at [267] of its reasons than non-compliance with s 54(1) of the 1996 Management Act (which requires the by-law to provide for maintenance of property) does not provide for invalidation of the by-law for non-compliance. The respondent says this conclusion was not challenged and is an analogous provision to s 51(1)(a).

(2) As to maintenance or repair of the common property and the requirements of s 54(1), the Tribunal found the 2009 minutes "recorded that [the respondent] was responsible for repairing or maintaining the

common property, which is the same effect". Reference was again made to the Tribunal's reasons at [267].

(3) As to the requirements for the respondent to provide written consent for the purpose of s 52 of the 1996 Management Act, this is a new argument. In any event, the section did not apply because "a by-law affecting the common property does not affect the specific lot". In any event, the conclusive presumption in s 53(3) operates after 2 years.

(4) Finally, in relation to the submission concerning s 48 of the 1996 Management Act and the 2 year limitation on registering a by-law, the respondent says this section is irrelevant. The orders sought are for the appellant to "prepare and register a common property rights by-law"

67 In relation to the 2014 resolutions the respondent made the following submissions:

(1) Insofar as the appellant asserted ambiguity in the terms of the resolution, available meeting papers were "highly relevant to addressing any ambiguity in the minutes". Ms Taouk gave evidence concerning the purpose of the resolution and the rights thereby granted, namely to transfer the common property on the registered plan of subdivision, which was not challenged. The respondent said:

> The parties' discussions regarding the common property transfer began in 2009. The issues had been addressed at meetings in 2009. Since then Jacinta had enclosed and use the common areas in question, and without objection from [the appellant].

(2) The evidence before the Tribunal supported its conclusion regarding the authorisation that was given. The appellant's submission concerning the limited scope of approaching Council was "mere speculation". The minutes should not be construed "with the rigour applied to commercial agreement" and no relevant error was shown by the Tribunal in its conclusion concerning the authorisation thereby granted.

(3) As to the suggestion that the certificates signed in consequence of the resolution were false, reliance is again placed on s 28(4) of the 1973 Development Act. Further, consideration for the transfer was provided, namely the payment of stamp duty and registration fees. As for the assertion that the signing of these documents by Ms Haidar constituted her being "off on a frolic of her own", the appellant did not run this case at first instance and should not be permitted to do so now.

68 In relation to the challenge to the Tribunal's jurisdiction the respondent said appeal grounds 4 to 9 were not properly matters of jurisdiction. Rather, the issue was what orders the Tribunal could make in the exercise of its jurisdiction. The exercise of a discretion to refuse to make an order is an exercise of discretion, not a denial of it. The respondent submits that the essence of the appellant's submissions is that the Tribunal could not make the

particular orders in question, not that the Tribunal lacked authority to hear and determine the dispute.

69 As to the orders made, particularly in respect of the caveat, this should not be seen as, in effect, an application for removal of a caveat. Rather, it was an application for the respondent to be "registered on title as the proprietor of the common property in question". In this regard, the respondent again said it relied on the "'conclusive evidence' certificates". It was this relief and not the removal of the caveat that was the substance of the claim.

70 As to orders in the nature of specific performance, s 241 conferred such powers on the Tribunal. Further and in any event, s232(1) is an order making power which is not limited, the Tribunal being permitted to make any appropriate order to settle a dispute that falls within that section.

71 Finally, there is no basis to conclude the orders were uncertain. A mandatory injunction requiring a party to take "all steps necessary" is quite appropriate to avoid orders in "overly particular terms" than might otherwise permit the party enjoined avoiding compliance.

Analysis

72 The ultimate issue in respect of the common property dispute is whether the respondent was entitled to become the registered proprietor of proposed new Lot 84 which was to be created by the registration of the plan of subdivision as provided by order 3(a) made 1 June 2020 and whether Lot 84 was to have registered in its favour a common property rights by-law in respect of the area and on the terms set out in order 3(b) made 1 June 2020.

73 Alternatively, was the respondent entitled to exclusive use of various areas of the common property following an agreement and/or resolutions passed by the Owners Corporation in 2009.

74 If not, the appellant sought an order for removal of the patio enclosures and storage cage located on common property.

75 In this regard, the Tribunal recorded at [30] of the reasons:

> The [respondent/lot owner] resisted the claims for removal of the patio enclosures and the storage cage as they were said to be within the

claimed common property. However, if it did not succeed in its claim to a part of the claimed common property then it consented to being ordered to remove the items within a reasonable period.

76 In deciding this appeal, it is necessary to identify the basis upon which the respondent/lot owner claimed it was entitled to the relief sought.

The Lot owner's claim

77 In its amended application (AB 37, paras 73-88) the respondent set out the following terms:

> 73 Prior to 2009, the common area adjacent to Lot 83 was observed as being in a disrepair and frequented by drug users, loiterers and other unwanted persons.
>
> 74 An agreement was made between the Applicant and Strata Manager, Tania Haidar of Platinum Properties Pty Ltd on behalf of the Owners Corporation, that the Applicant would be granted exclusive access to the common area in exchange for its repair and upkeep.
>
> 75 The agreement reached between the parties was that the Applicant would renovate the common area at their expense in consideration for the exclusive use of the area (the Agreement)
>
> 76 The Agreement arose under the scheme
>
> 77 The agreement was evidenced by conduct:
>
> Particulars
>
> The agreement to allow Lot 83 exclusive use of the properties evidenced by:
>
> (a) The EGM resolution of 20 January 2009.
>
> (b) The AGM resolution of 1 April 2009.
>
> (c) The Adjourned Extraordinary General Meeting resolution on 24 December 2014.
>
> (d) The [respondent/lot owner's] payment of stamp duty on 31 January 2016; and
>
> (e) The application made by the [respondent/lot owner] on 2 February 2018 to give effect to the transfer of exclusive use.
>
> 78 It was foreseeable that if the Owners Corporation breached the Agreement that the Applicant would suffer loss.
>
> 79 On 20 January 2009, it was resolved at an Extraordinary General Meeting (EGM) of the Owners Corporation that exclusive use of common property should be given to the Applicant. Further, at the 1 April 2009 AGM, it was resolved that Lot 83 would be given approval to redevelop the common area.

80 The Applicant redeveloped the common area at its own expense.

81 On 24 December 2014, the Adjourned Extraordinary General Meeting was held by the Owners Corporation where two resolutions were made:

i. to resolve and authorise Lot 83 (Jacinta Investments) to lodge the new amended strata plan to council as per the attachment; and

ii. to resolve and provide authority to the strata managing agent to affix the common seal on all required documents for the lodgement of the strata plan with council.

82 On 31 January 2016, the Applicant paid stamp duty in the sum of $1,799.50 to effect the transfer.

83 On 2 February 2018, the Applicant made an application to the NSW Civil and Administrative Tribunal seeking an order that the Owners Corporation consent to the “registrable documents” being lodged and an order that the Certificate of Title to the common property in SP 74698 be provided to the mortgagee of Lot 83 in order to enable an increase in mortgage entitlements.

84 On 8 July 2018, the Owners Corporation’s lawyers alleged that the Applicant lodged a proposed transfer and subdivision of the common area to Lot 83.

85 In response, the Owners Corporation registered a caveat on SP74698 (AK578247k).

86 The Owners Corporation agreed to grant transfer and subdivide the common area to Lot 83. Once the strata management changed, that agreement was reneged upon. Instead a caveat was lodged.

87 The lodgement of the caveat was in breach of the Agreement and interfered with the use of common property.

Particulars

The agreement to allow Lot 83 exclusive use of the property is evidenced by:

i. The EGM resolution on 20 January 2009;

ii. The AGM resolution on 1 April 2009;

iii. The Adjourned Extraordinary General Meeting resolution on 24 December 2014;

iv. The Applicant’s payment of stamp duty on 31 January 2016; and

v. The application made by the Applicant on 2 February 2018 to give effect to the transfer of exclusive use.

88 Being an agreement arising under the scheme and, having been breached, impacting the enjoyment of that common property, the New South Wales Civil and Administrative Tribunal has jurisdiction under

section 232(1), sub-sections (a) and (d) of the Act to made an order to settle this dispute.

78 The respondent also claimed damages of $184,112.00 (AB 37, para 89).The amended claim was in similar terms to that contained in the original application at AB 10 para 33.

The Lot owner's evidence

79 In respect of the agreement, said to have been reached in 2009 or "prior to 2009", and what occurred thereafter, Ms Taouk, the director of the respondent, gave the following evidence in her affidavit affirmed 8 May 2019 (AB 1070 and following):

> 72 Prior to 2009, the common area adjacent to Lot 83 was frequently used as a meeting place by drug users, loiters and other unwanted persons and had become difficult to keep clean.
>
> 73 An agreement was made between John Chahine and the Strata Manager, Tania Haidar of Platinum Properties Pty Ltd on behalf of the Owners Corporation. It was agreed that Jacinta Investments would be granted exclusive access to the common area in exchange for its repair and upkeep. It was stipulated that John [Ms Taouk's former husband] would be required to renovate the common area at his expense, in consideration for exclusive use of the area (the Agreement).
>
> 74 On 21 February 2009, it was resolved at an Extraordinary General Meeting (EGM) of the Owners Corporation that exclusive use of common property should be given to Jacinta investments. Further, at the 1 April 2009 AGM, it was resolved that lot 83 would be given approval to redevelop the common area. Annexed and marked'(1A) is a copy of the EGM resolution of 21 February 2009 and annexed and marked '(1B)' is a copy of the AGM and resolution on 1 April 2009.
>
> 75 In early May 2009, Mhanna Architects Pty Limited submitted the proposal to expand the restaurant (XXX, Bankstown) to Council. Work was also completed by Gary Edwards, who was the surveyor who conducted work on the property for the proposal.
>
> 76 After completing most of the works required for submission to Council, JC and I began to experience financial difficulty. This led to delays, which stalled the process. When we began to recover financially in 2014, John resumed the completion of the work and the preparation for the proposal to Council. We paid for all the work ourselves. It was obviously apparent that the work was being done and there was no objection by the Strata.
>
> 77 Eva Attie and Matthew Shad from Shad Partners Solicitors were the solicitors directing the action needed to finalise the submission to council and LPI Office (Land and Property Information).

78 JC and I were advised by the Strata manager that due to the time lapse in completing the work required, the documentation and plans had to be reapproved by the Body Corporate, even though they had already been previously approved and sealed. I consulted Tania Haidar (Platinum Properties who were the previous strata managers) in 2014 to take the appropriate action to approve the new strata plan and the unit entitlements.

79 Platinum Properties (Tania Haider) advised John and I that we were required to hold a meeting to have our plans approved by the Owners Corporation. She advised that to have by-laws approved, we required a special resolution, with 75% of the Owners Corporation agreeing to the motion. This was delayed several times, as there was no quorum. The meeting was adjourned and finally took place on 12/12/2014. ***Annexed and marked '(1D)'*** *is a copy of the email between the Strata Manager & I regarding the process.*

80 Platinum Properties sent all relevant documentation to the owners and landlords for consultation.

81 A meeting was held on 12/12/2014 at 4:30pm. Although there were several owners present, unfortunately there were not enough in attendance to vote on the resolution. The meeting was adjourned again to be held on 24/12/2014. This was communicated to all owners, who also had the right to vote by proxy.

82 On 24 December 2014, an Adjourned Extraordinary General Meeting was held by the Owners Corporation where two resolutions were made:

(a) to resolve and authorise Lot 83 (Jacinta Investments) to lodge the new amended strata plan to council as per the attachment; and

(b) to resolve and provide authority to the strata managing agent to affix the common seal on all required documents for the lodgement of the strata plan with council.

83 We were notified that due to the favourable number of proxy votes in favour of the motion, the documents would be approved by the Owners Corporation. The documentation was approved and stamped. ***Annexed and marked '(1C)'*** *is a copy of the EGM resolution on 24 December 2017 and* ***annexed and marked '(1E)'*** *is a copy of the Cross Street Documents with Common Seal.*

84 Jacinta Investments continued to gather documents to complete requisitions so that the proposal council be submitted to the LP Office.

80 We should note that the resolution which Ms Taouk refers to as having been passed on 21 February 2009 was in fact passed on 20 January 2009, Ms Taouk erroneously referring to the date of the Minutes, being 21 February 2009, not the date the meeting was held being 20 January 2009. The resolution of 20 January 2009 (AB 1000) was in the following terms:

2) Resolved to provide exclusive use to the common property and the storages (sic) downstairs as well as parking spaces (as per the attached plan) to Lot 83. All expenses for this change, paperwork, changes made through land titles office, surveyors, and change of by-laws etc. will be paid by Lot 83

81 The resolutions of 1 April 2009 (AB 1003) were in the following terms:

Consideration and resolution was given to the following maintenance & administrative matters:

…

j) **Resolved** to provide approval to the restaurant (Lot 86-according to the attached plans) for the supply and installation of the front awning to the building. The restaurant agreed that the glass awning will be cleaned on a weekly basis. This is to clean any bird droppings or rubbish disposed from the upstairs unit onto the awning. Approval is also given to install the restaurant sign on the awning. Installation will be in professional manner with no damage to common property. The cost of any repair to any damage made to common property will need to be reimbursed by the restaurant.

k) **Resolved** that the restaurant (Lot 86 previously known as Lot 83) would be given approval (attached drawings) to extend the restaurant to the common property. However approval was given on the following basis:

- Renovations/Work are to be carried out during normal trading hours under the council's terms and conditions.

- Unit entitlements are amended accordingly on the plan as levies per quarter for to Lot 86 (sic) will need to increase.

- Any staff from the restaurant needs to keep all security and fire doors closed.

- Lot 86 (restaurant) contributes at their own cost to clean and maintain the ground floor common area and lobbies (internal and external areas).

- Lot 86 (restaurant) agree that there will be no loud noise or any disturbances to residents in the building on Monday, Tuesday, Wednesday, Thursday and Sunday's from 8:30 PM onwards, Friday night will be from 10 PM onwards and Saturday nights will be from 12.00 am onwards.

82 The resolutions of 24 December 2014 (AB 1016), which related to the lodgement of the strata plan, passed following adjournment of the extraordinary general meeting of 12 December 2014, were in the following terms:

2) **RESOLVED** that the Owners Corporation authorised Lot 83 (Jacinta Investments) to lodge the new amended strata plan to Council as per the attachment.

3) **RESOLVED** that Strata managing agent is authorised to affix the common seal on all required documents for the lodgement of the strata plan with Council.

The Lot owners submissions at first instance

83 In its submissions concerning the common property claim dated 21 October 2019 in the proceedings at first instance at AB 771 the respondent set out its position in the following terms:

> 3. The Common Property Claim
>
> 3.1 The wrongful placement of a caveat claim is pleaded at paragraphs 73 to 93 of the Amended Reasons.
>
> 3.2 The facts giving rise to the claim are set out in paragraphs 71 to 89 of the affidavit of Yvonne Taouk.
>
> 3.3 Prior to 2009, the common area adjacent to lot 83 was frequently used as a meeting place by drug users, loiterers and other unwanted people.
>
> 3.4 The Common Property Claim arises from an agreement between the Applicant and the Strata Manager, Tania Haidar of Platinum Properties Pty Ltd, on behalf of the Owners Corporation prior to 2009. The agreement was an oral agreement (evidenced in writing and by conduct) which provided that the Applicant would be granted exclusive access to the common property area adjacent to Lot 83 of Strata Plan 74698, 7-8 Cross Street, Bankstown (Common Property Area). In consideration for the exclusive use of the Common Property Area, the Applicant was required to renovate the area at its expense.
>
> 3.5 On 20 January 2009, it was resolved at an Extraordinary General Meeting of the Owners Corporation that the Applicant would be granted exclusive use of the Common Property Area.
>
> 3.6 Further, at the 1 April 2009 Annual General Meeting, it was resolved that the Applicant would be given approval to redevelop the Common Property Area.
>
> 3.7 The Applicant redeveloped the common area at its own expense. The work was carried out, in the main, in 2009 and completed in 2014.
>
> 3.8 The Strata Manager then determined that new documents and plans had to be approved by the Body Corporate.
>
> 3.9 On 24 December 2014, it was approved at the Adjourned Extraordinary General Meeting (with the necessary number of proxies to meet the special resolution requirements) that the Applicant be authorised to lodge the new amended strata plan to the council so that it may have an exclusive use of the common property.
>
> 3.10 The Applicant undertook the necessary procedures to lodge a new strata plan and have it approved.

> 3.11 It appears from the evidence of Andrew Abbott that the Owners Corporation had a change of heart in early February 2016. The Strata Manager was replaced.

84 In its outline of closing submissions dated 31 October 2019 at para 2 (AB 817) and para 75 (AB 837) the respondent said:

> 2. Similarly, the Owners Corporation's caveat over part of the common property has prevented Jacinta from becoming registered as the proprietor of that parcel since mid-2016. In doing so, the Owners Corporation seeks to resile from the agreement the parties reached in 2009, the resolutions passed at meetings on 20 January 2009, 1 April 2009 and 24 December 2014, and the steps subsequently taken in connected with these resolutions.
>
> …
>
> 75. Jacinta is entitled to be registered as the proprietor of part of the common property given the agreement it reached with the Owner's Corporation's strata managing agent, the resolutions the Owners Corporation passed on 30 January 2009, 1 April 2019 and 24 December 2014, and the steps taken in connection with these resolutions. Jacinta seeks:
>
> > (a) a declaration that it is entitled to be registered on title as the property of that party of the common property; and
> >
> > (b) orders requiring the Owners Corporation to do all things necessary on its part so this transfer may be registered on title.

85 Then, in its closing submissions in reply dated 10 December 2019, at para 49 (AB 927) the respondent described its claim as follows:

> 49. Much of the Owners Corporation's submissions regarding this part of the dispute is immaterial to Jacinta's claim. That claim can be stated succinctly. Jacinta is entitled to be registered as proprietor of part of the common property given the agreement it reached with the Owners Corporation's strata managing agent, the resolutions the Owner's Corporation passed on 30 January 2009, 1 April 2019 and 24 December 2014, and the steps taken in connection with these resolutions. It seeks orders to give effect to this. The relevant part of the common property is hatched in the drawing included in the report prepared by Stewart J Dixon of S.J Dixon Surveyors and dated 9 July 2019 (at Exhibit R1).

86 The agreement and resolutions which are the subject of this dispute were reached or made prior to the commencement of the SSMA and the *Strata Schemes Development Act 2015 (NSW)*. Consequently the 1996 Management Act and the 1973 Development Act are relevant.

87 In respect of the minutes of meeting and the resolutions passed, at [212] of the reasons the Tribunal said of the evidence and the claims made:

> The main documents relied upon by the lessor were referred to at the outset of these reasons. The first was a minute of a resolution at an EGM on 20 January 2009 that the lessor submitted granted it exclusive use of the relevant common property. The second was a minute of a resolution at the AGM on 1 April 2009 that the lessor submitted approved redevelopment of the relevant common property by the lessor. The redevelopment work was carried out at the lessor's expense, mainly in 2009. An affidavit from a member since 2013 of the SC, led by the OC, confirmed that the restaurant looked largely as it now does when she purchased it in early October 2012. The third was a special resolution at an adjourned EGM on 24 December 2014 (adjourned for absence of quorum from 12 December 2014) which the lessor submitted authorised the steps towards and the registration of an amended strata plan containing a subdivision that created Lot 84 out of the claimed common property that was being transferred to the lessor together with the lessor's Lot 83.

Relevant legislation

88 Transfer of common property to a lot owner to form a new lot requires both the lodgement of a plan of subdivision and a form of Transfer from the transferor to the transferee.

89 The plan of subdivision must identify the land to be transferred and the new or consolidated lot to be created as well as the common property which is to remain as common property.

90 Inter alia, ss 9-11of Division 1 Creation of lots and common property in the 1973 Development Act set out the requirements for the lodgement and registration of a plan of subdivision.

91 Division 2 Common property of the 1973 Development Act regulated dealing with common property. Section 21 of the 1973 Development Act provided:

> **21 Common property to be dealt with only under this Act and the Strata Schemes Management Act 1996**
>
> Common property shall not be capable of being dealt with except in accordance with the provisions of this Act and the Strata Schemes Management Act 1996.

92 In respect of the transfer of common property s 25 of the 1973 Development Act provided:

25 Transfer or lease of common property

(1) A body corporate may, pursuant to a special resolution, execute a transfer or lease of common property other than common property the subject of a lease accepted or acquired by the body corporate under section 19 (2).

…

93 Transfers are registered under the RP Act by the Registrar General. In respect of executing a transfer and registration thereof s 28 provided:

28 Effect of dealings under this Division

(1) In this section dealing includes a plan referred to in section 27 (2).

(2) A dealing executed by a body corporate for the purposes of the exercise of any of its powers under this Division shall be as valid and effective as it would be if it were also executed by the proprietors of all the lots the subject of the strata scheme concerned and the receipt of the body corporate for purchase money, rent, premium or other moneys payable to the body corporate in respect of the dealing shall be a sufficient discharge and shall exonerate every person paying any such moneys from any responsibility for their application.

(3) A body corporate shall not execute a dealing for the purposes of this Division:

(a) whereby the estate or interest of the body corporate or of the proprietors or any of them in the parcel or in any part thereof is diminished unless:

(i) all persons (other than the body corporate and the proprietors) having interests recorded in the Register in the parcel or that part, as the case may be, have released them in so far as they affect the land the subject of the dealing or the dealing may properly be, and has been, made subject to those interests, and

(ii) all persons having interests (other than interests referred to in subparagraph (i) or statutory interests) in the parcel or that part, as the case may be, being interests which have been notified to the body corporate, have released them as against the person taking under the dealing, not being a plan, or benefiting by the registration of the dealing, being a plan, or

(b) unless any by-law to which Division 4 of Part 5 of Chapter 2 of the Strata Schemes Management Act 1996 applies and relating to the land the subject of the dealing has been:

(i) repealed, or

(ii) amended in so far as it would, but for the amendment, have detracted from the interest passing under the dealing.

(4) A dealing lodged for registration under the Real Property Act 1900 or the Conveyancing Act 1919 for the purposes of this Division shall not be registered under either such Act unless it is accompanied by a certificate under the seal of the body corporate:

(a) certifying that:

(i) the resolution authorising the execution of the dealing was a special resolution, and

(ii) the requirements of subsection (3) (a) (ii) were complied with, and

(b) except where all lots concerned are held by the original proprietor or where a certificate under this paragraph or section 9 (3) (d) or 13 (2) (b) has been previously lodged in the office of the Registrar-General, or a certified or office copy of the minute of an order made under section 182 of the Strata Schemes Management Act 1996 authorising the registration of the dealing is so lodged, certifying that the resolution referred to in paragraph (a) was passed after the expiration of the initial period, and the certificate under the seal of the body corporate given for the purposes of this subsection shall be conclusive evidence of the facts stated therein in favour of the Registrar-General and any person taking under the dealing, not being a plan, or benefiting by the registration of the dealing, being a plan.

(5) This section does not prevent the execution in accordance with section 28N of a dealing by a body corporate, or by a developer on behalf of the body corporate, to give effect to a decision about a development concern (within the meaning of section 28O) or prevent the registration of a dealing so executed.

94 Where common property is not being transferred to a lot owner, an owners corporation was nonetheless empowered under the 1996 Management Act to grant to a Lot owner exclusive use of the common property by means of a by-law registered under the scheme or the grant of a license.

95 In respect of the creation of an exclusive use by-law in respect of common property, ss 48 and 52 of the 1996 Management Act provided:

48 What steps must an owners corporation take to make an amendment effective?

(1) An amendment or repeal of a by-law or, a new by-law, has no force or effect until:

(a) the owners corporation has lodged a notification, in the form approved under the Real Property Act 1900, in the Registrar-General's office, and

(b) the Registrar-General has made an appropriate recording of the notification in the folio of the Register comprising the common property.

(2) A notification cannot be lodged in the Registrar-General's office more than 2 years after the passing of the resolution for the amendment, repeal or new by-law.

52 How does an owners corporation make, amend or repeal by-laws conferring certain rights or privileges?

(1) An owners corporation may make, amend or repeal a by-law to which this Division applies, but only:

(a) with the written consent of the owner or owners of the lot or lots concerned and, in the case of a strata leasehold scheme, the lessor of the scheme, and

(b) in accordance with a special resolution.

(2) A by-law to which this Division applies may be made even though the person on whom the right of exclusive use and enjoyment or the special privileges are to be conferred had that exclusive use or enjoyment or enjoyed those special privileges before the making of the by-law.

(3) After 2 years from the making, or purported making, of a by-law to which this Division applies, it is conclusively presumed that all conditions and preliminary steps precedent to the making of the by-law were complied with and performed.

96 In respect to the power of the appellant to grant a licence in respect of common property, s 65B of the 1996 Management Act provided:

65B Owners corporation may grant licence to use common property

(1) An owners corporation may grant a licence to an owner of a lot to use common property in a particular manner or for particular purposes if the owners corporation has approved the granting of the licence by special resolution passed at a general meeting of the owners corporation.

(2) A licence may be granted subject to terms and conditions.

Note—

Division 4 of Part 5 of Chapter 2 enables owners corporations to make by-laws granting exclusive use rights and special privileges (including licences) in relation to common property.

Was there an agreement to transfer common property and is the Form 9 certificate conclusive evidence of a resolution to transfer common property to the Lot owner?

97 In our view there was no agreement between the appellant and the respondent to transfer the common property nor does the Form 9 certificate constitute conclusive evidence of a resolution to transfer common property to the Lot owner.

98 Our reasons are as follows.

99 At the outset, we should say that it is unclear from the Tribunal's reasons exactly when it is said an agreement was entered into between the appellant and the respondent to transfer the common property. However, an analysis of the evidence to which the Tribunal referred does not support a finding there was an agreement to transfer common property either in 2009 or at some time thereafter.

100 Further, the evidence does not support a conclusion that there was a special resolution passed by the owners corporation to transfer common property to the respondent.

101 Finally, Form 9 is not conclusive evidence of the fact a special resolution was passed to transfer common property and s 28(4) does not operate in the manner found by the Tribunal.

102 In relation to the events in 2009, the claim made by the respondent in the amended application (AB 37) was that there was an "agreement between the [respondent] and the Strata Manager, Tania Haidar … on behalf of the Owners Corporation, that the [respondent] would be granted exclusive access to the common area (emphasis added) in exchange for its repair and upkeep". It was not a claim that there was an agreement to transfer common property.

103 There was no direct evidence from Mr Chahine, the former director of the respondent, who was said to be the person to whom Ms Haidar had spoken. Rather, there was indirect evidence of the respondent's current director, Ms Taouk, who said in her affidavit at par 73 (AB 1070 and following):

> … It was agreed that Jacinta Investments would be granted exclusive access to the common areas in exchange for its repair and upkeep. It was stipulated that John [Ms Taouk's former husband)] would be

> required to renovate the common area at his expense, in consideration for exclusive use of the area (emphasis added) (the Agreement).

104 Otherwise, there is no evidence of any conversation at this time that the owners corporation would transfer to the respondent any common property.

105 In our view, the conversation between Mr Chahine and Ms Haidar said to constitute an agreement was not, on any view, an agreement to transfer common property to the respondent. As noted in the highlighted passage of Ms Taouk's affidavit, if any agreement was reached it was for the grant of "exclusive use" of common property areas.

106 Further, Ms Haidar, as the representative of the Strata Agent Platinum Properties Pty Ltd, had no authority to enter into any agreement in respect of the use, occupation or transfer of common property. There was no evidence of any resolution having already been passed by the appellant to confer such authority on Ms Haidar or Platinum Properties. Ms Haidar did not otherwise have ostensible authority. In this regard s 25(1) requires a special resolution to transfer common property. Similarly, any special rights or privileges to be granted by the making of a by-law or by the grant of a licence also required a special resolution of the appellant: ss 52 and 65B of the SSMA. In the absence of any evidence to suggest that the strata agent was otherwise authorised to deal with land ownership issues of the appellant, there could be no relevant holding out by the owners corporation that Ms Haidar or Platinum Properties had authority to deal with the common property.

107 In so far as these discussions constituted an agreement in principle to be approved by the appellant at a general meeting, the resolutions passed in April 2009 could not, having regard to their terms, constitute the approval by the appellant to enter into an agreement to transfer common property to the respondent or confirmation of any agreement earlier reached.

108 First, the resolution of 20 January 2009 was a resolution "to provide exclusive use to the common property (emphasis added) and the storages (sic) downstairs as well as parking spaces (as per the attached plans)". Again, by its terms, the resolution did not purport to authorise a transfer of the common

property. The reference in the resolution to the need for a “change of by-laws” is inconsistent with there being a resolution to transfer common property.

109 Second, the resolutions of 1 April 2009 do not, by their terms, purport to transfer or agree to transfer any common property to the respondent.

110 Two resolutions were passed under the heading “maintenance & administrative matters”. The first was resolution (j). That resolution, for some unexplained reason referring to “Lot 86”, gave “approval to the restaurant (Lot 86-according to the attached plans) for the supply and installation of the front awning to the building”. That resolution dealt with the requirement to clean the awning on a weekly basis, the cleaning of bird droppings and rubbish, permission to install the restaurant sign on the awning, the need for installation to be done in a professional manner and for the reimbursement of the owners corporation of the cost of any repair to any damage common property. We infer that the reference to “the attached plans” is the plans for supply and installation of the awning.

111 The second resolution, resolution (k), was for “approval (attached drawings) to extend the restaurant to the common property”. Again no reference is made to a transfer of the common property. Rather, the approval was “to extend the restaurant to the common property” (emphasis added) not to transfer the common property.

112 The Tribunal relied on the second dot point in that resolution as supporting a view that the resolution should properly be construed as an approval to transfer common property. The second dot point, which was one of the conditions on which approval was given, said:

- Unit entitlements are amended accordingly on the plan as levies per quarter for to Lot 86 (sic) will need to increase.

113 While this is a curious condition, there is no plan of subdivision or other document referenced in or attached to the minutes, nor was there any evidence to suggest that a plan of subdivision or proposal to transfer was before the owners corporation at its general meeting on 1 April 1009. Otherwise, the condition was not a resolution to subdivide or transfer common property.

114 Further, the condition at dot point 4 of the resolution approving an extension of the restaurant imposes an obligation on the respondent "at their cost to clean and maintain the ground floor common area and lobbies (internal and external areas)". This condition is consistent with the being a proposal to grant exclusive use of the common property to the respondent with maintenance obligations being a condition of that grant, not a transfer of common property.

115 It follows that no approval was given at the general meetings on 20 January 2009 or 1 April 2009 to transfer common property to the respondent.

116 As to the resolution passed 24 December 2014, this resolution does not authorise:

(1) the owners corporation to enter into an agreement to transfer common property;

(2) the execution of a form of transfer of common property;

(3) ratify any agreement made in 2009 or at any other time prior to 24 December for 2014 for the transfer of common property to the respondent.

117 According to its terms, it only purports to authorise the lodgement of a "new amended strata plan to Council" (emphasis added) and "to affix the common seal on all required documents for the lodgement of the strata plan with Council" (emphasis added). The notice of extraordinary general meeting does not suggest a different resolution was passed or that the terms of the resolution were different to that recorded in the minutes: see AB 1007.

118 In the absence of a special resolution complying with s 25(1) of the 1973 Development Act, there was no authority of the appellant or its managing agent to sign a transfer of any common property.

119 It follows that, contrary to the conclusions of the Tribunal, at no time was there an agreement to transfer common property to the respondent nor was a resolution in fact passed by the appellant to sign such a transfer.

120 In relation to the last matter, the Tribunal found that by reason of the operation of s 28(4) of the 1973 Development Act the Form 9 certificate was "conclusive evidence of the facts stated therein", namely that the appellant had passed a resolution to transfer the common property to the respondent.

121 We disagree with this conclusion. In our view, on its proper construction s 28(4) only operates upon registration of a dealing.

122 The section provides that a certificate "shall be conclusive evidence of the facts stated therein in favour of the Registrar-General and any person taking under the dealing, not being a plan, or benefiting by registration of the dealing, being a plan". It is a protection conferred on those identified, namely the Register-General, "any person taking under the dealing" and any person "benefiting by registration of the dealing, being a plan".

123 Assuming for the moment that a Form 9 certificate is a "dealing" within the meaning of that section, the benefit conferred only arises upon registration of the dealing.

124 As stated in submissions, legal title passes on registration in respect of property registered under the *Real Property Act 1900 (NSW)* (RP Act). It is only at this point in time that protection needs to be afforded in respect of legal title. Further, the language of s 28(4) which we have quoted above supports this conclusion. First, protection of the Registrar-General is only required at the point of registration when legal title passes. Second, a person only "takes" under a dealing when it is registered. Thirdly, the expression "benefiting by registration" suggests the process of registration has been completed and the relevant plan is registered.

125 A contrary conclusion would lead to the result that an erroneous or unauthorised signing of a certificate would bind an owners corporation. It would also provide an unnecessary protection to those identified as benefiting from the section. Leaving aside the Registrar-General, those persons upon whom a benefit is conferred under s 28(4) would otherwise have an equitable interest or equity arising from any transaction between them and an owners corporation. To the extent such persons had no enforceable interest, they would be in no need of protection. Finally, the need for protection is in connection with legal title which they have received or which, by reason of the registration of a plan they will derive a benefit. Until this time, protection of their legal title is not required.

126 It follows that the Tribunal was in error in concluding there was an agreement to transfer the common property and it was in error concerning the operation of s 28(4) and/or any evidentiary effect in relation to the certificates and the entitlement of the respondent to receive a transfer of common property.

127 Consequently, order 3(a) made 1 June 2020 should be set aside.

Was there a grant of exclusive rights to occupy common property and, if so, was that grant by way of license or special by-law?

128 The answer to this question involves an examination of the resolutions passed on 20 January and 1 April 2009.

129 Having regard to the affidavit of Ms Taouk and in the absence of any other evidence, it is clear there was a discussion some time prior to the meeting on 20 January 2009. That discussion was between Mr Chahine on behalf of the respondent and Ms Haidar on behalf of the strata manager concerning a proposal to grant exclusive access to common property in favour of the respondent in exchange for its repair and upkeep. Thereafter, an extraordinary general meeting of the appellant was held on 20 January 2009 and an annual general meeting was held on 1 April 2002 at which the occupation of common property by the respondent was considered. In all there were three resolutions passed, one on 20 January 2009 and two on 1 April 2009.

130 As stated above, the resolution of 20 January 2009 was to "provide exclusive use of the common property and the storages (sic) downstairs as well as car parking spaces (as per the attached plan)" to the respondent. This was on the basis:

> All expenses for this change, paperwork, changes made through land titles office, surveyors, and change of by-laws etc. will be paid by Lot 83.

131 The resolutions of 1 April 2009 permitted the installation of an awning and provided for the cleaning and maintenance of the ground floor common area and lobbies and imposed noise limitations on the use of the area. There was also obligations imposed requiring the respondent "to keep all security and fire doors closed". These conditions, when read in context, imposed financial obligations upon the respondent in consideration for the exclusive use benefit conferred.

132 Having regard to these resolutions, dot point 2 (which related to levies and alteration of unit entitlements) should, in the absence of any evidence to suggest that there was an agreement to transfer common property or a resolution to do so, the dot point should be construed as nothing more than recognising the respondent would be responsible for the financial burden concerning cleaning and maintenance of common property that would otherwise have fallen to the appellant to meet by reason of the then s 62 of the 1996 Management Act (now s 106 of the SSMA).

133 At the time or after these resolutions were passed, the evidence discloses that the respondent occupied common property consisting of the areas adjacent to Lot 83 and the storage areas. These areas are depicted in the drawings prepared by the surveyor, SJ Dixon Surveyors Pty Ltd dated 9 July 2019 (SJ Dixon Survey) at AB 1078. While reference was made in the resolution of 20 January 2009 two car parking spaces and "storages downstairs", no submissions were made concerning these areas. In this regard we note there are existing rights under Special By-law 1 (AB 981, AB 998 and AB 999) concerning the areas depicted in the SJ Dixon Survey: AB 1079 and AB 1080.

134 While the plans referred to in the minutes of 20 January 2009 and 1 April 2009 are not available, it can be inferred that the area actually occupied as depicted in the SJ Dixon Survey at AB 1078 is the same area that was the subject of the resolution recorded in those minutes. This is particularly so having regard to the finding of the Tribunal that no objection was made until these proceedings were commenced about the respondent occupying the areas depicted in the SJ Dixon Survey: reasons at [255]-[262].

135 As stated above, the 1996 Management Act permitted the passing of a by-law to grant rights or privileges (s 52) or the grant of a licence (s 65B) to use common property.

136 Having regard to the evidence to which we have referred and the resolutions passed in 2009, in our view it is clear that the appellant intended to and did pass a resolution granting privileges or rights over common property to the respondent by way of a by-law under s 52 of the 1996 Management Act. In this regard there was no submission that the resolution was not passed by the

requisite majority. The reference in the 20 January 2009 resolution to the respondent being responsible for the expenses of registering a by-law confirms the grant was by way of a by-law under s 52 and not a licence under s 65B.

137 The grant was for exclusive use of the areas depicted in the SJ Dixon Survey at AB 1078. The grant was on the following terms:

(1) the respondent would be responsible for all costs and expenses in relation to the preparation and registration of the by-law (20 July 2009 resolution);

(2) the respondent had permission to install a glass awning the cleaning, repair and maintenance for which it was responsible (resolution (j) 1 April 2009);

(3) the respondent was, at its cost, responsible for:

(a) keeping all security and fire doors closed (resolution (k) 1 April 2009-dot point 3);

(b) cleaning and maintaining the ground floor common property area and lobbies (internal and external) (resolution (k) 1 April 2009-dot point 4);

(4) No loud noise or any disturbance to residents in the building being permitted:

(a) on Monday, Tuesday, Wednesday, Thursday and Sunday from 8:30 pm onwards;

(b) on Friday night from 10:00 pm onwards; and

(c) on Saturday nights from 12:00 am onwards.

138 In this regard we note s 52(3) of the 1996 Management Act provides that after 2 years from the making, or purported making, of a by-law to which the section applies that is conclusively presumed that all conditions and preliminary steps precedent to the making of the by-law were complied with and performed.

139 It is also clear from the evidence that the by-law has not been registered. The obligation to do so was on the appellant, owners corporation: s 48 1996 Management Act. By reason of s 48(2) it cannot now be lodged as more than 2 years have passed since the by-law was made.

140 Despite this failure, there was an agreement for valuable consideration which has been performed by the respondent in consequence of its occupation and use of the common property areas. It was not suggested that the 1996

Management Act and the SSMA and/or the failure to register the by-law within the prescribed statutory period rendered the agreement unenforceable.

141 In these circumstances, despite the earlier failure of the appellant to lodge for registration a relevant by-law, it seems to us that it is now appropriate to make an order requiring the passing of any necessary resolutions to make a by-law on the terms we have set out above and for that by-law to be registered with the Registrar-General. The power to now make such a by-law is found in s 142 by-law of the SSMA. The power may be exercised despite the exclusive use rights being pre-existing: s 143(3) of the SSMA. That subsection provides:

> A common property rights by-law may be made even though the person on whom the right of exclusive use and enjoyment or the special privileges are to be conferred had that exclusive use or enjoyment or enjoyed those special privileges before the making of the by-law.

142 The by-law should provide for maintenance of the common property and keeping it in good repair as required by s 144 of the SSMA, the obligations upon the respondent to be those set out at [137] above.

143 The appellant raised a jurisdictional challenge and/or a challenge to the order making powers of the Tribunal to resolve the present dispute. We should deal briefly with this aspect of the appeal.

144 Firstly, in our view the present dispute is about

(1) the operation, administration or management of a strata scheme: s 232(1)(a);

(2) an agreement authorised or required to be entered into under the SSMA: s 232(1)(b);

(3) an agreement between the owners corporation and an owner of a lot in a strata scheme that relates to the scheme or a matter arising under the scheme: s 232(1)(d); and/or

(4) the exercise of or failure to exercise a function conferred or imposed by or under the SSMA or the by-laws of the strata scheme: s 232(1)(e).

145 Consequently, there is a power to make an order to settle the dispute, the general order making power being sufficient to authorise the making of orders compelling the passing of relevant resolutions to permit registration of a by-law in accordance with the agreement we have found exists and in accordance with the resolutions passed by the appellant in 2009.

146 In our view, the language of s 232(1) is wide enough to encompass a dispute concerning whether an agreement has been reached or a resolution has been passed for the transfer of common property from the owners corporation to a lot owner or grant special use privileges in respect of common property. To the extent this involves a determination of a question of title, the Tribunal is permitted to make such a determination because it is deciding a matter under the SSMA. Consequently, s 239 does not operate in the manner contended by the appellant.

147 Finally, the appellant said the present application was out of time. This is a defence that was not raised at first instance and should not now be permitted on appeal: Coulton v Holcombe (1986) 162 CLR 1; [1986] HCA 33 at [9].

148 It follows from the above reasons that order 3(b) made by the Tribunal on 1 June 2020 should be set aside and in lieu thereof orders should be made to facilitate the making and registration of a special use by-law consistent with these reasons. We will permit the parties to apply to the Tribunal at first instance concerning any dispute about the implementation of these orders.

Power to make orders concerning levying the respondent

149 The appellant says the Tribunal had no power to make what the appellant described as a "quarantine order", that is an order that prevented an owners corporation from levying a successful applicant in connection with both costs and expenses of proceedings.

Submissions

150 The appellant dealt with each of the sources of power upon which the Tribunal relied as justification for making order 2 set out above.

151 As to ss 90 and 104 of the SSMA the appellant said:

(1) Section 90 is a power granted to "the court" and there is no reason to construe this expression as including the Tribunal. It is an undefined term, which must be construed in the context of the SSMA and the conferral by that legislation upon the Tribunal of express powers to make orders. The heading of the section does not form part of the SSMA: ss 34 and 35 of the *Interpretation Act 1987 (NSW)*. In any event, the heading which refers to "proceedings between one or more owners of lots and an owners corporation" does not assist in interpreting what is meant by the expression "the court".

(2) Section 104 "operates according to its own terms and does not provide power to the Tribunal to make an order. Reliance is placed on the decision of the Appeal Panel in *Owners of Strata Plan No 80412 v Vickery (No 2)* [2019] NSWCATAP 97(*Vickery No 2*) at [26].

152 As to the powers found in ss 232(1)(a) and (e) the appellant submitted:

(1) The Tribunal was wrong to suggest these powers were sufficiently broad to encompass a quarantine order either when read with ss 90 and 104 or as an independent source of power.

(2) There is no relevant complaint in the sense used in s 232 of the SSMA the resolution of which might engage the order making powers found in these sections. A resolution of any damages claim and a resolution of rights in connection with s 106(5) do not give rise to a dispute as to an owners corporation raising funds to pay for any damages award.

(3) The Tribunal's approach to the award of damages, by suggesting that the respondent would not be fully compensated if required to contribute to the funds of the owners corporation to meet such an award confuses two things. First is the liability of the owners corporation to the Lot owner. The second is the requirement in the SSMA for all Lot owners to contribute in proportion to the unit entitlements in respect of any levies to be made by an owners corporation to meet its financial obligations. In short, the SSMA prescribes power and when funds are to be levied against lot owners and when a Lot owner might be relieved from an obligation to contribute.

153 Consequently, s 232 can only be invoked in connection with any relevant dispute which the Tribunal has authority to decide which falls within the meaning of that section. Further, s 90(2) deals with the very power to make quarantining orders and in the absence of that section conferring power on the Tribunal, s 232 does not assist.

154 In relation to ss 241 and 229(a) of the SSMA the appellant submitted:

(1) In making order 2 on 29 June 2020 the Tribunal did not in its reasons mentioned these sections as a source of power. Consequently it must be taken the Tribunal did not rely on them.

(2) In any event a quarantine order could not be properly characterised as an order ancillary to the award of damages. Rather, it "affects substantive rights and obligations imposed on owners and an owners corporation concerning the raising of contributions".

155 In response, the respondent made the following submissions.

156 First, the respondent made general submissions to the following effect:

(1) The submissions of the appellant would, in effect, mean that the respondent would subsidise the damages or compensation payable to it

by the owners corporation. In addition, it would be subsidising the owners corporation in respect to its costs and/or any entitlement to recover its own costs. This would undermine the compensatory function of s 106(5) of the SSMA.

(2) There is a broad power in s 232(1) to settle a complaint or dispute.

(3) The decision of the Tribunal in *Vickery No 2* and the conclusion at [26] was incorrect. It is a statutory prohibition which would be rendered ineffective if a Lot owner could not enforce the provision. The Tribunal has authority to settle a complaint or dispute and the dispute is about the levying of contributions, a matter expressly recognised as one of the functions of an owners corporation: s 13(1)(b) of the SSMA.

(4) The principle of compensation would be eroded if an owners corporation could levy the successful Lot owner in respect of any award.

157 Secondly, in respect of s 90 of the SSMA, the respondent made the following submissions:

(1) The expression "court" in s 90 of the SSMA "should be read generically for the reasons provided in *Maywood Aust Pty Ltd v Owners SP 85338 (No. 3)*, SC 1712874 (unpublished). Otherwise, the comments in *Vickery No 2* is a conclusion "rather than … a considered analysis of the statute's text, context and purpose". Its origin in s 229 of the *Strata Schemes Management Act, 1996 (NSW)* (repealed) (1996 Management Act), is language reflective of judicial proceedings. However, in the context of the SSMA, s 90 is found in Part 5, which relates to levying of contributions, the respondent made the following submission:

> Numerous provisions of this Division make express reference to the Tribunal: see, for example, sections 82(2), 86, 85(8), 87(1), 88 and 89(1). This context demonstrates that disputes relating to these financial management issues are to be directed to the Tribunal

(2) Unlike the 1996 Management Act, which excluded adjudicators from making orders for the payment of costs, the SSMA does not contain an express prohibition on the Tribunal awarding costs. Rather it contains provisions "which are consistent with the Tribunal having power": see, for example, sections 229(a) and 232(1).

(3) As such, section 90 must be considered in a different context to the 1996 Management Act and the expression "court" is "better regarded as relic of the previous statutory regime. When properly construed in its amended context, it also captures the Tribunal". The Court in *Vickery* "made numerous statements which are consistent with section 90 applying in proceedings before the Tribunal"

(4) Otherwise, s 232(1) should be construed as a broad conferral of power, reliance on that section not producing an anomalous result.

158 As to ss 229(a) and 241 the respondent made the following submissions:

(1) A quarantine order is ancillary to any costs order which the Tribunal might make in the respondent's favour.

(2) Otherwise, it is a "consequential matter" which the Tribunal is empowered to address under s 229(a).

(3) Finally, the order made is one which requires a person to "do or refrain from doing a specified act in relation of the strata scheme" and is thus within the ambit of s 241 of the SSMA.

Analysis

159 The question is whether the Tribunal has power to make an order in respect of the proportions in which an owners corporation might levy Lot owners in connection with an award for money made against it in favour of a Lot owner in proceedings in the Tribunal and in respect of any cost orders made in relation to such proceedings.

160 It is variously asserted that the Tribunal has power to make such an order under s 90, s 104, s 232 or other sections of the SSMA. As necessary, we will deal with each of these sections below.

161 The issue raises a matter of statutory construction. The relevant principles can be stated briefly.

162 In Commissioner of Taxation of the Commonwealth of Australia v Consolidated Media Holdings Ltd [2012] HCA 55; 250 CLR 503, the High Court said at [39] (p519]:

> "This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the [statutory] text" (citation omitted). So must the task of statutory construction end. The statutory text must be considered in its context. That context includes legislative history and extrinsic materials. Understanding context has utility if, and insofar as, it assists in fixing the meaning of the statutory text. Legislative history and extrinsic materials cannot displace the meaning of the statutory text. Nor is their examination an end in itself."

163 Where there is conflict or ambiguity, an interpretation is to be given which promotes the purpose of the legislation, provides for a consistent and fair meaning and provides for the harmonious operation of the legislation as a whole. In Project Blue Sky Inc & Ors v Australian Broadcasting Authority [1998] HCA 28; 194 CLR 355, the High Court said at [69]-[71] (citations 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 The 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".

164 In relation to the grant of power, the High Court said in Owners of “Shin Kobe Maru” v Empire Shipping Company Inc [1994] HCA 54; (1994) 181 CLR 404 at 421:

> It is quite inappropriate to read provisions conferring jurisdiction or granting powers to a court by making implications or imposing limitations which are not found in the express words.

165 To these requirements should be added the caution in interpreting the SSMA expressed by Leeming JA in *Vickery* at [120], where he said:

> To my mind, little assistance is to be obtained in determining the answer to the question posed by this appeal by the different drafting techniques employed in other sections of the Act. The argument is in substance based on the expressio unius maxim, which is seldom a safe guide. In legislation which has been added to and subtracted from in the 1973 and 1996 and 2015 variants, only as a last resort would I regard these considerations as decisive.

166 First, it is convenient to deal with s 90 of the SSMA. This section provides:

90 Contributions for legal costs awarded in proceedings between owners and owners corporation

(1) This section applies to proceedings brought by one or more owners of lots against an owners corporation or by an owners corporation against one or more owners of lots (including one or more owners joined in third party proceedings).

(2) The court may order in the proceedings that any money (including costs) payable by an owners corporation under an order made in the proceedings must be paid from contributions levied only in relation to the lots and in the proportions that are specified in the order.

(3) The owners corporation must, for the purpose of paying the money ordered to be paid by it, levy contributions in accordance with the terms of the order and must pay the money out of the contributions paid in accordance with that levy.

(4) This Division (other than provisions relating to the amount of contributions) applies to and in respect of contributions levied under this section in the same way as it applies to other contributions levied under this Division.

167 In our view this section does not confer order making power on the Tribunal as the expression "court" in s 90 does not include Tribunal. Our reasons are as follows.

168 Section 90 is found within Part 5 Financial management of the SSMA which deals with the creation of an administrative fund and capital works fund. This part generally regulates the creation of particular funds from which expenses of an owners corporation are paid and provides for the levying of lot owners to raise such funds. In this regard s 83(2) provides a general statement that the levies raised are payable by the lot owners in proportion to the unit entitlements of their respective lots.

169 Part 5 provides the Tribunal with specific powers to adjust levies and make orders in connection therewith in particular circumstances. These include:

(1) where a particular lot is used for a purpose which might increase premiums payable for the strata scheme: s 82(2);

(2) varying contributions where amounts proposed to be levied are excessive or inadequate: s 87(1);

(3) relieving a lot owner from the obligation to pay interest: s 85(8).

170 In relation to interest, the power to make such an order is also conferred on a court. In this regard, s 85(8) provides:

> The Tribunal or a court may, on application by an owner, order that no interest is chargeable on a specified contribution if the Tribunal or the court is satisfied that the owners corporation should reasonably have made a determination not to charge interest for the late contribution.

171 As can be seen, s 85(8) of the SSMA distinguishes between the Tribunal and a court. Unlike s 85(8), s 90 only uses the expression court. This is an indicator that the expression "court" does not include the Tribunal.

172 Also, s 104 of the SSMA, that in part deals with the levying of Lot owners by an owners corporation in respect of its costs and expenses incurred in proceedings in the Tribunal brought by a successful Lot owner, is an indicator that the legislature was not intending s 90 operate as a grant of power to the Tribunal: *Vickery* per Basten JA at [35]-[39], Leeming JA at [121]-[123] and White JA at [183].

173 Rather, s 90 operates to grant a court the power to adjust levies between Lot owners when a court orders the payment of money (including costs) in favour of a Lot owner. As Basten JA said at [38], without such a power being given to a court, in respect of awards made against an owners corporation by the a court (including orders for the payment of costs) the SSMA would require levying of all lot owners, in effect requiring a successful lot owner to contribute to any payment to which they were entitled in consequence of an order made.

174 It follows that s 90(2) is not a source of power for the Tribunal to make a quarantining order.

175 Next we deal with s 104 of the SSMA.

176 In our view s 104 does not confer an order making power on the Tribunal: *Vickery No 2* at [26]. It imposes on an owners corporation a prohibition on levying a lot owner in certain circumstances. Section 104 provides:

> **104 Restrictions on payment of expenses incurred in Tribunal proceedings**
>
> (1) An owners corporation cannot, in respect of its costs and expenses in proceedings brought by or against it for an order by the Tribunal, levy a contribution on another party who is successful in the proceedings.
>
> (2) An owners corporation that is unsuccessful in proceedings brought by or against it for an order by the Tribunal cannot pay any part of its

costs and expenses in the proceedings from its administrative fund or capital works fund, but may make a levy for the purpose.

(3) In this section, a reference to proceedings includes a reference to proceedings on appeal from the Tribunal.

177 The section mandates that "in respect of [the owners corporation's] costs and expenses":

(1) an owners corporation cannot levy a contribution on another party who is successful in the proceedings; and

(2) cannot pay any part of its costs and expenses from its administrative fund or capital works fund.

Rather, a special levy may be made for the purpose of paying those costs, the persons who can be levied to exclude the successful lot owner.

178 If an owners corporation acts in contravention of this provision, a dispute may arise enabling the Tribunal to make orders under s 232(1) to settle such a dispute by compelling an owners corporation to comply with the obligation imposed under s 104.

179 Absent such a dispute, the Tribunal has no power to make orders to enforce the obligation imposed by s 104.

180 Next we deal with s 232(1) of the SSMA.

181 In our view this section does permit the Tribunal to make a quarantining order, both in respect of levies for the purpose of paying an award for damages and an award of costs payable by an owners corporation to a successful Lot owner.

182 Section 232 grants to the Tribunal power to "make an order to settle a complaint or dispute". What is required to enliven the order making power is a dispute within the specified categories in s 232(1) of the SSMA. That section provides:

> (1) **Orders relating to complaints and disputes** The Tribunal may, on application by an interested person, original owner or building manager, make an order to settle a complaint or dispute about any of the following—
>
> (a) the operation, administration or management of a strata scheme under this Act,
>
> (b) an agreement authorised or required to be entered into under this Act,

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

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

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

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

183 The types of orders that can be made are not specified, other than for the requirement that the order be one "to settle a complaint or dispute". There is no reason to construe such a grant in a limited way: *Shin Kobe* (above); *Vickery* per Basten JA at [26]-[28] and White JA at [167].

184 Such an approach when construing a general order making power was also adopted by White J (as he then was) in construing the general order making power in s 21(1)(a) of the *Agricultural Tenancies Act 1990 (NSW)* which permits the Tribunal to make "an order giving effect to a determination that may be made by the Tribunal under this Act": *Steak Plains Olive Farm Pty Ltd v Australian Executor Trustees Limited* [2015] NSWSC 289 at [79] and following.

185 The question is whether there is a relevant dispute which would attract jurisdiction and enliven the order making power and whether the SSMA otherwise specifies which lot owners are to be levied in funding any liability of an owners corporation to a lot owner in respect of such disputes.

186 At first blush, the claims raised in the present appeal, being against a body corporate, would suggest that the raising of funds to meet such obligations for which the owners corporation might be liable are internal to the owners corporation in the same way as would operate in circumstances where a shareholder sues a company. However, such an approach ignores the nature of an owners corporation and the manner in which funds are raised to meet its various financial obligations, both recurring and non-recurring.

187 The SSMA provides for an "administrative fund" and a "capital works fund" to be established into which levies are paid: ss 73 and 74 SSMA. Sections 79-81 of the SSMA deal with particular matters for which levies might be raised and the fund into which particular levies are to be paid. These provisions might be

described as the mechanism for funding the ordinary operating expenses and capital works program of an owners corporation. They require the owners corporation to estimate expenses likely to be incurred and pass a resolution that amounts for those estimates should be levied against Lot owners. In respect of such levies, s 83 provides payments of the contributions fixed under the estimating process required by the SSMA are to be paid by individual lot owners "in shares proportional to the unit entitlements of their respective lots". This is subject to an exception in s 82 which is not presently relevant, that relates to levies in connection with insurance premiums.

188 Generally, these sections regulate the raising of funds to meet obligations to third parties in respect of expenses of an owners corporation incurred in performing its functions under the SSMA.

189 However, this regime does not operate, or at least not exclusively, in connection financial obligations of the owners corporation in respect of disputes with lot owners.

190 This is clear from ss 90 and 104 of the SSMA.

191 In the case of s 104, an owners corporation is prohibited from paying "any part of its costs and expenses in the proceedings from its administrative fund or capital works fund, but may make a levy for that purpose". In doing so, an owners corporation "cannot … levy a contribution on another party who is successful in the proceedings".

192 Once it is accepted that there are exceptions to the operation of s 83, there is no reason to confine disputes about "the operation, administration or management of a strata scheme under this Act" or about " an exercise of … a function conferred or imposed by or under [the SSMA]" on an owners corporation as excluding disputes about which lot owners should bear the financial consequences arising from the owners corporation's liability to a lot owner in connection with proceedings brought under the SSMA. This is so whether that liability is in respect of damages or in respect of costs awarded by the Tribunal in determining a dispute otherwise within s 232(1) of the SSMA.

193 Further, it would be a peculiar interpretation of the general order making power found in s 232(1) and the jurisdiction granted thereunder if the Tribunal could make an award for damages against an owners corporation under s 106(5) for "any reasonably foreseeable loss suffered by the owner as a result of a contravention of this section by the owners corporation" but could not make an order to ensure that the successful owner was not otherwise required to contribute to their own loss because of the operation of s 83 of the SSMA. Similarly, such an interpretation would have odd consequences in connection with any order for costs made in favour of a successful owner.

194 It might be thought that such an interpretation fails to construe s 232(1) in context, having regard to the express provisions found in ss 90 and 104 of the SSMA.

195 There are several answers to this proposition.

196 First, as pointed out in *Vickery*, s 90 is necessary as an express grant to a court which would otherwise have no power in connection with an owners corporation levying lot owners concerning awards for damages and costs and expenses awarded in court proceedings: Basten JA at [38], Leeming JA at [122] and White JA at [183].

197 Secondly, s 104 is no more than a provision that says that the costs and expenses of an owners corporation, in any proceedings successfully bought against it by an applicant, cannot be the subject of a levy against that successful party. It says nothing of damages or costs payable to a successful party.

198 Thirdly, no assistance is gained by considering the historical context of s 104. This is because the predecessor to s 104, s 230 of the 1996 Management Act, originally operated in circumstances where adjudicators could not make an award for damages and could not award costs to either party, nor could the then the Consumer Trader and Tenancy Tribunal on appeal from an adjudicator's decision (save in limited circumstances not presently relevant): see ss 138(3)(d), 176 and s 192 of the 1996 Management Act.

199 On the creation of the Civil and Administrative Tribunal (NCAT), the regime of adjudicators continued, all appeals to the Tribunal under the 1996 Management Act being by way of external appeal to the Tribunal, as permitted by 1996 Management Act and the NCAT Act. There was still no power to award damages, although s 192 was repealed. It provides little or no assistance in deciding this case to consider whether, under the 1996 Management Act, the changes affected at that time permitted the Tribunal to make a quarantining order in respect of costs of proceedings, the power to award costs in proceedings before the Tribunal regulated by the NCAT Act.

200 Fourthly, the *expressio unius* maxim provides little assistance in interpreting the grant of power under s 232(1) of the SSMA: *Vickery* per Leeming JA at [120]. Rather, the section should be construed in a manner "that is consistent with the language and purpose of all the provisions of the statute": *Project Blue Sky* above.

201 Fifthly, there is nothing inconsistent with an interpretation of s 232(1) which permits the making of orders concerning who is to be levied in connection with an award for damages and/or costs made in favour of a successful owner so as to ensure that, where appropriate, the successful owner is not burdened with the obligation to pay themselves a portion of the award made in their favour. This interpretation is wholly consistent with ss 90 and 104 of the SSMA.

202 Indeed, it would be a curious result if a court could make a quarantining order in favour of a successful plaintiff to ensure they were properly compensated but the Tribunal could not.

203 It follows that this ground of appeal should be dismissed.

204 In doing so, we note that the form of the order by the Tribunal included an order dealing with the levying of lot owners in respect of the payment of the appellant's own costs of the proceedings at first instance and on appeal as well as the levying of lot owners in respect of the payments due to the respondent for damages and the respondent's costs of the proceedings at first instance.

205 In relation to the costs and expenses of the owners corporation in these proceedings and the proceedings at first instance, in our view s 104 operates

by its terms upon an unsuccessful owners corporation. As we said above, it is not a source of power for the Tribunal to make an order concerning who should be levied in respect of an owners corporation's costs and expenses in proceedings in which that owners corporation has been unsuccessful.

206 Prima facie, the Tribunal should not have made such an order, s 104 of SSMA operating according to its terms.

207 On the other hand, there may be an argument concerning who is successful in the proceedings at first instance. This may affect the operation of s 104 although it would seem that, having regard to the relief originally claimed including damages the respondent is properly to be regarded as a successful lot owner for the purpose of s 104.

208 As we propose to permit the parties to make submissions in relation to costs, for the reasons outlined below, it is appropriate not to make any order in respect of the appellant's costs and expenses at this stage.

Costs

209 The appellant has been partially successful in its appeal. On the other hand, having regard to our conclusions, it would appear the respondent was successful in obtaining the alternative relief sought in its original application, namely the registration of a by-law permitting its exclusive use of the area in the SJ Dixon Survey.

210 We will permit the parties to make submissions concerning costs of the proceedings at first instance and in respect of this appeal, including the terms of any quarantining order in respect of costs of each of the parties.

Orders

211 The Appeal Panel makes the following orders:

(1) The appeal is allowed in part.

(2) Orders 3(a) and (b) made 2 June 2020 are set aside and in lieu thereof the following orders are made:

Pursuant to Part 7 Divisions 1 and 2 of the Strata Schemes Management Act 2015, the respondent (The Owners – SP 74698) is to take all necessary steps to convene a general meeting, pass a special resolution and register a common property rights by-law in respect of

common property in favour of the applicant (Jacinta Investments Pty Ltd) and the owners from time to time of lot 83 on the following terms:

a) Exclusive use and enjoyment is to be granted to the owner of lot 83 in respect of the common property being the ground floor area depicted in the survey of SJ Dixon Surveyors Pty Ltd dated 9 July 2019 found in the Appeal Bundle at AB 1078.

b) The owner of lot 83 is responsible for all costs and expenses in relation to the preparation and registration of the by-law by the owners corporation;

c) The owner of lot 83 has permission to install a glass awning the cleaning, repair and maintenance for which it was responsible;

d In using the common property area, the owner of lot 83 is, at its cost, responsible for:

I. keeping all security and fire doors closed on the ground floor;

II. cleaning and maintaining the ground floor common property and lobbies;

III. not permitting loud noise or any disturbances to residents in the building as follows:

i. on Monday, Tuesday, Wednesday, Thursday and Sunday from 8:30 pm onwards;

ii. on Friday night from 10:00 pm onwards; and

iii. on Saturday nights from 12:00 am onwards.

(3) Order 2 made 20 June 2020 is set aside and in lieu thereof the following order is made concerning the order for payment of damages:

The respondent (The Owners – SP 74698) is to levy all lot owners, other than the applicant (Jacinta Investments Pty Ltd) in respect of the award for damages payable by the respondent to the applicant pursuant to Order 1 that 1 June 2020, such levy is to be in proportion to the unit entitlements of each lot owner other than the applicant.

(4) The parties have liberty to apply to the Tribunal in the proceedings at first instance in connection with any dispute about the implementation of order 2.

(5) In respect of costs of the proceedings at first instance and of this appeal and on the question of whether an order of the type in order 3 above should be made in respect of such costs, the following directions apply:

(a) within 14 days from the date of this decision any applicant for costs (costs applicant) is to file and serve evidence and submissions in support of that application (costs application).

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

(c) Within 42 days from the date of this decision the costs applicant is to file and serve any submissions in reply.

(d) The submissions are to include submissions about whether an order should be made dispensing with a hearing.

(6) Save as provided above, the appeal is dismissed.

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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