Civil and Administrative Tribunal

New South Wales

Case Name:	The Owners Strata Plan 675 v York & Edwards
Medium Neutral Citation:	[2022] NSWCATAP 171
Hearing Date(s):	On the papers
Date of Orders:	24 May 2022
Decision Date:	24 May 2022
Jurisdiction:	Appeal Panel
Before:	P Durack, Senior Member G Sarginson, Senior Member
Decision:	(1) The appeal is allowed. (2) Set aside the order made by the Tribunal on 18 October 2021 dismissing the application the subject of those proceedings. (3) The proceedings are remitted to a differently constituted Tribunal for redetermination of so much of the application as concerned whether the Tribunal should make the order sought under s 236 (1) of the Strata Schemes Management Act 2015 (NSW), including the question as to what are the current unit entitlements of each of the lots in the strata scheme, in circumstances where: (a) It has already been determined by the Tribunal, in accordance, with that section and s 236 (2) of that Act that it considers that the allocation of unit entitlements among the lots was unreasonable when a strata plan of subdivision was registered on 17 June 2014, as required by s 236 (1) (a) of that Act. (b) The respective values of each of the lots, within the meaning of s 236 (2) of that Act, has been ascertained by the Tribunal as being the values set out under the "Certificate of Value" set out on page 53 of the Keen Report (as referred to in these reasons).

	(4) Such redetermination is to be made on the basis of the evidence already adduced to the Tribunal at first instance and such further evidence as the Tribunal may allow.
Catchwords:	LAND LAW - strata title - application under s 236 of the Strata Schemes Management Act 2015 (NSW) for an order allocating unit entitlements among the strata scheme lots - consideration of factors other than market values of the lots. APPEALS - exercise of discretionary power-errors of law-taking account of irrelevant considerations
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) Conveyancing (Strata Titles) Act 1961 (NSW) Strata Schemes Development Act 2015 (NSW) Strata Schemes Management Act 1996 (NSW) Strata Schemes Management Act 2015 (NSW) Strata Titles Act 1973 (NSW)
Cases Cited:	Anderson Stuart v Treleavan [2000] NSWSC 283; 49 NSWLR 88 House v R (1936) 55 CLR 499 Sahade v Owners Corporation SP 62022 [2014] NSWCA 208 Seeto v The Owners Strata Plan No 49458 [2019] NSWCATAP 166 Spencer v The Commonwealth (1907) 5 CLR 418:
Texts Cited:	Nil
Category:	Principal judgment
Parties:	The Owners Strata Plan 675 (Appellant) The Owners Strata Plan 675 (First Respondent) Bernadette York and Kevin Edwards (Second Respondents)
Representation:	Solicitors: Tankards Law (Appellant) B. York and K. Edwards self-represented (Respondents)
File Number(s):	AP 2021/00324989

Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Citation:	Not Applicable
Date of Decision:	18 October 2021
Before:	G Meadows, Senior Member
File Number(s):	SC 21/17511

REASONS FOR DECISION

1 The Owners Corporation of Strata Plan 675, the appellant, appeals from the Tribunal's decision made on 18 October 2021 to dismiss its application under s 236 of the *Strata Schemes Management Act 2015* (NSW) (SSMA) for a reallocation of unit entitlements in the scheme.

2 On 3 December 2021, the Appeal Panel made a consent order that on oral hearing was dispensed with under s 50 (2) of the *Civil and Administrative Tribunal Act 2013* (NSW) and the appeal was to be determined on the papers.

3 The second respondents, who are husband-and-wife, are the owners of one of three residential lots in the scheme that otherwise consists of 32 commercial lots, as well as the owners of an occupied and unused lot in the scheme identified as a loft. They have opposed the proposed reallocation of unit entitlements.

4 For the reasons set out below, we have decided the appeal should be allowed. The application is to be redetermined on the basis that the required pre-condition for the exercise of the power concerning unreasonableness of the relevant allocation of unit entitlements in the last registered strata plan of subdivision has already been decided.

Background

5 The strata scheme in issue arose from the conversion, in the early 1960s, of the Australian Hotel in Wagga Wagga into premises for shops and offices into what became known as the Australian Arcade.

6 Strata Plan 675 was registered on 3 April 1964. Subsequently, over the period from 1966 to 2014 there were 7 subdivisions of lots and common property, which were the subject of Strata Plans 2224, 13163, 22413, 31148, 68784, 73747 and 89511. The last of these subdivisions, the subject of Strata Plan 89511, was registered on 17 June 2014.

7 After the last registered subdivision (on 17 June 2014) there were 36 lots in the scheme and 1922 unit entitlements. These lots are located amongst various floors of the building consisting of a basement, ground floor, first and second floors. All of these lots are commercial lots used for either retail shops or offices, except for three residential lots, being lots 27, 31 and 37.

8 Lot 32 is a sizeable area located on the first floor consisting of an unoccupied loft which is in a dilapidated condition.

9 Lots 31 and 32 are owned by the second respondents. They were the only parties who opposed the proposed reallocation of unit entitlements. They opposed the reallocation of unit entitlements on bases that included that it would result in large increases in their strata levies substantially exceeding those payable in the market; would render their lots unsellable; and was out of all proportion to the strata scheme costs referable to their lots.

10 Lot 31 was purchased by the respondents in March 2015 for a price of $231,000. It has an area of 94 sqm. It has a current unit entitlement of 60. Under the proposed reallocation this would increase to a unit entitlement of 109.

11 Lot 32 was purchased by the second respondents in June 2017 for a price of $140,000. It has an area of 180 sqm. It has a current unit entitlement of 24. Under the proposed reallocation this would increase to 43.

12 The Australian Arcade is located in Zone “B3-Commercial Core” of the Wagga Wagga Local Environmental Plan 2010. The objectives of that zone include

providing a wide range of retail, business, office, entertainment, community and other suitable land uses that serve the needs of the local and wider community. The use of Lots 31 and 37 for residential purposes was gained in 2008 and 2009. Lot 27 had been used for residential purposes long before that time.

13 From a detailed expert report by Mr Keen from Keen Property Pty Ltd (the Keen Report) presented to the Tribunal by the Owners Corporation, it was plain and uncontroversial that the historic subdivisions and their various resulting allocations of unit entitlements had, at the time of the last subdivision in June 2014 and at the current time, led to a situation where there was a considerable disparity between the percentage values of, at least, many of the lots in the scheme (as a percentage of the total of the values of all of the lots) and their percentage share of unit entitlements. With some lots the percentage share of unit entitlements was substantially less than the percentage share of value and with some other lots the converse was the situation.

14 The expert report was dated 11 January 2021. Mr Keen is a certified practising valuer. It was obtained by the Owners Corporation for the purpose of meeting the requirement in s 236 of the SSMA concerning valuation of lots at the relevant time, being the date of the last registered subdivision, namely 17 June 2014. No competing expert evidence was presented to the Tribunal.

15 The Keen Report contained valuations of each lot. It explained that valuations had been arrived at using the *Direct Comparison Method*, which compared a subject property's characteristics with those of comparable properties that had sold in similar transactions and assessed the consideration process of a hypothetical purchaser having regard to the available market information, the features and relevant factors of the subject property as at the date of valuation. It referred to authority concerning the application of the best evidence as to what a purchaser would pay for the land and the use of sales of comparable properties as a "yardstick", including the more usual occurrence that some sales are comparable but require either adjustment to be an accurate yardstick or to be given reduced weight in making a valuation judgement: at [116]-[121]. It also referred to the tests of market value set out in *Spencer v The Commonwealth* (1907) 5 CLR 418: at [28]-[33].

16 A section of the Keen Report dealt with external residential sales evidence: at 12.3. It was said that the author's research had revealed no similar buildings with residential lots with sales around the valuation date and that, therefore, sales evidence of residential lots within conventional developments within Wagga Wagga had been selected with reference to a comparison with the subject property on the basis of location, age and standard of building and, where known, accommodation. Such sales evidence was then set out: at [112]-[113].

17 As to the valuation in the Keen Report for Lot 31 at $230,000 (at page 41), the above sale in March 2015 at $231,000 was referred to, giving rise to a square metre rate of $2,450, and it was said:

> Lot 31 sold relevant to the date of valuation the rounded sales price has been adopted as market value. This rate is further supported by the external residential sales analysis which has produced a range for internal area between $2,265m2 and $2900 m2.

18 As to the valuation in the Keen Report for Lot 32 at $90,000 (at page 42), based upon a square metre rate of $500 m2, it was said that:

> My research revealed no loft sales relevant to the date of valuation. I have assessed value for Lot 32 equivalent to approximately 35% of the rate of $1400 m2 utilised for the valuation of the upper floor office lots.

19 A table of the valuations was provided in the report (at page 52). From this it can be seen that many of the commercial lots were valued at square metre rates in excess of the square metre rate for the residential lots. Valuations range from $49,600 to $235,000. At a valuation of $230,000, Lot 31 was the second highest value of the scheme lots.

20 A table of the application of percentage values to derive a quantity of unit entitlements (based upon a total of 1922 unit entitlements) was also provided (at page 54), as well as a table setting out the resulting percentage variance in unit entitlements from the current to the proposed new allocation (at page 56).

21 The table of percentage variances of unit entitlements showed that the largest variance was a percentage increase of 128% in respect of Lot 14 and that Lots 31 and 32 had the next highest percentage increases at 82% and 79%, respectively – an increase from 3.12% of unit entitlements to 5.67% in the case of Lot 31 and an increase from 1.25% of unit entitlements to 2.23 % in the case

of Lot 32. Other commercial lots had, by way of example, percentage increases of 45%, 41% and 37% and percentage decreases of 41%, 38% and 33%.

Legislative provisions

22 When a strata plan with respect to particular land is registered the plan must include a schedule of unit entitlements.

23 Under s 18 of the *Conveyancing (Strata Titles) Act 1961* (NSW) the schedule of unit entitlements lodged with a strata plan for registration was required to have endorsed on it in whole numbers the unit entitlement of each lot and a number equal to the aggregate unit entitlement of all lots. There was no requirement that the unit entitlements be apportioned on a market value basis at the valuation date, as provided for in the current legislation (Clause 2 (1) of Schedule 2 of the Strata Schemes Development Act 2015 (NSW) (SSDA).

24 Lots in a scheme established under the 1961 Act could be subdivided by registration of a strata plan of resubdivision. A strata plan of resubdivision was required to have endorsed on it a schedule apportioning among the lots created by the resubdivision the unit entitlements of the lots in the original strata plan as are included in the resubdivision.

25 Under the *Strata Titles Act 1973* (NSW) lots and common property could be subdivided by registration of a strata plan of subdivision. The strata plan of subdivision was required to be accompanied by a schedule setting out the proposed unit entitlement of each lot not included in the subdivision (continuing lots) and each lot proposed to be created by the subdivision (proposed lots). The requirements for the schedule vary depending on whether the subdivision included common property.

26 If no common property was included in the proposed subdivision then each continuing lot was required to have the same proportion of unit entitlements as it had under the previous plan, while the aggregate unit entitlements of the proposed lots was required to have the same proportion of unit entitlements as their predecessor lots had in some under the previous plan.

27 If common property was included in the proposed subdivision then the schedule was required to show, as a whole number, the proposed unit

entitlement of each continuing lot and each proposed lot and also the proposed aggregate unit entitlement of all continuing and proposed lots. The body corporate was also required to agree to the proposed schedule of unit entitlements by special resolution. No other requirements were prescribed.

28 The proportionate allocation of unit entitlements is important because it forms the basis for the levying of contributions (s 83 (2) of the SSMA), the liability to rates (s192 of the SSDA), voting where a poll is demanded (clause 14 (3) of Schedule 1 of the SSMA) and distribution of money in the administration and capital works funds (s 77 of the SSMA).

29 Section 236 of the SSMA, relevantly, provides:

> **236 Order for reallocation of unit entitlements**
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> (1) **Tribunal may make order allocating unit entitlements** The Tribunal may, on application, make an order allocating unit entitlements among the lots that are subject to a strata scheme in the manner specified in the order if the Tribunal considers that the allocation of unit entitlements among the lots—
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> (a) was unreasonable when the strata plan was registered or when a strata plan of subdivision was registered, or
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> (b) was unreasonable when a revised schedule of unit entitlement was lodged at the conclusion of a development scheme, or
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> (c) became unreasonable because of a change in the permitted land use, being a change (for example, because of a rezoning) in the ways in which the whole or any part of the parcel could lawfully be used, whether with or without planning approval.
>
> (2) **Matters to be taken into consideration** In making a determination under this section, the Tribunal is to have regard to the respective values of the lots and to such other matters as the Tribunal considers relevant.
>
> (3) **Persons who may apply for order** An application for an order under this section may be made by any of the following—
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> (a) an owner of a lot (whether or not a development lot) within the parcel for the strata scheme,
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> (b) the owners corporation,
>
> (c) the lessor, in the case of a leasehold strata scheme,
>
> (d) the local council, or by any other public authority or statutory body representing the Crown, being an authority or body that is empowered to impose a rate, tax or other charge by reference to a valuation of land.
>
> (4) **Application to be accompanied by valuation** An application for an order must be accompanied by a certificate specifying the valuation, at the relevant time of registration or immediately after the change in the permitted land use, of each of the lots to which the application relates.

(5) **Qualifications of person making valuation** The certificate must have been given by a person who is a qualified valuer within the meaning of the **Strata Schemes Development Act 2015.**

The approach to a s 236 reallocation application

30 The accepted approach to be taken by the Tribunal in respect of the present application is that set out in a number of propositions by Santow J in *Anderson Stuart v Treleavan* [2000] NSWSC 283; 49 NSWLR 88 (at [87],[91] and [144]) in respect of the *Strata Schemes Management Act 1996* (NSW) (see per Sackville JA in *Sahade v Owners Corporation SP 62022* [2014] NSWCA 208 at [62], [86]-[91]; *Seeto v The Owners Strata Plan No 49458* [2019] NSWCATAP 166), namely:

(1) A staged process is contemplated. First, the Tribunal must ascertain the respective values of the lots subject to the strata scheme. Secondly, the Tribunal must determine whether, having regard to the respective values of the lots at the time the strata plan was registered, the allocation of unit entitlements at that time was unreasonable. Thirdly, if the allocation was unreasonable at that time, the Tribunal must consider whether to make an order reallocating unit entitlements among the lots subject to the strata scheme.

(2) The effect of the expression "have regard to" in s 236 (2) is that the Tribunal must take the respective values of the lots into account as a "fundamental element" in determining (relevantly) whether the allocation of unit entitlements among the lots was unreasonable when the strata plan was registered. However, the respective value of the lots is not the exclusive consideration, and the Tribunal may have regard to other matters that show or tend to show that the allocation of unit entitlements among the lots was or was not unreasonable.

(3) If the Tribunal finds that the original allocation of unit entitlements was unreasonable, it has power to vary the allocation, but is not bound to do so. Thus, it may take other relevant matters into account in determining whether an order should be made varying the original allocation of unit entitlements.

The Tribunal's decision

31 The reasoning of the Tribunal can be summarised as follows:

(1) The Keen Report was very comprehensive and complied in all respects with the Tribunal's requirements for expert reports.

(2) The relevant date for the consideration as to whether the allocation of unit entitlements was unreasonable was the date of registration of the last strata plan of subdivision, namely 17 June 2014.

(3) The Tribunal's approach to the application is to follow the three stages, as we have summarised above.

(4) As to the first stage (ascertaining values of the lots at the relevant date), the respondents' submissions that Mr Keen had not given proper attention to the effect on a particular lot's value of the very high annual levies resulting from the allocation of unit entitlements and that in arriving at value regard should be had to the "typical" range of levies as a proportion of lot value were rejected.

(5) The respondents' submission that the price they paid for Lot 31 should be disregarded in arriving at value because their purchase failed the "Spencer test" was also rejected.

(6) The Tribunal said:

> In my opinion, Mr Keen's report should be accepted (but see below why I have not accepted it). It sets out in great detail the nature of the comparisons being made and the bases on which Mr Keen as (sic) applied the evidence used in his report. I accept the schedule of unit entitlement allocations set out in his certificate on page 53 of his report and I have, with respect, checked his calculations in the proposed unit entitlements schedule on page 54 of his report.

(7) The certificate on page 53 of Mr Keen's report was a "Certificate of Value" setting out his valuations for each of the lots in the scheme, including Lot 31 at a value of $230,000 and Lot 32 at a value of $90,000. Hence, it is clear enough, that the Tribunal, having directed itself to the first stage of its assessment, that is to ascertain the respective values, found that the values were as set out in this certificate. In this context, the reference to "see below where I have not accepted it" must be a reference to the Tribunal's conclusion that despite its acceptance of the Keen Report valuations it would not accept the proposed reallocation of unit entitlements as set out in the Keen Report. The respondents' submissions accept this interpretation. They state:

> 49 The Tribunal did not accept the Keen report's proposal that the unit allocation should be made solely on the basis of the valuations. The Tribunal was correct and reasonable to not accept the Keen Report for that purpose, as the report took no account of any issues of relative costs arising from the lots, and relative amenities enjoyed by the lots, nor of the reasonableness of the proposed strata fees….
>
> 50 Even excepting the Keen valuations, the Tribunal correctly did not accept that the Keen allocation, based only on those valuations, was reasonable…

(8) The Tribunal said that because of various anomalies (which it outlined) the Tribunal was unable to except that the current schedule of unit entitlements as listed and used by Mr Keen was accurate.

(9) Leaving aside the problem with the current schedule of unit entitlements used by Mr Keen, the Tribunal found that the allocation of unit entitlements as at 14 June 2014 was unreasonable because, as shown by Mr Keen's report, a number of lot owners were paying less than is fair because they were allocated too few unit entitlements. Conversely, other lot owners were paying more, and in some cases significantly

more, than was fair because they were allocated too many unit entitlements.

(10) Absent anything further, the Tribunal would exercise its discretion to make an order allocating unit entitlements otherwise than as were allocated at 14 June 2014.

(11) However, there were further issues that persuaded the Tribunal on the basis of the current evidence such an order should not be made.

(12) The first issue was the anomalies already noted about the Keen Report schedule of current unit entitlements which meant that the Tribunal was unable to except that schedule as representing the true allocation as from 14 June 2014. The Tribunal said that it might be that the applicant or the parties together were able to explain these anomalies but, in any case, there was a further reason why it declined to exercise its discretion.

(13) This further reason was that the Tribunal was not persuaded that the proposed allocations to Lots 31 and 32 were reasonable. There were four reasons for that conclusion.

(14) First, the Tribunal was not satisfied that Lot 31 (perhaps, along with the other two residential lots) "should fairly be contributing to the running costs of the strata scheme, at least on the basis of the current evidence". In this regard, the Tribunal did not accept Mr Keen's unsupported suggestion that a residential lot would probably use more water than a commercial or retail lot. The Tribunal was not suggesting that in every case it would be necessary to go through the exercise of analysing the exact or even an approximate proportion of water, waste disposal and similar on a lot by lot basis. However, here the three residences were swamped by the number of commercial or retail lots. There was a real possibility that some of these were very high users of water and waste disposal such as a hair salon or a café or restaurant.

(15) Secondly, the Tribunal was concerned that there was simply no true comparison properties available to Mr Keen since none of the comparison properties could be described as a tiny minority of residential lots within a large majority of commercial or retail lots. Furthermore, Mr Keen was obliged to and did make significant adjustments to take account of the added amenities and outdoor areas enjoyed by the comparison properties.

(16) Thirdly the Tribunal stated:

> …. While I do not accept the respondents' analysis of Strata levies as a proportion of lot value, particularly when referring to what appear to me to be premium properties in capital cities. Furthermore, so far as I've been able to determine from a close perusal of that evidence, those schemes were overwhelmingly residential which itself renders them inapposite as comparison properties.

(17) Fourthly, the Tribunal was unable to accept either the purchase price or the valuation of Lot 32. This is described as an empty space in a dilapidated condition whether that part of the building has a new roof or

not. The Tribunal did not accept that a valuation of that space could reasonably be made without some indication of its proposed use. With reference back to the first of these four reasons, Lot 32 uses no water, has no waste disposal and appears to have very minimal use of any of the common property. Whilst noting that, in the usual circumstances, unit entitlements will be allocated whether or not a particular lot uses a lift, however, the Lot 32 situation was an extreme case.

(18) The Tribunal was in no position on the evidence to determine some different allocation of unit entitlements to those proposed by the appellant.

(19) The Tribunal concluded:

> For those reasons and together with the apparent discrepancies between Mr Keen's Schedule of current unit entitlements and the schedule contained in strata plan 89511, the application is dismissed.

The limited appeal right

32 Under s 80 of the NCAT Act, a party may appeal as of right to the Appeal Panel in an internal appeal on any question of law.

33 In respect of any other grounds, in the case of an appeal from the Consumer and Commercial Division of the Tribunal, the appellant must satisfy the Appeal Panel that leave to appeal should be granted under cl 12 sch 4 of the NCAT Act on the basis that:

> …..the appellant may have suffered a substantial miscarriage of justice because:
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> (a) the decision of the Tribunal under appeal was not fair and equitable, or
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> (b) the decision of the Tribunal under appeal was against the weight of evidence, or
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> (c) significant new evidence has arisen (being evidence that was not reasonably available at the time the proceedings under appeal were being dealt with)

34 Even if these conditions for the grant of leave are satisfied, the Tribunal has a discretion concerning the grant of leave which it will ordinarily only exercise in the circumstances described in *Collins v Urban* [2014] NSWCATAP 17 at [84 (2)], namely.

> Ordinarily it is appropriate to grant leave to appeal only in matters that involve:
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> 1 issues of principle;
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> 2 questions of public importance or matters of administration or policy which might have general application; or

> 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
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> 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,

Grounds of appeal

35 The appellant appealed on grounds that it said raised questions of law and also sought leave to appeal on the basis that the appellant had suffered a substantial miscarriage of justice because the decision was not fair and equitable and was against the weight of the evidence.

36 As to questions of law, the appellant contended that in some respects the Tribunal asked itself the wrong question; it also took into account irrelevant considerations, including findings that were perverse; and failed to take account of relevant considerations. It also contended that the decision was legally unreasonable in the sense that no reasonable Tribunal could have reached the decision that it did on the basis of the reasons that it gave.

37 The question whether a discretionary refusal to exercise a statutory power has been validly determined raises for consideration the principles in *House v R* (1936) 55 CLR 499 at 504-505, namely, whether in the exercise of the discretion the Tribunal, amongst other matters, the Tribunal acted upon a wrong principle or allowed extraneous or irrelevant matters to affect the decision, or if the Tribunal failed to take into account some material consideration. These matters raise questions of law.

38 Because we consider that the Tribunal did allow extraneous or irrelevant matters to affect the exercise of its discretion, it is unnecessary for us to address all of the grounds of appeal.

Submissions

39 The appellant relied upon written submissions lodged on 10 January 2022. These included the appellant’s written submissions to the Tribunal at first instance dated 30 August 2021. The appellant also relied upon written submissions in reply lodged on 16 February 2022. The respondents relied

upon written submissions lodged on 7 February 2022. These included their written submissions to the Tribunal at first instance dated 24 June 2021. We have read and considered all of these written submissions.

Alleged errors of law-consideration

40 We consider that the Tribunal erred in law in relation to each of the four reasons that it gave for its refusal to exercise the power (outlined above) even though it found that the relevant allocation of unit entitlements was unreasonable. We turn to each of these errors.

41 As to the first reason, the respondents contended that what the Tribunal was saying was that it was not satisfied that it would be fair for Lot 31 to contribute to the strata scheme's "total costs of water and waste disposal, etc, at the same rate as commercial and retail lots". However, that is not what the Tribunal's reasons state.

42 Whether the residential lots should be contributing to the strata costs was not a question that arose for consideration. The respondents did not contend that they should not be paying *any* strata levies. Rather, the contention was that the *increase* in strata levies that would result from the proposed reallocation of unit entitlements was unfair and out of all proportion to the costs these lots place on the strata scheme and out of all proportion to the market.

43 Accordingly, this consideration was an irrelevant consideration and resulted from the Tribunal asking itself the wrong question.

44 As to the second reason (no true comparable properties for Lot 31), the respondents submitted that the Tribunal found, correctly, as it was entitled to, that the comparison properties were not sufficient for the purpose of determining a reallocation and were not a good basis to justify the proposed reallocation and the consequent strata fees. However, this submission does not address the problems that we have identified below.

45 We note, as the respondents' submissions recognise, that this was a factor that only concerned Lot 31. This is because the absence of a true comparison, to which the Tribunal referred, was because there were no comparable properties in which *residential* lots were a tiny minority.

46 Having concluded that the allocation of unit entitlements was unreasonable at the relevant time because of the Keen Report valuations, which it accepted, in our opinion, this was not a matter that could sensibly arise at the next stage (third stage) of the Tribunal's assessment. Furthermore, the Tribunal's consideration of this matter was misconceived because the notion of a comparable property in the valuation sphere recognises the lack of complete identity and the likely need for adjustments. It was also misconceived because the primary factor in Mr Keen's valuation of Lot 31 was the sale price to the respondents.

47 The Tribunal was not saying, in effect, that the appellant needed to find a comparable property in which there was a unit entitlement and consequent strata levy for residential lots supporting the proposed change to the residential lots in this scheme. That would be an unreasonable requirement for approval of the proposed reallocation.

48 Accordingly, this consideration was an irrelevant consideration and resulted from the Tribunal asking itself the wrong question.

49 As to the third reason, it is not possible to understand what this factor really was. It appears that the matter the Tribunal had in mind was not fully set out. As it appears, it refers to matters that seem to be favourable to the appellant. Accordingly, we can only regard what is set out as an irrelevant consideration.

50 The respondents' submissions about this third reason (at [34] to [38]) did not confront the problem with these reasons that we have referred to.

51 As to the fourth reason, the respondents' submitted that it was clear from the facts why the Tribunal stated what it did in respect of the fourth reason, namely that it would be unreasonable to accept either the inflated purchase price paid by the respondents or the valuation of Lot 32 as the metric for reallocating unit entitlements to Lot 32 because it would have been unreasonable to apply strata fees to this lot, a relatively useless loft which benefits from little of the amenities, at the same rate as other usable commercial lots. They also submitted that the Tribunal did not make a general statement that the use of the commercial property must be known before it can be valued, that the Tribunal was adverting to the fact that Lot 32 was not suitable for commercial

premises and, yet, the valuer treated Lot 32 as any other commercial lot and allocated units on that basis.

52 As we have already mentioned, we agree that earlier in the reasons the Tribunal accepted the Keen Report valuations, including that for Lot 32 and intended to refer later in the reasons to factors as to why it was not prepared to accept the Keen Report's proposed unit entitlements that flowed from those valuations.

53 Nevertheless, in dealing with this fourth reason, it seems to us that the Tribunal reverted to a question as to whether the Keen Report valuation of Lot 32 could be accepted. We say this because of the clear language that the Tribunal was "unable to accept …. the valuation of lot 32" and that it "cannot accept that a valuation of that space can reasonably be made without some indication of its proposed use". These are conclusions that were inconsistent with the earlier conclusion that the Keen Report valuations were accepted. In view of the earlier clear conclusions accepting the valuations, these aspects of the fourth reason were irrelevant considerations.

54 Furthermore, the Tribunal's reliance on the matters relating to this fourth reason reveals a number of errors. First, it refers to being unable to accept the purchase price for Lot 32, which is, presumably, a reference to the price paid by the respondents in 2017. However, Mr Keen did not rely on that purchase price for the purpose of his valuation (as appears above) and consequent reallocation of unit entitlements. Secondly, the Tribunal referred to the space as being in a dilapidated condition, but this was a matter that Mr Keen referred to in arriving at his valuation (at page 23). Thirdly, knowledge of the proposed use of a property is not a requirement for arriving at a valuation. Rather, it is potential use that is relevant. Fourthly, in addressing the valuation of Lot 32 the Tribunal did not address the approach outlined by Mr Keen, to which we have referred above.

55 Finally, the Tribunal appears to refer back to its consideration that it was not satisfied that certain lots should be contributing to the running costs of the strata scheme, which is a factor we have already addressed. It did not express

itself in terms that Lot 32 should not bear levies *at the same rate* as other commercial lots.

56 Furthermore, contrary to the respondents' submissions, the valuer did not treat Lot 32 as any other commercial lot. Rather, it applied a discount of 32% to the person per square metre rate utilised for the valuation of the upper floor office lots with a consequent effect on the proposed unit entitlement for that property.

57 Accordingly, we regard the matters set out by the Tribunal in respect of the fourth reason as irrelevant considerations and as resulting from the Tribunal asking itself the wrong questions.

58 For these reasons concerning the four reasons why the Tribunal concluded that it was not persuaded the proposed allocation of unit entitlements to Lots 31 and 32 was reasonable, we consider that the Tribunal's exercise of the discretion under s 236 miscarried.

Alleged error of fact concerning reliance upon Mr Keen's schedule of current unit entitlements

59 As already mentioned, the Tribunal found that it could not accept Mr Keen's schedule of current unit entitlements as representing the true position, although it recognised that the parties might be able to explain the anomalies that led to that conclusion.

60 The anomalies to which the Tribunal referred were:

> ….. Quite apart from the issue of two lots 1, two lots 2 and two lots 44, the schedule in my copy of Strata plan 89511 does not match the schedule used by Mr Keen. For example, strata plan 89511 has a lot numbered 13, a lot numbered 19, and lots 41 and 42, none of which are listed in Mr Keen's schedule. In addition, strata plan 89511 has no lot 50, nor the second lot 44. I have reviewed the voluminous material supplied, including a rather onerous analysis of each of the strata plans of subdivision and the effect of each on the relevant schedule of unit entitlements, and I am unable to find an explanation of these anomalies.

61 The appellant submitted:

> ….. the Tribunal has erroneously identified "anomalies" between the lot numbers contained in the unit entitlements listed in Strata Plan 89511 and Mr Keen's report. When Strata Plan 89511 and Mr Keen's report are read in conjunction with the Title Search contained at pages 57-59 of Mr Keen's report, it becomes apparent that:

> • Lots 13 and 19 as shown in the Schedule of Unit Entitlement in SP 89511 with a combined unit entitlement of 31 is Lot 44 in SP 68784 with unit entitlement of 31 as shown in the Title Search and Mr Keen's various schedule; and
>
> • Lots 41 and 42 as shown in SP 89511 with a combined unit entitlement of 42 is Lot 50 in SP 31148 with unit entitlement of 42 as shown in the Title Search and Mr Keen's various schedules.
>
> There is no actual "anomaly" as identified by the Tribunal. This factual error is plain and readily apparent, and so central to the tribunal's decision that it would be unjust to allow the finding to stand.

62 The respondents' submitted:

> 12 The Tribunal correctly identified anomalies in the Appellant's evidence, such that some lots were not consistently referred to, and different lots were referred to by the same lot number.
>
> 13 At page 8 of the Appellant's appeal submissions, the Appellant provides an explanation for these anomalies and argues "*This factual error is plain and readily apparent, and so central to the Tribunal's decision that it would be unjust to allow the finding to stand."*
>
> 14 Contrary to the Appellant's appeal submissions, this was not an error on the part of the Tribunal, the resolution of the anomalies in the Appellant's Expert Report was not readily apparent, and the issue was not central to the Tribunal's decision. This issue did not have a bearing on the decision, and the Tribunal was not obliged to resolve these anomalies, as the application was rejected by the Tribunal for other, sufficient reasons. That is, even if there was an explanation for the anomalies and they could be clarified, it would make no difference to the decision.

63 The respondents also submitted that the Tribunal made no error of law in respect of this issue.

64 The appellant's explanation concerning this matter may well be correct, although, without finally deciding, we would not go so far as to say the true position is plain. We note that the respondents do not say that it is incorrect. However, as the Tribunal's reasons suggest, this ought to be a factual matter that is common ground between the parties and, no doubt, if it had been the sole issue determining whether the application succeeded or not then clarification would have been sought from the parties so that the application was determined according to the real issues in dispute.

65 It is unnecessary for us to determine this ground of appeal because we have already concluded that the exercise of the discretion miscarried and, as further explained below, the application will need to be remitted to a differently constituted Tribunal for redetermination. The position concerning the anomalies

to which the Tribunal refers can be resolved in carrying out that redetermination.

Respondents' submission that the dismissal of the application was correct, in any event

66 The respondents' submitted that there were multiple, individually sufficient reasons why the application could not be granted and that, accordingly, even if the Tribunal erred on some point (which the respondents did not accept) the application could not succeed because it was "egregiously unfair".

67 As to this, the respondents' submissions included:

(1) The proposed allocation was made solely on valuations, taking no account of any of the very real issues of fairness and reasonableness.

(2) For example, the appellant had proposed an allocation that would have approximately doubled the strata fees in respect of Lot 31, a modest one-bedroom apartment with virtually no amenities, to fees of over $9000.00 per annum. Such fees were of the order seen in respect of the most luxuriously served multi-million-dollar apartments.

(3) Such fees would make Lot 31 highly unsaleable, as no person in their right mind would buy it. Thus, the allocation would devalue Lot 31 to a great extent and infringe on the property rights of the owners.

(4) The proposed allocation was inequitable and out of proportion to relative costs and benefits related to the lots.

68 In substance, the respondents invited the Appeal Panel to undertake a fresh exercise of the discretion under s 236 at the third stage of a consideration of an application under that section and that in doing so we should decide to refuse the application.

69 In making this submission, the respondents did not seek to challenge the Tribunal's acceptance of the Keen Report market values for each of the lots or the Tribunal's conclusion that the allocation of unit entitlements at the time of the registration of the last strata subdivision, namely 17 June 2014, was unreasonable.

70 However, there were no findings by the Tribunal concerning these subjects affecting the exercise of the discretion and the more detailed material (both submissions and evidence) that lay behind these submissions and which were in issue between the parties.

71 In these circumstances, it is neither practical, efficient nor fair to the parties that we embark upon a fresh exercise of the s 236 discretion.

72 Accordingly, and in view of the matters we have referred to in [68] above, the proceedings should be remitted to a differently constituted Tribunal for re--determination of the exercise of the discretion under s 236 (1) in circumstances where it has already been determined by the Tribunal that the allocation of unit entitlements as at the relevant time was unreasonable, having regard to the respective values of the lots as also already determined by the Tribunal.

ORDERS

73 For the above reasons, we order as follows:

(1) The appeal is allowed.

(2) Set aside the order made by the Tribunal on 18 October 2021 dismissing the application the subject of those proceedings.

(3) The proceedings are remitted to a differently constituted Tribunal for redetermination of so much of the application as concerned whether the Tribunal should make the order sought under s 236 (1) of the *Strata Schemes Management Act 2015* (NSW), including the question as to what are the current unit entitlements of each of the lots in the strata scheme, in circumstances where:

(a) It has already been determined by the Tribunal, in accordance, with that section and s 236 (2) of that Act that it considers that the allocation of unit entitlements among the lots was unreasonable when a strata plan of subdivision was registered on 17 June 2014, as required by s 236 (1) (a) of that Act.

(b) The respective values of each of the lots, within the meaning of s 236 (2) of that Act, has been ascertained by the Tribunal as being the values set out under the “Certificate of Value” set out on page 53 of the Keen Report (as referred to in these reasons).

(4) Such redetermination is to be made on the basis of the evidence already adduced to the Tribunal at first instance and such further evidence as the Tribunal may allow.

****

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