Civil and Administrative Tribunal

New South Wales

Case Name:	The Owners – SP No 91684 v Liu; The Owners – SP No 90189 v Liu
Medium Neutral Citation:	[2022] NSWCATAP 1
Hearing Date(s):	22 November 2021
Date of Orders:	5 January 2022
Decision Date:	5 January 2022
Jurisdiction:	Appeal Panel
Before:	R C Titterton OAM, Senior Member J Kearney, Senior Member
Decision:	1. In matter 2021/00262738: (a) The appeal is dismissed; and (b) The stay of the Tribunal's orders granted 29 September 2021 is lifted. 2. In matter 2021/00262728: (a) The appeal is dismissed; and (b) The stay of the Tribunal's orders granted 29 September 2021 is lifted. 3. The Respondent is to file submissions on costs (limited to five pages) within 28 days; 4. The Appellants may respond within a further 14 days. 5. The Respondent may reply within a further 14 days.

6. The Appeal Panel proposes to determine the issue of costs “on the papers” and without a hearing. If either party opposes that course they should address that matter in their submissions.

Catchwords:	LAND LAW – Strata Schemes Management Act – validity of by-law - harsh, unconscionable or oppressive – without power - severability
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) – s 80 Fair Trading Act 1987 (NSW) - s 54A Fair Trading Amendment (Short-Term Rental Accommodation) Act 2018 – s 137A Interpretation Act 1987 (NSW) – ss 3, 32 and 34 Strata Schemes Management Act 2015 (NSW) – ss 79, 136, 137, 137A, 139, 150
Cases Cited:	Buck v Bavone [1976] HCA 24; (1976) 135 CLR 110 Collins v Urban [2014] NSWCATAP 17 Cooper v The Owners - Strata Plan 58068 (2020) 103 NSWLR 160; [2020] NSWCA 250 Cooper Brookes (Wollongong) Pty Ltd v FCT (1981) 35 ALR 151 Gelder v The Owners Strata Plan No 38308 [2020] NSWCATAP 227 Mailey v Sutherland Shire Council (2017) 226 LGERA 188; [2017] NSWCA 343 Sportodds Systems Pty Ltd v New South Wales [2003] FCAFC 237; (2003) 133 FCR 63 Owners SP 3397 v Tate [2007] NSWCA 207 Politis v Federal Commissioner of Taxation [1988] FCA 446 Thompson v Goold & Co [1910] AC 409 Upton v Martin and Stein Antiques Pty Ltd [2017] NSWCATAP 175
Category:	Principal judgment
Parties:	In 2021/00262738: The Owners - SP No 91684 and The Owners - SP No 90189 (Appellants) Ava Dongmei Liu (Respondent) In 2021/00262728:

	Ava Dongmei Liu (Appellant) The Owners - SP No 91684 and The Owners - SP No 90189 (Respondent)
Representation:	Counsel: In 2021/00262738: Counsel: D Knoll (Appellants) M Cobb-Clark (Respondent) Solicitors: Grace Lawyers (Appellants) Sachs Gerace Lawyers (Respondent) In 2021/00262728: Counsel: M Cobb-Clark (Appellant) D Knoll (Respondents) Solicitors: Sachs Gerace Lawyers (Appellant) Grace Lawyers (Respondents)
File Number(s):	2021/00262738 & 2021/00262728
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Citation:	Not applicable
Date of Decision:	17 August 2021
Before:	C Paull, Senior Member
File Number(s):	SC21/41841, SC 21/41842

REASONS FOR DECISION

Introduction

1 These two appeals were heard together. In each appeal, the appellant is the owners corporation of a strata plan. The respondent is the same person for each appeal. She is a lot owner in each of the strata plans.

2 The appeals concern two residential towers at Sydney Olympic Park. The buildings are adjoining and have separate strata plans. Each has about 25 levels. There are 391 lots in SP 91864 and 447 lots in SP 90189.

3 In May 2020, each owners corporation passed a special resolution to amend the existing by-laws relating to short-term rental accommodation.

4 The respondent brought proceedings in the Consumer and Commercial Division of the Tribunal to challenge the by-laws in each strata plan.

5 On 17 August 2021, the Tribunal decided the by-laws in each strata scheme were invalid. The owners corporation in each strata plan appeals from that decision.

6 The by-laws for each scheme are identical in terms except for numbering. The two strata plans have the same legal representatives. The parties agreed we could hear the appeals together.

7 As the by-laws are the same, and to avoid confusion, we will refer in these reasons only to the appeal in matter 2021/00262738 (the Owners – Strata Plan 90189 v Liu) and the by-laws from SP 90189 with the intention that the reasons apply to both matters. However, the final orders will deal with each appeal and strata plan.

The statutory framework

8 Section 136(1) of the *Strata Schemes Management Act 2015* (NSW) (SSMA*)* empowers an owners corporation to make by-laws for the purpose of the "… control, management, administration, use or enjoyment of the lot or lots and common property".

9 Section 139(1) of the SSMA provides a restriction on the by-law making power. Relevant to this appeal, it provides:

> **139 Restrictions on by-laws**
>
> (1) By-law cannot be unjust A by-law must not be harsh, unconscionable or oppressive.
>
> Note—
>
> Any such by-law may be invalidated by the Tribunal (see section 150).

10 The SSMA was amended by the *Fair Trading Amendment (Short-Term Rental Accommodation) Act 2018* (NSW) and on 10 April 2020 s 137A of the SSMA commenced. It provides:

> **137A Short-term rental accommodation**
>
> (1) A by-law made by a special resolution of an owners corporation may prohibit a lot being used for the purposes of a short-term rental accommodation arrangement if the lot is not the principal place of residence of the person who, pursuant to the arrangement, is giving another person the right to occupy the lot.
>
> (2) A by-law has no force or effect to the extent to which it purports to prevent a lot being used for the purposes of a short-term rental accommodation arrangement if the lot is the principal place of residence of the person who, pursuant to the arrangement, is giving another person the right to occupy the lot.
>
> (3) In this section, ***short-term rental accommodation arrangement*** has the same meaning as in section 54A of the *Fair Trading Act 1987*.

11 Section 54A of the *Fair Trading Act 1987* (NSW) relevantly provides:

> ***short-term rental accommodation arrangement*** means a commercial arrangement for giving a person the right to occupy residential premises for a period of not more than 3 months at any one time, and includes any arrangement prescribed by the regulations to be a short-term rental accommodation arrangement, but does not include any arrangement prescribed by the regulations not to be a short-term rental accommodation arrangement.

12 We are not aware of any relevant regulations made pursuant to that definition.

13 In summary, s 137A allows a strata scheme to make by-laws prohibiting short term rentals if the lot is not the principal place of residence of the person giving the right to occupy. Where the lot is the principal place of residence, a by-law prohibiting short term rentals has “no force or effect”.

14 The respondent’s proceedings in the Tribunal were based upon s 150 of the SSMA which provides:

> **150 Order invalidating by-law**
>
> (1) The Tribunal may, on the application of a person entitled to vote on the motion to make a by-law or the lessor of a leasehold strata scheme, make an

> order declaring a by-law to be invalid if the Tribunal considers that an owners corporation did not have the power to make the by-law or that the by-law is harsh, unconscionable or oppressive.
>
> (2) The order, when recorded under section 246, has effect as if its terms were a by-law repealing the by-law declared invalid by the order (but subject to any relevant order made by a superior court).
>
> (3) An order under this section operates on and from the date on which it is so recorded or from an earlier date specified in the order.

15 It should be noted s 150(1) has two limbs. The first is where the Tribunal finds a by-law is beyond power and the second where a by-law is found to be "harsh unconscionable or oppressive".

Proceedings in the Tribunal

16 The Tribunal heard the two matters together on 3 May 2021. Each party was legally represented. The Tribunal's decision and reasons were published on 17 August 2021.

17 In the Tribunal, there was no dispute that Ms Liu, the respondent to the appeal but the applicant in the Tribunal (for consistency, in these reasons we will call her "the respondent"), being a lot owner, was entitled to vote on the motion in May 2020. The owners corporation unsuccessfully challenged her standing on other grounds but there is no appeal from that aspect of the decision and so there is no need to review that finding.

18 The respondent argued that a number of parts of the by-law passed in May 2020 were (in accordance with s 150(1) of the SSMA) either harsh, unconscionable or oppressive or that the owners corporation did not have the power to make the by-law.

19 We pause to note that the by-law in question is headed "Special By-Law 3 – Short-Term Rental Accommodation Arrangement" and comprises 11 numbered clauses (most with sub-clauses) and includes an interpretation clause. The respondent was successful in relation to two sub-clauses namely cll 10(b) and 10(e). The parts of the by-law where she was not successful were raised in the appeal as an alternative basis to support the decision of the Tribunal. However, as we have decided to dismiss the appeal we do not have to consider this argument.

20 By way of background, and in summary, the by-law was passed shortly after s 137A of the SSMA came into effect and appears to be drafted using s 137A as a framework.

21 We will not set out the by-law in full as it is nearly 4 typed A4 pages in length. A brief summary and selective quotes will suffice for these reasons.

22 Clause 3 prohibits any short term rental arrangement where the lot is not the principal place of residence of the owner or occupier. Clause 4 permits short term rental where the lot is the principal place of residence, but subject to conditions.

23 The two parts of the by-law the Tribunal found to be invalid appear in cl 10 as follows (omitting irrelevant parts):

> 10. This by-law confers on the owners corporation the following additional functions, powers, authorities and duties:
>
> (a) …
>
> (b) the power to deactivate access devices to the lot of any owner or occupier who is found to be in breach of this by-law;
>
> (c) – (d) …
>
> (e) for absolute clarity, the Owners Corporation, may recover the cost and expenses of carrying out the activities referred to in clause 9 from the respective Owner as a levy debt, due and payable at the owners corporation's direction and which, if unpaid within one month of being due, will bear simple interest at the rate of 10 percent per annum or, If the regulations provide for another rate, that other rate, until paid and the interest will form part of that debt.

24 In the cross-referenced cl 9, a lot owner indemnifies the owners corporation against any claims, action, demands or expenses including legal and administrative expenses incurred in a variety of ways - but essentially - as a result of a breach of the by-law.

Tribunal reasons

25 At [21] of the reasons, the Tribunal, correctly in our view, stated the question to be answered in terms of s 150 of the SSMA – "*Are the by-laws beyond power or harsh, unconscionable or oppressive?"*

26 It first considered cl 10(b), noting the respondent argued it was harsh, unconscionable or oppressive. The Tribunal outlined the arguments made by

each party, referred to the recent leading authority of *Cooper v The Owners - Strata Plan 58068* (2020) 103 NSWLR 160; [2020] NSWCA 250 and said:

> 37. Access is an inherent property right. A provision such as this removes that property right with no preconditions; no stipulations as to how and when the breach is required to be "found" so as to trigger deactivation and deprive access; and once triggered, in what circumstances access is to be denied and for how long.
>
> 38. These provisions have inherent qualities that may impact severely on the fundamental rights of owners and occupiers at a price that exceeds and outweighs the benefits they seek to achieve.

27 At [90] the Tribunal found cl 10(b) fell *"… within the parameter contemplated by s 150(1) SSMA"*. In saying this, it was understood by all parties that the Tribunal found cl 10(b) to be "*harsh, unconscionable or oppressive".*

28 The Tribunal then considered other aspects of the by-laws not relevant to this appeal and then considered cl 10(e).

29 The issue was whether a by-law providing for money owing under the new by-laws indemnity provisions to be recovered as a levy debt was within power. The respondent submitted there is no power under the SSMA to strike levies for such items. The Tribunal said that the appellant had not "specifically addressed this point". The appellant submitted this was incorrect and we will return to this aspect later.

30 The Tribunal reasoned that amounts owing by a lot owner as a result of a breach of the short-term rental by-laws were not money for the Administrative Fund or Capital Works Fund (SMAA, s 79). In particular, such a debt could not be characterised as "other recurrent expenditure" to make it part of the Administrative Fund (SMAA, s 79(1)(c)).

31 Contributions levied on owners must, according to s 83(2), be payable by the owners in share proportional to the unit entitlements. The only other provision allowing the contribution by way of a levy of an individual owner to be made larger, is s 82 which is not presently relevant and relates to the use of a lot which causes an increase in insurance. The Tribunal said at [87] that the relevance of this provision is that it suggests that without a statutory power there is no power to make the costs associated with an owner's short term rental arrangement recoverable as a levy debt.

32 At par [90] the Tribunal found cl 10(e) fell "… within the parameter contemplated by s 150(1) of the SSMA by which it was understood by all parties that the Tribunal found cl 10(e) to be "beyond power".

33 The Tribunal then considered whether the offending clauses could be severed and the balance of the new by-law allowed to stand. The Tribunal decided that what was left in place was something which was not approved by the general meeting by special resolution. The Tribunal decided to declare the by-law invalid in its entirety. It said the appellant could seek to pass another by-law to "give effect to" s 137A of the SSMA if it wished.

The appeals

34 These appeals were commenced within time on 14 September 2021. On 29 September 2021, the Appeal Panel granted leave for each party to be legally represented and granted a stay of the Tribunal's orders "until further order or finalisation of the appeal, whichever is the earliest in time".

35 The documents we had available for these appeals were:

(1) the strata application filed in each matter

(2) the affidavit of the respondent dated 30 November 2020;

(3) the statement of Daniel Holt including exhibit DH-1 dated 22 February 2021;

(4) the statement of Kallen Vallett dated 19 February 2021;

(5) a summons and documents from Auburn Police;

(6) the appellants' submissions in the Tribunal dated 6 April 2021;

(7) the Notice of Appeal in each matter;

(8) the Reply to Appeal in each matter;

(9) the transcript of the proceedings before the Tribunal;

(10) the appellants' appeal submissions;

(11) the respondent's appeal submissions; and

(12) the appellants' submissions in reply.

Grounds of appeal

36 The grounds of appeal as finally argued before us can be summarised as follows. The appellants submit that the Tribunal:

(1) applied an incorrect test when applying the words "harsh, unconscionable or oppressive";

(2) applied the incorrect test in finding that part of the by-law was without power;

(3) did not apply the correct test when deciding that the offending parts of the by-law could not be severed;

(4) failed to afford the appellant procedural fairness in that it did not take account of a material submission;

(5) failed in making (or not making) certain factual findings.

37 Grounds (1) to (4) raise questions of law. Pursuant to s 80 of the *Civil and Administrative Tribunal Act 2013 (NSW)* (NCAT Act) appeals to the Appeal Panel lie as of right in respect of questions of law. On any other ground, leave of the Appeal Panel is required: s 80(2)(b).

38 The appellants acknowledged they required leave to pursue ground (5).

39 We will consider each ground in turn.

Ground 1 – correct test of "harsh, unconscionable or oppressive"

40 The appellant submits the Tribunal misdirected itself when it asked whether the impact on the fundamental rights of owners was outweighed by the benefits of the by-law. It was said that this was an error because it was not the correct test to determine whether a by-law is "harsh unconscionable or oppressive" within s 150 SSMA.

41 In approaching this issue, we commence with the proposition that words are to be given their ordinary within the statutory context. In conducting this analysis, we have the benefit of the recent Court of Appeal decision in *Cooper.* That case concerned the validity of a by-law which imposed a blanket ban on animals (with the exception of recognised assistance animals for persons with a disability).

42 We note in passing that Basten JA in that case at [24] described the interpretation of those words as "fraught with difficulty".

43 The strata scheme under review here is similar to the one considered in *Cooper* in that the lot owners have a freehold interest. The Court of Appeal (Basten JA at [8] – [19] and Macfarlan JA at [76]) noted that as a result they

are entitled to "… enjoy and exercise the ordinary incidents of ownership of property except to the extent they are lawfully constrained from doing so" (per Macfarlan JA at [76]).

44 Section 136 of the SSMA deals with the matters by-laws may be made for:

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

45 It identifies three functions – management, administration and control relating to lots and common property. This is consistent with the language of s 9:

> 9 Owners corporation responsible for management of strata scheme
>
> (1) The owners corporation for a strata scheme has the principal responsibility for the management of the scheme.
>
> (2) The owners corporation has, for the benefit of the owners of lots in the strata scheme—
>
> (a) the management and control of the use of the common property of the strata scheme, and
>
> (b) the administration of the strata scheme.
>
> (3) The owners corporation has responsibility for the following—
>
> (a) managing the finances of the strata scheme (see Part 5),
>
> (b) keeping accounts and records for the strata scheme (see Parts 5 and 10),
>
> (c) maintaining and repairing the common property of the strata scheme (see Part 6),
>
> (d) taking out insurance for the strata scheme (see Part 9).

46 In *Cooper,* Basten JA said at [12]

> It follows that by-laws may (i) confer specific functions on the owners corporation with respect to the use and enjoyment of the lots and the common property, (ii) make provision directly in relation to the use and enjoyment of the lots and the common property, but for the purpose of managing, administering or controlling the strata scheme. That reading is consistent with the terms of the model by-laws, which may be found in Sch 3 to the Strata Schemes Management Regulation 2016 (NSW).

47 Other provisions of the SSMA permit a by-law, for example, to limit number of adults who may reside in a lot (s 137) or as in the instant case, to prohibit a lot being used for short term rental accommodation.

48 The restrictions on by-law making are found in s 139 set out above and the remedy appears in s 150. As stated earlier, s 150 has two limbs. The first is where the Tribunal finds a by-law is *beyond power* and the second where a by-law is found to be *harsh unconscionable or oppressive*. In *Cooper*, Basten JA said at [19] (footnotes omitted):

> A finding that there had been a contravention of s 139(1) required an evaluative judgment on the part of NCAT. To establish legal error in such circumstances, as Gibbs J explained in Buck v Bavone,*1*it must be shown that the Tribunal has not acted in good faith, has acted arbitrarily or capriciously, misdirected itself in law, failed to take account of mandatory considerations, taken into account prohibited considerations, or has acted unreasonably.

49 We accept this statement identifies our task.

Identifying the correct test

50 The appellant submitted that the Tribunal misdirected itself and that the correct test is to be found in *Cooper.* Basten JA said at [24]:

> First, it should be accepted that a correct understanding of the phrase "harsh, unconscionable or oppressive" is fraught with difficulty. Although attention should be paid to each word, it is far from clear that significant guidance is obtained from that exercise.

51 The appellant urged upon us that we should have regard to the second reading speech of the relevant Minister when introducing the amendments which introduced s 137A into the SSMA. The appellant says this is permitted by s 34 of the *Interpretation Act 1987* (NSW) (Interpretation Act). The argument is that the by-law in question is a type of delegated legislation and so subject to s 34 which provides:

> **34 Use of extrinsic material in the interpretation of Acts and statutory rules**
>
> (1) In the interpretation of a provision of an Act or statutory rule, if any material not forming part of the Act or statutory rule is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material—
>
> (a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision (taking into account its context in the Act or statutory rule and the purpose or object underlying the Act or statutory rule and, in the case of a statutory rule, the purpose or object underlying the Act under which the rule was made), or
>
> (b) to determine the meaning of the provision—
>
> (i) if the provision is ambiguous or obscure, or

> (ii) if the ordinary meaning conveyed by the text of the provision (taking into account its context in the Act or statutory rule and the purpose or object underlying the Act or statutory rule and, in the case of a statutory rule, the purpose or object underlying the Act under which the rule was made) leads to a result that is manifestly absurd or is unreasonable.

…

52 The respondent says we should not have regard to extrinsic material.

53 We agree that it is not appropriate to have regard to the extrinsic material in this matter. This is for two reasons. First, s 34 is permissive – we "may" have regard. Secondly, assuming the by-law is subject to s 34 (on which we express no view), we are not satisfied that the extrinsic material assists in ascertaining the meaning of the provision because the meaning of the provision is not in doubt, the issue is whether that meaning is permitted by another provision, namely s 150(1) of the SSMA.

54 In our view, the meaning of cll 10 (c) and (e) of the by-law are not ambiguous or obscure nor manifestly absurd or unreasonable. We are guided in this view by the remarks of McColl JA in *Owners SP 3397 v Tate* [2007] NSWCA 207 who said at [71(9)], when discussing the correct approach to the interpretation of by-laws:

> Caution should be exercised in going beyond the language of the by-law and its statutory context to ascertain its meaning; a tight rein should be kept on having recourse to surrounding circumstances.

55 Accordingly, we will not have regard to the Second Reading Speech.

56 Returning to *Cooper*, Basten JA considered the term *harsh unconscionable or oppressive* as a "triune" conveying a single criterion in which community standards are one consideration; while Fagan J decided the term should be read disjunctively and so the subsection is breached if any of the words apply.

57 The appellant submitted that, of what it described as the three possible tests to be distilled from *Cooper*, the Tribunal did not apply any of them. These tests were (AB 629):

(1) is the by-law provision so lacking in reasonable proportionality as not to be a real exercise of the power to make a short term rental accommodation by-law, which power was granted by s 137A of the SSMA?

(2) does the by-law provision inevitably operate arbitrarily in some cases?

(3) does the by-law provision lack any rational connection with the enjoyment of other lots and the common property?

58 We do not consider it necessary to resolve the subtle differences of opinion expressed in *Cooper*. It is sufficient for present purposes to observe that however one interprets the words *"harsh unconscionable or oppressive", Cooper* stands for the proposition that the regulation of conduct by persons living in close proximity in a strata scheme will involve a valuative judgment and the fact that a by-law may be administratively convenient for an owners corporation cannot justify interference with the ordinary rights of lot owners by means of the by-law (see [46] - [52], [82] and [96]).

59 It appears to us that the Tribunal has fulfilled its statutory role by applying the ordinary meaning of the words *"harsh, unconscionable or oppressive"* to reach an evaluative judgment. We are not persuaded that the Tribunal misdirected itself in law in the manner described in *Buck v Bavone* (1976) 135 CLR 110; [1976] HCA 24.

60 Further, the Tribunal gave cogent reasons at [37] why it formed that view. The de-activation of access codes removes an important and fundamental property right – namely access – with no pre-conditions, nor details of how the breach is to be "found" and once triggered for how long.

61 In any event, we consider the Tribunal in this matter did apply one of the tests identified by the appellant. The Tribunal adopted the "reasonable proportionality" test (see [56](1) above) when it said at [38] that the by-law "may impact severely on the fundamental rights of owners and occupiers at a price that exceeds and outweighs the benefit they seek to achieve".

62 Accordingly, the first ground of appeal fails.

Second ground – test of whether the by-law was made without power

63 The by-law provided that a lot owner is to indemnify the owners corporation for money it spent resulting from a breach of the by-law. The Tribunal found the indemnity provision to be valid.

64 The by-law further provided that money owing under the indemnity provision may be recovered as a levy debt. The Tribunal found this part of the by-law to be invalid as being beyond power.

65 Regarding the Tribunal recording at [80] that "I do not understand the [appellant] to have specifically addressed this point", the appellant says that it was submitted orally that this provision was a mechanism for billing and recovery only. Accepting that to be the case, it appears to us that the appellant is not prejudiced by the oversight by the Tribunal because the argument that it is a mechanism for billing and recovery does not meet nor overcome the reasons of the Tribunal that the provision is without power. That is because the Tribunal reasoned that levies under the SSMA can only be raised in certain circumstances and this was not one of them. For instance, the Tribunal reasoned it is not the kind of expenditure that fell within the Administrative Fund ([83] to [85]) or the capital works fund ([82]). Section 83 is clear that levies are raised "in respect of each lot" and "are payable by the lot owners "in shares proportional to the unit entitlements".

66 The Tribunal noted that s 82 creates a statutory exception to this scheme where a lot owner may be levied an amount for additional insurance premiums where the use of that lot causes premiums to be increased. The Tribunal reasoned that without some such statutory power, there is no power to create a by-law to make expenses arising from owner's short term rental accommodation arrangement recoverable as a strata levy contribution.

67 We do not find any error or misdirection (in the relevant sense) by the Tribunal in those reasons.

68 The appellant also argued the by-law should be read so that the words "as a levy debt" really mean "as if it was a levy debt" so the language is deeming language and only provides a method of collection so cannot fall foul of ss 139 and 150. We disagree for the following reasons.

69 First, it is impermissible to read additional words into legislation except in very limited circumstances; *Thompson v Goold & Co* [1910] AC 409 at 420; *Cooper Brookes (Wollongong) Pty Ltd v FCT* (1981) 35 ALR 151. We see no reason

(compelling or otherwise) in this case to read additional words into the by-law because the plain meaning of the words is clear.

70 Secondly, even if such additional words were employed, it still would be without power because the issue is not whether the owners corporation can recover a debt from a lot owner, it is the characterisation of that debt "as if it was a levy debt" which is without power. To label it as a merely a mechanism for billing and recovery misses the point that the by-law, impermissibly, characterises the debt as if it were a levy debt.

Ground 3 - severance

71 The Tribunal found two parts of the by-law invalid. It also found that those parts should not be severed from the by-law as a whole. As a result, it declared the whole by-law invalid. The Tribunal reasoned that:

(1) section 150 provides the Tribunal may declare "a" by-law to be invalid;

(2) there is no power in s 150 to redraft or "tamper" with parts of the by-law;

(3) the by-law (without the invalid parts) is not the same as what was passed by special resolution a general meeting. It may not have been passed in the altered form. The meeting may not have adopted the by-law without the missing parts or might have resolved to make a different by-law;

(4) the owners corporation was not prevented from seeking to make another by-law to give effect to s 137A of the SSMA [97] if it wished.

72 The appellant submits the Tribunal misdirected itself in so doing because it failed to take into account s 32 of the Interpretation Act and on a proper application of that provision, the balance of the by-law should have been upheld as valid.

73 The appellant submits that the by-law is an instrument "made" under an Act (Interpretation Act, s 3) because it is made under a power provided for in the SSMA. We agree. As a result, s 32 of the Interpretation Act applies.

74 Section 32 provides:

> **32 Instruments to be construed so as not to exceed the powers conferred by the Acts under which they are made**
>
> (1) An instrument shall be construed as operating to the full extent of, but so as not to exceed, the power conferred by the Act under which it is made.

> (2) If any provision of an instrument, or the application of any such provision to any person, subject-matter or circumstance, would, but for this section, be construed as being in excess of the power conferred by the Act under which it is made—
>
> > (a) it shall be a valid provision to the extent to which it is not in excess of that power, and
> >
> > (b) the remainder of the instrument, and the application of the provision to other persons, subject-matters or circumstances, shall not be affected.
>
> (3) This section applies to an instrument in addition to, and without limiting the effect of, any provision of the instrument or of the Act under which it is made.

75 In *Mailey v Sutherland Shire Council* (2017) 226 LGERA 188; [2017] NSWCA 343 at [37] the NSW Court of appeal decided that severance of an invalid portion of an instrument is permissible provided the residue does not operate in "a manner wholly different" from the original document.

76 The respondent says we should not accept this submission because the Tribunal has no power to reformulate a by-law so that it complies with the prohibition against harsh, unconscionable or oppressive by-laws in s 139 SSMA – see *Cooper* per Basten JA at [47] and Macfarlan JA at [81]; the latter said "the Court's role does not extend to re-formulating an invalid by-law or making suggestions as to alternative forms of by-law that might be valid". The respondent says we are bound to follow that decision.

77 In addition, the respondent says the owners corporation, when making by-laws, occupy a position that is akin to a legislative body so to sever parts and leave the rest is usurping the function of the legislative body by deciding for itself how to formulate legally valid legislation. In *Sportodds Systems Pty Ltd v New South Wales* [2003] FCAFC 237; (2003) 133 FCR 63 the Full Federal Court explained at [19]:

> Put simply the Court cannot 'construe' the relevant provision, whether by reading down or by expunging invalid provisions, where the effect of doing so is to create a provision which the Parliament did not intend. For this purpose various *indicia* are referred to such as the extent of the proposed change; the *indicia* within the statute itself; the legislative purpose and so on. But the essential issue remains – is the Court carrying out the permissible function of the interpretation of the statute (read in the context of the relevant Acts Interpretation Act provision), or is the Court itself making legislation?

78 While the Tribunal did not refer in its reasons to the authorities raised by the parties in this appeal, we are not persuaded that Tribunal fell into error. This is because in its reasoning it referred to the essential issues – first, the Tribunal should not ”tamper” with the by-law to make it effective; second, the loss of the invalid parts of the by-law were such that the Tribunal was not satisfied that the remainder was that which had been intended.

79 As was noted in *Upton v Martin and Stein Antiques Pty Ltd* [2017] NSWCATAP 175 at [18] that, on an appeal from bodies like the Tribunal, the role of the Appeal Panel is to examine the decision appealed from in a sensible and balanced way and not to go over the reasons for decision with a fine tooth comb and an eye keenly attuned to a perception of error: *Politis v Federal Commissioner of Taxation* [1988] FCA 446 at [14] per Lockhart J.

80 The ground of appeal also fails.

Ground 4 – failed to afford the appellant procedural fairness in that it did not take account a material submission

81 The appellant argued that the failure to respond to a substantial, clearly articulated argument may give rise to legal error in a variety of ways, such as a failure to accord natural justice or through a constructive failure to exercise jurisdiction. An alternative characterisation of the issue is a failure to accord procedural fairness.

82 The appellant said the Tribunal fell into error in this manner with respect to three of its submissions:

(1) an owners corporation has a legitimate interest in ensuring, especially after breach of the short-term rental accommodation by-law, that access to the common property is limited to persons that are entitled to be on the common property;

(2) the cost recovery provision operated only where there had been a breach of the by-law, and so was reasonably tailored and thus a real exercise of the power granted by s 137A of the SSMA; and

(3) section 32 of the Interpretation Act had to be taken into account and applied when deciding the severance issue.

83 The appellant relies on *Gelder v The Owners Strata Plan No 38308* [2020] NSWCATAP 227 at [63] where it was said:

> In our view, engagement with the question whether the appellant had unreasonably refused to consent to the proposed amendments required a meaningful analysis of the fact that the proposed amendments, if made, would remove proprietary rights of the appellant. The Tribunal did not do so.

84 We do not accept that the Tribunal fell into error in the relevant sense.

85 Regarding (1), the appellant said that the Tribunal did not "actively engage" with its submissions. However, the Tribunal did deal with this, albeit briefly, at [35] - [36] and [62] – [63]. Those brief references are all that was needed in the circumstances because the lot owner did not dispute the owners corporation's assertion of an interest in ensuring that access to the common property is limited to those entitled to be there. The legitimate interests of the owners corporation was not challenged, the real issue was the manner chosen to protect those interests.

86 We accept the respondent's submission that having a legitimate interest of that nature does not mean the owners corporation is entitled to adopt whatever means it deems appropriate to pursue those interests. The focus of the Tribunal was the effect of the by-law upon a lot owner so that the legitimate interests of the owners corporation, while relevant, was not of sufficient importance in the analysis to warrant more than tangential reference. The Tribunal's focus was upon the correct issue – unlike in *Gelder* where the Tribunal failed to focus on the significant loss of proprietary interests by the lot owner.

87 Regarding (2), this submission confuses the issues. The Tribunal decided there was no power to impose a levy of the type described in the by-laws. In that event, submissions regarding whether the by-law is "harsh, unconscionable or unfair, are not relevant.

88 Regarding (3), we accept the Respondent's submission that the Tribunal did consider whether the invalid provisions could be severed at [91] – [96].

89 This ground of appeal fails.

Ground 5 - failed in making (or not making) certain factual findings

90 This ground of appeal seeks to re-consider findings of fact, made or not made. To do this, the appellant concedes that the leave of the Appeal Panel is

needed because internal appeals, as this is, may be made as of right on a question of law, and otherwise with leave of the Appeal Panel: s 80(2) of the NCAT Act. The circumstances in which the Appeal Panel may grant leave to appeal from decisions made in the Consumer and Commercial Division are limited to those set out in cl 12(1) of Sch 4 of the NCAT Act. In such cases, the Appeal Panel must be satisfied that the appellant may have suffered a substantial miscarriage of justice on the basis that:

(1) the decision of the Tribunal under appeal was not fair and equitable; or

(2) the decision of the Tribunal under appeal was against the weight of evidence; or

(3) significant new evidence has arisen (being evidence that was not reasonably available at the time the proceedings under appeal were being dealt with).

91 In *Collins v Urban* [2014] NSWCATAP 17 (*Collins v Urban*), the Appeal Panel stated at [76] that a substantial miscarriage of justice for the purposes of cl 12(1) of Sch 4 may have been suffered where:

> "… [T]here was a "significant possibility" or a "chance which was fairly open" that a different and more favourable result would have been achieved for the appellant had the relevant circumstance in para (a) or (b) not occurred or if the fresh evidence under para (c) had been before the Tribunal at first instance."

92 Even if an appellant from a decision of the Consumer and Commercial Division has satisfied the requirements of cl 12(1) of Sch 4, the Appeal Panel must still consider whether it should exercise its discretion to grant leave to appeal under s 80(2)(b). In *Collins v Urban*, the Appeal Panel stated at [84] that ordinarily it is appropriate to grant leave to appeal only in matters that involve:

(1) issues of principle;

(2) questions of public importance or matters of administration or policy which might have general application;

(3) an injustice which is reasonably clear, in the sense of going beyond merely what is arguable, or an error that is plain and readily apparent which is central to the Tribunal's decision and not merely peripheral, so that it would be unjust to allow the finding to stand;

(4) a factual error that was unreasonably arrived at and clearly mistaken; or

(5) the Tribunal having gone about the fact finding process in such an unorthodox manner or in such a way that it was likely to produce an unfair result so that it would be in the interests of justice for it to be reviewed.

93 The appellant says that when considering whether the by-law was harsh, unconscionable or oppressive, the Tribunal should have, but did not, make factual findings as to the mischief which the by-law sought to address. This, it is said, was necessary to assess the reasonable proportionality of the by-law.

94 The appellant says the mischief was the evidence of the building manager of nuisance, damage (and consequent insurance claims) resulting from short term tenants. Thus, the impugned provisions sought to regulate behaviour which had an adverse impact on the enjoyment of other lots and the common property. It is argued this was significant but not considered by the Tribunal.

95 This submission could only refer to the by-law found to be harsh, unconscionable or oppressive. It would not be relevant to the by-law made without power because the mischief is not relevant to the question of whether power exists to make the by-law.

96 Regarding the by-law found to be harsh, unconscionable or oppressive, while the Tribunal did not refer to that evidence, in our view the failure to do so does not constitute a miscarriage of justice in the sense referred to in *Collins v Urban*. That is because it is significant that the evidence referred to was not disputed by the respondent and that the focus of the analysis was the effect upon the lot owner of the loss of access. The Tribunal's decision was not against the weight of the evidence nor was it not fair and equitable because of the affect upon proprietary rights of owners in the offending by-law.

97 Even if we were wrong in that conclusion, we would not exercise our discretion to grant leave to appeal because we are not satisfied that any ground involves an issue of principle, a question of public importance, an injustice which is reasonably clear or that the Tribunal has gone about its fact finding process in such an unorthodox manner that it is likely to have produced an unfair result. Even if an appellant establishes that they may have suffered a substantial miscarriage of justice in the sense explained above, the Appeal Panel retains a discretion whether to grant leave under s 80(2) of the NCAT Act. An appellant must demonstrate something more than that the Tribunal was arguably wrong: *Pholi v Wearne* [2014] NSWCATAP 78 at [32].

Notice of contention

98 In her Reply to appeal in each matter, the respondent sought to raise a number of further grounds in support of the Tribunal's decision. The parties called this the notice of contention and some time was spent hearing argument concerning it. However, as we have resolved to dismiss the appeal, it is not necessary for us to consider the matters raised in the notice of contention.

Costs

99 If the Respondent wishes to seek an order for costs in their favour, they are to file and serve submissions limited to five pages as to why the Appeal Panel should make such an order within 28 days. Those submissions must identify the appropriate costs rule.

100 if the Appellants oppose any costs order being made, they are to file and serve submissions limited to five pages as to why such an order should not be made within 14 days after receipt of the Respondents' submissions.

101 The Respondents are to file and serve any reply submissions within a further 14 days.

102 We propose to determine the issue of costs "on the papers" and without a hearing. If either party opposes that course, they should address that matter in their submissions.

Orders

103 The Appeal Panel makes the following orders:

(1) In matter 2021/00262738:

(a) the appeal is dismissed; and

(b) the stay of the Tribunal's orders granted 29 September 2021 is lifted

(2) In matter 2021/00262728:

(a) the appeal is dismissed; and

(b) the stay of the Tribunal's orders granted 29 September 2021 is lifted

(3) The Respondent is to file submissions on costs (limited to five pages) within 28 days;

(4) The Appellants may respond within a further 14 days.

(5) The Respondent may reply within a further 14 days.

(6) The Appeal Panel proposes to determine the issue of costs “on the papers” and without a hearing. If either party opposes that course they should address that matter in their submissions.

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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