Civil and Administrative Tribunal

New South Wales

Case Name:	Sultan v The Owners - Strata Plan No.4382
Medium Neutral Citation:	[2022] NSWCATCD 96
Hearing Date(s):	11 May 2022
Date of Orders:	29 June 2022
Decision Date:	29 June 2022
Jurisdiction:	Consumer and Commercial Division
Before:	R Alkadamani, Senior Member
Decision:	1. Pursuant to section 232 of the Strata Schemes Management Act 2015 the respondent pay the applicants $1,660.00 within 14 days; 2. The application is otherwise dismissed.
Catchwords:	REAL PROPERTY - Strata titles - Section 130, Strata Schemes Management Act 2015 (NSW) – Personal property REAL PROPERTY - Strata titles – Special by-laws – Proper construction
Legislation Cited:	Interpretation Act 1987 (NSW) Strata Schemes Development Act 2015 (NSW) Strata Schemes Management Act 2015 (NSW)
Cases Cited:	Re The Licensing Ordinance (1968) 13 FLR 143 Shahbazian v Owners Corporation SP 56466 [2017] NSWCATCD 83 The Owners of Strata Plan No 3397 v Tate (2007) 70 NSWLR 344; [2007] NSWCA 207 Victims Compensation Fund v Brown [2002] NSWCA 155
Texts Cited:	Nil

Category:	Principal judgment
Parties:	Mohsin Sultan (First Applicant) Robyn Sultan (Second Applicant) The Owners – Strata Plan No. 4382 (Respondent)
Representation:	First Applicant (Self-represented) Second Applicant (Self-represented) Mr Hedge (Respondent)
File Number(s):	SC 22/06062
Publication Restriction:	NIL

REASONS FOR DECISION

1 This is an application by lot owners in a strata scheme. The respondent, The Owners - Strata Plan No 4382, is the owners corporation ("the owners corporation").

2 The applicants seek orders that the owners corporation purchase a portion of their lot, namely, a portion of their garage. They seek this order under s 130 of the *Strata Schemes Management Act* 2015 ("SSMA").

3 The applicants also seek monetary orders. These claims arise from by-laws which provided that the applicants were to be reimbursed or paid for their strata levies. The monetary orders are sought under s 232 of the SSMA. The background to the by-laws is more fully described below.

The hearing

4 At the hearing Mr Sultan and Mrs Sultan appeared. Mr Sultan represented the applicants and was assisted by Mrs Sultan. For convenience, and without disrespect, I will refer to Mr Sultan and Mrs Sultan as the applicants unless it is appropriate to refer to only one of them.

5 Mr Hedge, the current chairperson and secretary of the owners corporation, represented the respondent.

6 The hearing was conducted on 11 May 2022. Due to the Tribunal's COVID-19 protocols, the hearing was conducted remotely by audio-visual link. Mr Sultan and Mrs Sultan appeared by telephone link.

Evidence

Evidence of the applicants

7 The applicants relied on a bundle of documents which were attached to the application (exhibit 1). The documents relied on comprised pages 5 to 40 of that bundle. The applicants also relied on documents filed on 13 April 2022 (exhibit 2). There was no objection by the Owners Corporation to either exhibit.

Evidence of the respondent

8 The owners corporation relied on a folder of documents filed 1 April 2022. This folder comprised 102 pages, commencing with a 15 page statement by Mr Hedge (exhibit 3). The statement was followed by numerous primary documents which included documentary evidence of the original lot entitlements, documents from the strata titles board dated 17 May 1976 recording variations to unit entitlements and documents concerning by-laws that relate to these proceedings. Exhibit 3 also contained documents from previous proceedings involving the applicants, including statements by various witnesses.

Findings

9 Strata plan no 4382 was registered on 11 December 1969. SP4382 is a residential building located at Brighton Le-Sands, Sydney. It consists of 55 lots and common property. Of the 55 lots, 28 lots are apartments and 27 lots are garages.

10 The first and second applicants are the owners of lots 27 and 30.

11 Lot 27 is a two-bedroom apartment and lot 30 is a garage of 390 square feet. It is convenient to use imperial units of measurement rather than metric units because some of the primary records in evidence do not record the metric units.

12 The current unit entitlement for lot 27 is 44 units and the current unit entitlement for lot 30 is 3 units. The current aggregate unit entitlement is 1204 units. However, that was not always the case. Prior to May 1976 the unit entitlement for lot 27 was 2 units and the unit entitlement for lot 30 was 1 unit.

At that time the aggregate unit entitlement was 84 units (exhibit 3, pp 26 and 27).

13 In May 1976 an application was made by the owners corporation to the Strata Titles Board to alter the allocation of unit entitlements.

14 On 21 October 1976 the Strata Titles Board made an order under the *Strata Titles Act* 1973 (NSW) amending the allocation of unit entitlements to the current allocation (exhibit 3, pp. 34-36).

15 The back 'corner' of lot 30, the garage, is physically separated from the rest of lot 30 by two walls that protrude towards each at right angles from two common property walls that partly delineate lot 30. The two walls that protrude from the common property walls are not depicted on the strata plan and it is common ground they are not common property walls. For convenience I will refer to these two walls within lot 30 that are not depicted on the strata plans as "the two internal walls".

16 The result is that the two common property walls and the two internal walls enclose a cubic space that is entirely within lot 30. This cubic space is referred to by the applicants, and in correspondence from various parties, as the "pump room". Although it is not accurate in terms of its proper legal characterisation to describe the space enclosed within lot 30 as a "pump room", it is convenient to do so in this judgment when referring to that space.

17 There is no dispute that the effect of the two internal walls creates a physical barrier between the cubic space that is referred to as the "pump room" and the cubic space comprising the balance of the garage. Lot 30 is, of course, one whole cubic space comprising the garage and the pump room.

18 The pump room contains equipment relating to the water and electricity supply to SP 4382. It is common ground that the equipment does not belong to the applicants. From the photographic evidence and oral evidence, it appears that at least one cylinder shaped object in the pump room is affixed to the floor and relates to the water supply to the building. The pump room also contains electrical equipment related to the whole building.

19 The pump room is about 45 square feet. Consequently, about 45 ft sq out of the 390 ft sq of lot 30 is effectively walled off by the two internal walls and separated from the rest of garage. The combination of the two internal walls separating the pump room space from the balance of lot 30 and the presence of equipment affixed in that space which is needed for the whole building, deprives, or at the very least diminishes, the applicants of the ability to use that portion of lot 30.

20 The applicants' central complaint in these proceedings is that the pump room effectively appropriates their lot property. The applicants say that they are deprived of the portion of the enclosed by the two internal walls. The primary relief that the applicants claim is that the Owners Corporation be required to purchase the area comprising the pump room. They seek an order ("Order 1") pursuant to s130 of the SSMA as follows:

> The Owners Corporation to acquire the relevant space from us – that is the Owners Corporation purchase the space out of lot 30 and acquire it as common property. The Owners Corporation would need to seek its own advice in relation to the value of this property and costs associated with such transfer being effected. Within a specified limited time for the acquisition. This will identify the Responsibility in case of trespassing or if an individual [is] hurt, injured or death in the area.

21 The other aspect of the applicants' complaints relate to reimbursement of strata levies or payment by the owners corporation of a fee pursuant to by-laws. The background and history relating to these issues is set out in the following paragraphs.

22 In 2014 Mr Sultan joined the executive committee of the owners corporation. At that time lots 27 and 30 were owned by Ms Sultan's mother.

23 In January 2015 Mr Sultan was elected treasurer and secretary of the executive committee.

24 In 2017 Mr Sultan discovered what he considered a discrepancy in the allocation of unit entitlements. The apparent discrepancy was that, contrary to what may have been understood in 2017, the pump room was lot property and part of lot 30 rather than common property. However, due to the internal walls the pump room had been physically separated from the balance of lot 30 and apparently treated as common property.

25 Neither party tendered a survey report. However, some documents in exhibit 1 included a letter dated 10 October 2019 from W Buxton Pty Ltd, registered surveyors and extracts of a portion of a survey undertaken by that firm (see exhibit 1, pp 18, 18A, 31 and 35). Those documents show that lot 30 is 304.6 sq ft (28.3m2) not including the pump room. The pump room is 47.4 sq ft (4.4m2). In addition, a hallway adjoining the rear of lots 30 and 31 that provides access to the pump room is recorded as 42 sq ft (3.9m2) up to a point referred to as the doorway. The extent to which that portion of the hallway is on lot 30, lot 31 or common property is unclear. The letter dated 10 October 2019 records that according to the strata records lot 30 is 390 sq ft.

26 There was no valuation evidence tendered by either party that would enable the Tribunal to fix a price for the pump room if the Tribunal were otherwise satisfied that Order 1 should be made.

27 In about October 2017, the owners corporation resolved to pass Special By-Law 1 ("the original Special By-Law"). The original Special By-Law, as registered, was in the following terms:

> That the Owners Corporation of Strata Plan 4382 reimburse and give the owners of lot 27 compensation credit each year, an amount equal to the amount of levies raised each year, due to the owners being unable to use part of their registered lot, due to the pump room and all its inclusions and part of corridor common use by the Owners Corporation of Strata Plan 4382.

28 Since lot 30 is the garage associated with lot 27, the reference to the owners of lot 27 in the original Special By-Law is for practical purposes the same as a reference to the owners of lot 30.

29 In the applicants' submissions (exhibit 3, page 3), the text of the original Special By-Law was incorrectly recorded as follows:

> That the Owners Corporation of Strata Plan 4382 reimburse ***or*** give the owners of lot 27 compensation credit each year, an amount equal to the amount of levies raised each year, due to the owners being unable to use part of their registered lot, due to the pump room and all its inclusions and part of corridor common use by the Owners Corporation of Strata Plan 4382.
>
> (my emphasis)

30 I do not consider that the applicants' conduct was anything other than a genuine mistake. However, the question of whether, on the proper construction or interpretation of the original Special By-Law, the word "*and*" appearing

between "*reimburse*" and "*give the owners of lot 27 compensation*" should be read as if it had been "*or*", is a significant issue in these proceedings. This issue is discussed in greater detail below.

31 At some point after the original Special By-Law was made, there was discord among some lot owners. This included proceedings in which the applicants and some lot owners were parties.

32 On about 28 October 2020 the owners corporation resolved to pass another special by-law. That special by-law, as registered, is recorded as an amendment to Special By-Law 1 (the original Special By-Law) as follows:

> Special By-Law 1: Amended at E.G.M. 28.10.20 – Refer By Law drafted by the Solicitor.

33 I will refer to the Special By-Law resolved at the 28 October 2020 extraordinary general meeting of the owners corporation as the amended Special By-Law.

34 During the hearing Mr Sultan gave evidence that the text of the resolution amending the original Special By-Law was at pages 28 – 30 of exhibit 1. Mr Hedge did not dispute this evidence. Pages 28 – 30 of exhibit 1 were an attachment to a letter dated 15 July 2020 from Pobi Laywers to the owners corporation. The 15 July 2020 letter recorded that one of the attachments to the letter was a "*new Special By-Law 1, including motions for the repeal of the old Special By-Law and the creation of a new by-law in its place"*.

35 The parties did not tender the document "*By Law drafted by the Solicitor*" referred to in the registered amended Special By Law. The parties also did not tender the forms lodged with the Registrar General leading to the registration of the amended Special By-Law. Consequently, on 31 May 2022 the Tribunal communicated with the parties raising this issue and providing an opportunity to the parties to tender the forms as lodged with the Registrar-General in respect of the amended Special By-Law (or to make objection to the tender of the documents). The Tribunal did not receive any further documents.

36 The Tribunal is not bound by the rules of evidence: s 38, *Civil and Administrative Tribunal Act* 2013 (NSW) ("CAT Act"). Further, the Tribunal's guiding principle under the CAT Act is "*to facilitate the just, quick and cheap resolution of the real issues in the proceedings*": s 36(1), CAT Act.

37 There is no dispute between the parties that the attachment to the 15 July 2020 letter contained the text of the special resolution passed at the extraordinary general meeting on 28 October 2020. Mr Sultan's uncontested evidence is that the text of the special resolution containing the amended Special By-Law is contained in pages 28-30 of exhibit 1. Having regard to s 38 of the CAT Act, the uncontested evidence of Mr Sultan and the absence of any dispute between the parties that the attachment to the 15 July 2020 letter contained the text of the special resolution passed at the extraordinary general meeting on 28 October 2020, the Tribunal accepts that the "*By Law drafted by the Solicitor*" referred to in the amended Special By-Law contains the same text as the attachment to the 15 July 2020 letter at pages 28 – 30 of exhibit 1.

38 Clause 2.1 of the attachment to the 15 July 2020 letter recorded the following relevant provisions:

> 2.1 The Owners Corporation must pay to the Owner of Lot 30 the Lot 30 Fee by the Due Date.

39 Clause 1.1 of the attachment defined "Due Date" and "Lot 30 Fee" as follows:

> "Due Date" means within 12 months from the date of the Owners Corporation specially resolving this by-law and each subsequent 12 month period thereafter commencing on the Anniversary Date.
>
> "Lot 30 Fee" means the sum of $1,660.00 being the market value for the use of the Pump Room and the Hallway, insofar as it reduces the area of Lot 30, for a 12 month period …

40 There is no evidence of the date that the amended Special By-Law 1 was registered. However, s 141(4) of the SSMA provides that a notification of a change to a by-law cannot be lodged in the Registrar-General's office more than 6 months after the passing of the resolution to make the by-law. Consequently, I infer that the amended Special By-Law was registered on or before 28 April 2021.

41 As at June 2021 the applicants had not paid strata levies for the 2019 financial year or the 2020 financial year.

42 On 15 June 2021 the applicants were issued with a final notice requiring payment of $7,992.00, which included strata levies due as at 12 February 2021, interest to 25 June 2021 and a debt recovery cost of $25.00. The

applicants were informed that if payment was not received within 21 days the matter would be referred to a debt collection agency.

43 The applicants paid the owners corporation the amount sought in the final notice but noted their position that the payment was made under protest. The precise date that the applicants paid the strata fees is unclear from the evidence but I infer it was prior to 20 July 2021 because a letter dated 20 July 2021 from the strata managers, Absolute Strata Management, refers to the applicants' request for their levies to be refunded for the levy period 1 November 2019 to 1 August 2020.

44 Subsequently, at a general meeting of the owners corporation on 21 September 2021, the owners corporation passed a new set of by-laws to replace the existing by-laws. It is common ground that the text of the by-laws passed by the 21 September 2021 resolution does not contain the amended Special By-Law.

45 However, there is no evidence that the by-laws resolved at the 21 September 2021 general meeting have been registered under s 141 of the SSMA. In the 31 May 2022 communication from the Tribunal with the parties, the Tribunal also raised the issue that the parties had not tendered a copy of the registered by-laws after the amendments resolved at the general meeting of 21 September 2021 or evidence of when those by-laws were registered. The Tribunal provided the parties with an opportunity to tender the forms as lodged with the Registrar-General in respect of the by-laws as resolved at the 21 September 2021 general meeting and evidence of the date of registration of those by-laws. The Tribunal did not receive any further documents.

46 Consequently, unlike the state of the evidence in relation to the amended Special By-Law, there is no evidence at all that the by-laws passed at the 21 September 2021 general meeting have been registered.

47 The applicants have not been provided with a reimbursement for annual strata levies for the 2019/20 financial year. It is also common ground the amounts sought in Orders 2 and 3 have not been reimbursed, credited or paid to the applicants.

48 Consequently, the applicants seek an order that the owners corporation pay $4,777.00 in relation to the 2019/20 financial year ("Order 2") pursuant to the original Special By-Law. The applicants also seek an order that the owners corporation pay $1,660.00 in relation to the 2020/21 financial year ("Order 3") pursuant to the amended Special By-Law.

49 Finally, the applicants seek an order that the owners corporation provide a written apology for distress and humiliation that they have experienced and the way that they have been treated ("Order 4").

Consideration of the Claims

Order 1

50 Section 130 of the SSMA provides:

> **130 Orders relating to personal property**
>
> (1) The Tribunal may, on application by an owner of a lot in a strata scheme, make one of the following orders if the Tribunal considers that an acquisition, or a proposes acquisition, by the owners corporation of personal property is unreasonable—
>
> (a) that the personal property acquired be sold or otherwise disposed of by the owners corporation within a specified time,
>
> (b) that the personal property not be acquired.
>
> (2) The Tribunal may, on application by an owner of a lot in a strata scheme, order the owners corporation to acquire personal property if the Tribunal considers the owners corporation has unreasonably refused to acquire the personal property.

51 The SSMA does not define "*personal property*". However, the term personal property is usually used in reference to items of property such as chattels or goods that are not interests in real property such as land or fixtures upon the land.

52 The distinction between real property and personal property is shown in s 21 of the *Interpretation Act* 1987, which defines property as follows:

> **property** means any legal or equitable estate or interest (whether present or future and whether vested or contingent) in real or personal property of any description, including money, and includes things in action.

53 Section 7 of the *Conveyancing Act* 1919 draws a similar distinction between real property and personal property.

54 Although the Interpretation Act and the Conveyancing Act define both real and personal property as forms of property, the specific reference to each form of property demonstrates the distinction between the two forms of property.

55 The SSMA refers to to "*common property*" and "*personal property*" in s 106 and other sections. The use of the terms "*common property*" and "*personal property*" in the SSMA also supports an interpretation of personal property not used in contrast to real property, such as interests in land.

56 The term "*personal property*" used in s 130 of the SSMA is also to be understood as a reference to personal property such as goods or chattels and not a reference to real property such as interests in land. In Order 1 the applicants seek an order that the owners corporation acquire a portion of lot 30. That would be an order that the owners corporation acquire real property rather than personal property. It follows that s 130 of the SSMA does not provide a basis for the Tribunal to order that the owners corporation acquire the portion of lot 30 referred to as the pump room, or any portion of lot 30.

57 The applicants did not point to any other statutory provision that provided a source of power to order the owners corporation to acquire real property.

58 Section 25(2) of the *Strata Schemes Development Act* 2105 confers on an owners corporation a power to accept real property and thereby add it to the common property if certain conditions are satisfied. However, that Act does not provide a source of power to the Tribunal to compel an owners corporation to acquire real property.

59 In addition to the above, it would not be appropriate for the Tribunal to make Order 1 because there is no agreement or evidence on the value of the portion of lot 1 that the applicants seek to compel the owners corporation to acquire. Order 1 is an order to the effect that the parties agree on the terms of a transfer, including price. Such an order is inappropriate because compliance with, and enforcement of, such an order would be too uncertain and unworkable.

60 For the above reasons, the application insofar as it relates to Order 1 will be dismissed.

Orders 2 and 3

61 In relation to Orders 2 and 3, the applicants rely on s 232 of the SSMA.

62 Section 232 of the SSMA provides:

> **232 Orders to settle disputes or rectify complaints**
>
> (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.
>
> (2) Failure to exercise a function For the purposes of this section, an owners corporation, strata committee or building management committee is taken not to have exercised a function if:
>
> (a) it decides not to exercise the function, or
>
> (b) application is made to it to exercise the function and it fails for 2 months after the making of the application to exercise the function in accordance with the application or to inform the applicant that it has decided not to exercise the function in accordance with the application.

63 I am satisfied that the Tribunal has jurisdiction under s 232 of the SSMA to determine the proceedings in relation to Orders 2 and 3. The relief claimed in Orders 2 and 3 seeks orders that the owners corporation pay amounts allegedly due under the by-laws of the owners corporation. The dispute in these proceedings is properly characterised as a complaint by the applicants that there has been a "*failure to exercise... a function … imposed by … the by-laws of a strata scheme*": s 232(1)(e).

64 The owners corporation opposes Orders 2 and/or 3 on the following grounds:

(1) that on a proper interpretation of the special by-laws the applicants were required to pay the strata levies and then they would receive reimbursement but they had not made the payments;

(2) that in any event the special by-laws were rescinded in September 2021;

(3) that Mr Sultan had received payments from the owners corporation that needed explanation and that this was a set-off or akin to a set-off until a satisfactory explanation had been received;

(4) that Mr Sultan misled the lot owners into passing special by-law;

(5) that Ms Sultan had a conflict of interest when the special by-laws were passed because he was secretary and treasurer of the owners corporation and he was a beneficiary of his mother-in-law's will and "*clearly stood to gain personally from the special by-law and the manner in which he has chosen as treasurer to interpret the wording after he had the resolution passed*";

(6) that the "*owners corporation would like to request the Tribunal make an order under Section 150 of the [SSMA] declaring that the special by-law be invalid*".

65 The owners corporation did not submit that the original Special By-Law or the amended Special By-Law were inconsistent with the SSMA.

66 In relation to the owners corporation's *first* ground, by 20 July 2021 the applicants had paid the strata levies outstanding as at 12 February 2021. Consequently, I do not accept the first ground in relation to the 2019/20 strata levies.

67 In relation to the 2020/21 strata levies, the first ground relied on by the owners corporation does not apply to the applicants' claim for $1,660.00 because the issue of reimbursement is not relevant to that claim. The claim for $1,660.00 arose under the amended Special By-Law. The amended Special By-Law did not refer to a reimbursement or a credit. It simply obliged the owners corporation to "*pay to the Owner of Lot 30 the Lot 30 Fee by the Due Date*".

68 In relation to the owners corporation's *second* ground, in relation to Order 2, and the 2019/20 strata levies, the issue falls to be determined by considering the rights and obligations of the parties under the original Special By-Law and how the registration of the amended Special By-Law affected those rights and obligations. This in turn requires a consideration of the proper construction or interpretation of the original Special By-Law.

69 The principles informing the construction or interpretation of strata by-laws was considered by McColl JA in *The Owners of Strata Plan No 3397 v Tate* (2007)

70 NSWLR 344; [2007] NSWCA 207 McColl JA, with whom Mason P relevantly agreed, set out the following propositions at [71]:

> The following propositions emerge from the foregoing discussion:
>
> 1. By-laws are the "series of enactments" by which the proprietors in a body corporate administer their affairs; they do not deal with commercial rights, but the governance of the strata scheme: *Bailey*;
>
> 2. By-laws have a public purpose which goes beyond their function of facilitating the internal administration of a body corporate; cf *National Roads and Motorists' Assoc Ltd v Parkin, Lion Nathan Australia*;
>
> 3. Exclusive use by-laws may be inspected by third persons interested in acquiring an interest in a strata scheme, whether, for example, by acquiring units, or by lending money to a lot proprietor; such persons would ordinarily have no access to the circumstances surrounding their making; their meaning should be understood from their statutory context and language: *National Roads and Motorists' Assoc Ltd v Parkin, Lion Nathan Australia*.
>
> 4. By-laws may be characterised as either delegated legislation or statutory contracts: *Dainford; Re Taylor; Bailey; North Wind; Sons of Gwalia*;
>
> 5. Whichever be the appropriate characterisation, exclusive use by-laws should be interpreted objectively by what they would convey to a reasonable person: *Lion Nathan Australia*;
>
> 6. In interpreting exclusive use by-laws the Court should take into account their constitutional function in the strata scheme in regulating the rights and liabilities of lot proprietors inter se: *National Roads and Motorists' Assoc Ltd v Parkin, Lion Nathan Australia*.
>
> 7. Unlike the articles of a company, there does not appear to be a strong argument for saying exclusive use by-laws should be interpreted as a business document, with the intention that they be given business efficacy: cf *National Roads and Motorists' Assoc Ltd v Parkin* (at 236 [75]). That does not mean that an exclusive use by-law may not have a commercial purpose, and be interpreted in accordance with the principles expounded in cases such as *Antaios Compania Naviera SA*, but due regard must be paid to the statutory context in so doing;
>
> 8. An exclusive use by-law should be construed so that it is consistent with its statutory context; a court may depart from such a construction if departure from the statutory scheme is authorised by the governing statute and if the intention to do so appears plainly from the terms of the by-law: *Re Taylor*;
>
> 9. 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: *Lion Nathan Australia*.

70 In *The Owners of Strata Plan No 3397 v Tate* 70 NSWLR 344; [2007] NSWCA 207 McColl JA also said, at [72]:

> The question of whether the by-laws constitute delegated legislation or a statutory contract was not fully argued. As the foregoing discussion reveals, the decision on their characterisation may be a distinction without a substantial difference from the interpretative perspective. It is not appropriate to express a

> final view on these issues. It is sufficient to say that on either approach the interpretation of Special By-Law 21 had to be approached on a basis which was consistent with the statutory scheme and that caution had to be exercised in considering surrounding circumstances.

71 If the proper characterisation of strata by-laws is that they are delegated legislation, then they are to be interpreted in accordance with the principles of statutory interpretation: *The Owners of Strata Plan No 3397 v Tate* 70 NSWLR 344; [2007] NSWCA 207 at [36].

72 In these proceedings, the original Special By-Law provided that the owners corporation is to "*reimburse and give the owners of lot 27 compensation credit each year, due to the owners being unable to use part of their registered lot*". The purpose of the original Special By-Law was to provide compensation to the owners of lots 27/30 because the owners were unable to use the area in lot 30 described as the pump room.

73 The meaning of reimburse is central to the proper interpretation of the original Special By-Law. The Macquarie Concise Dictionary (5th ed) gives "*reimburse*" the following meanings:

> 1. to make repayment to for expense or loss incurred.
> 2. to pay back; refund; repay.

74 The meaning of "*reimburse*", whether it is repayment, to pay back, refund or repay presupposes that some form of payment has first been incurred or made and that it is then returned.

75 There are two possible interpretations of the original Special By-Law.

76 The first possible interpretation is that the owners of lot 27 are required to pay the strata levies and only then is the owners corporation required to reimburse the applicants. This interpretation is consistent with the ordinary meaning of the word "reimburse". However, this interpretation only achieves the purpose of the Special By-Law, as identified above, if and when the owners of lot 27 pay the strata levies. Consequently, on this interpretation, the compensation contemplated by the original Special By-Law is provided by the owners corporation only if the applicants pay their strata levies, notwithstanding that, in a practical sense, the pump room cannot be used by the owners of lot 27 whether or not the applicants pay their strata levies.

77 A reimbursement of the strata levies, rather than a simple waiver of the strata levies, may have been chosen in the original Special By-Law as the appropriate mechanism to provide compensation to the applicants because s 83(2) of the SSMA provides that contributions levied by an owners corporation must be levied on lot owners in shares proportional to their unit entitlement.

78 The second possible interpretation of the original Special By-Law is that the owners of lot 27 pay the strata levies and receive a reimbursement *or* are given credit for the strata levies. This interpretation requires that the word "*and*" be construed as if it had been "*or*". This interpretation was canvassed during the hearing.

79 There are a number of situations in the context of statutory interpretation in which the word "*and*" is able to be construed as if it had been "*or*". In *Re The Licensing Ordinance* (1968) 13 FLR 143 Blackburn J considered two categories of case in which the use of "*and*" is read as if it had been "*or*". His Honour said (at pp. 146-7):

> The first category is that of cases where, if "and" was given its natural meaning, the result was so extraordinary (to quote Lord Parker CJ in R v Oakes [1959] 2 QB 350, "an absurdity or unintelligibility") that in order to make sense of the provision the court was obliged to say that it must read the word "and" as if it had been "or"…
>
> The cases in the second category were those in which there was a list of items being joined by "and" and the list being governed or affected by words which showed that the list was a list of alternatives. In such a case, the word "and", which is used to join the items in the list, is truly cumulative; it links the members of a class and its function is to indicate that the whole class is to be considered together. Governing the words which enumerate the members of the class are other words which categorise the class, as a whole, as a class of alternatives ... the word "and" inside the class does not have dispersive or alternative force; its force is wholly cumulative; it is the words outside the class which give the dispersive effect.

80 The original Special By-Law is not absurd or unintelligible if the word "*and*" in the phrase "*the Owners Corporation of Strata Plan 4382 reimburse and give the owners of lot 27 compensation credit each year*" is not construed disjunctively. The words "*and give the owners of lot 27 compensation credit each year*" make clear, to the extent necessary, that the reimbursement does not have the result that the strata levy ledger for the owners of lot 27 is impacted negatively, in terms of their liability to pay strata levies, as a

consequence of the reimbursement. The second category identified in *Re the Licensing Ordinance* is not relevant to construing the original Special By-Law

81 In addition to the two categories identified by Blackburn J in *Re The Licensing Ordinance*, there is another category in which the word "*and*" is read as if it had been "*or*". In *Victims Compensation Fund v Brown* [2002] NSWCA 155, Mason P described the circumstances in which this category may arise as follows:

> Bennion, *Statutory Interpretation* 3rd ed (1997) pp431, 925-7 and *Supplement* (1999) pp S63-4 cites examples of composite expressions which must be construed as a whole, when it is incorrect to answer that the whole is necessarily the sum of its parts. In the *Supplement* at pp S63-4 the learned author states:
>
> *Pairs of words* The phrase "repair or maintenance" ... illustrates a common feature in legal expression, namely a liking for the use of pairs of words, whether in antithesis or apposition, in preference to a single term. The most common reason for this (often illusory) is the drafter's reluctance to rely on one word, with the comforting feeling that a pair of terms somehow conveys more than the sum of its parts...
>
> A frequent difficulty when pairs of words are used is whether both terms need to be satisfied, or whether one will do .... This depends on the context, and the purpose of the enactment. If an applicant is required to be "fit and proper" then obviously he must be both fit and proper. But if the use of a village green is required to be for the indulging by the inhabitants in "lawful sports and pastimes" then it will obviously not matter if a particular green is devoted exclusively to sports (but not pastimes) or pastimes (but not sports). The portmanteau is labelled "sports and pastimes", and as long as the particular thing done is to be found within the portmanteau all is well…
>
> …
>
> It is unnecessary to argue about whether when the public indulge in a particular activity, say rabbiting, it is a "sport" or a "pastime" because if it is not one it is the other (unless of course it is neither). With this sort of portmanteau phrase it does not make any practical difference where the dividing line is drawn between the meanings of the two terms. Indeed there are likely to be overlapping meanings. The precise meaning of each term never needs to be ascertained, because there is no weight on it. In this particular instance, some members of the public will indulge on the green or common in sports, some in pastimes, and some in both. It would be absurd to suggest that the definition is not satisfied unless all members of the public who go on the green or common indulge in *both* activities.

82 There is a practical difference between the terms "*reimburse*" and "*give …credit each year*" used in the original Special By-Law. The obligation to reimburse relates to the return of the funds paid. The requirement to "*give… credit each year*" makes clear that any return of funds to the applicants does not detrimentally affect their strata levies ledger. Consequently, the words "*the*

Owners Corporation of Strata Plan 4382 reimburse and give the owners of lot 27 compensation credit each year" in the original Special By-Law do not require that the word "*and*" be construed as if it had been "*or*"

83 It follows that the any entitlement to reimbursement under the original Special By-Law required the applicants to have first paid their strata levies. The applicants paid their strata levies for financial year 2019/20 after 15 June 2021. By 15 June 2021 the amended Special By-Law had been registered.

84 In those circumstances, the issue is whether the applicants were entitled to a reimbursement of their strata levies under the original Special By-Law for the financial year 2019/20 even though at the time they made they paid those strata levies the amended Special By-Law had been registered.

85 There is nothing in the text of the amended Special By-Law that expressly preserves rights and obligations under the original Special By-Law. The issue must therefore be resolved by determining the accrued rights and obligations of the parties when the amended Special By-Law was registered.

86 Section 30 of the Interpretation Act provides, relevantly:

> (1) The amendment or repeal of an Act or statutory rule does not –
>
> (a) revive anything not in force or existing at the time at which the amendment or repeal takes effect, or
>
> (b) affect the previous operation of the Act or statutory rule or anything duly suffered, done or commenced under the Act or statutory rule, or
>
> (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under the Act or statutory rule, or
>
> …

87 In *Shahbazian v Owners Corporation SP 56466* [2017] NSWCATCD 83 the Appeal Panel considered the meaning of "*accrued*" under s 30 of the Interpretation Act and said the following:

> 61 The House of Lords considered the word "obligation" used in the corresponding English provision, s 16 of the *Interpretation Act 1978 (c. 30)* (UK), in *Aitken v South Hams District Council* [1995] 1 AC 262. That case concerned a notice requiring the abatement of a noise nuisance arising from barking dogs served by a local authority on a defendant under the *Control of Pollution Act 1974* (UK). Under that Act, contravention of such a notice was punishable as a summary offence. After the notice was issued but before the contravention, the *Control of Pollution Act* was repealed. The House of Lords held that the notice remained effective after the repeal of the Act by operation

of s 16(1)(b) of the UK *Interpretation Act,* thus there was an accrued obligation to comply with the notice within s 16(1)(c) and the ability to enforce the obligation was preserved by s 16(1). Lord Wolfe held, at 271:

> "If the notice [requiring a person to restrain dogs from barking] remains effective, then the 'obligation' to comply with the notice would also be preserved by section 16(1)(c). This is subject to section 16(1)(c) applying to an 'obligation' enforceable under the criminal, as well as the civil, law ….
>
> As to this, although the application of section 16(1)(d) is confined to the criminal field, I do not consider that this means that the words 'obligation or liability' referred to in section 16(1)(c) have to be regarded as being restricted to a civil obligation or liability. The words remain appropriate to cover an obligation or liability enforceable under the criminal law. While 'right' and 'privilege', which are also referred to in section 16(1)(c), have a distinctly civil flavour, this is not equally true of 'obligation' and 'liability'. It is perfectly possible for the same enactment to create an obligation or a liability which is both enforceable in a civil action, by a claim for damages, and by a criminal sanction. It would be strange if, in that situation, section 16(1) could preserve the obligation or liability so far as it was enforceable in a civil action, but not so far as it was enforceable in criminal proceedings. To my mind the important question is where there is an obligation or liability rather than how that obligation or liability is enforced. The question of enforcement is dealt with in section 16(1)(e) and that provision clearly applies equally to civil and criminal enforcement."

62 It appears that the House of Lords was not familiar with civil pecuniary penalties, such as those available under s 202 of the 1996 Act as well as many other State and Commonwealth statutes. Nonetheless, the reasoning of Lord Wolfe is equally applicable in this case to an order of an adjudicator requiring a person to take certain action, potentially enforceable by the imposition of a civil penalty.

63 There is obvious scope for some overlap between "obligation" and "liability" as used in s 30(1). Unless there is some good reason to the contrary, meaning should be given to each word in a statute on the basis that the word adds something which would not be there if the word was left out - *The Commonwealth v Baume* (1905) 2 CLR 405 at 414 and 419, *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 12-13, *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28 at [71].

64 Having regard to the text, context, scope and purpose of s 30(1) and these cases, we are of the view that in s 30(1)(c):

> (1) "obligation" includes a reference to a duty or binding requirement on a person to take or refrain from taking certain action;
>
> (2) "liability" includes a reference to a binding requirement on a person arising out of some past failure or transaction.

88 Under the original Special By-Law, the owners corporation's obligation to reimburse the applicants did not arise until the applicants had paid their strata levies. The owners corporation was not obliged to return funds that it had not received. Consequently, at all times prior to the applicants' payment of their

2019/20 strata levies, the owners corporation did not have any accrued obligations in respect of the 2019/20 strata levies. The applicants paid their 2019/20 strata levies after 15 June 2021. At that time, the original Special By-Law was no longer in force because the amended Special By-Law had been registered. It follows that at the time that the applicants paid their 2019/20 strata levies, the owners corporation did not have an accrued obligation under the original Special By-Law to reimburse the applicants. The result is that the Tribunal cannot grant relief in terms of Order 2.

89 In relation to the owners corporation's *second* ground as it applies to Order 3 and the payment of the Lot 30 Fee under the amended Special By-Law, the due date for payment was 28 October 2021. There is no issue of reimbursement under the amended Special By-Law. The Lot 30 Fee became outstanding after 28 October 2021.

90 There is no evidence that the 21 September 2021 by-laws have been registered under s 141 of the SSMA or, if they have been registered, when that occurred. Under s 141(2) of the SSMA, a change to a by-law has no effect until the Registrar-General has made an appropriate recording of the notification in the folio of the Register for the common property. Consequently, there is no evidence that the owners corporation's obligation under the amended Special By-Law to pay the Lot 30 Fee ceased prior to 28 October 2021, being the date when the Lot 30 Fee became due and payable.

91 For completeness, had the proper approach to the interpretation of the original Special By-Law and the amended Special By-Law required that the matter be approached on the basis that by-laws are statutory contracts rather than delegated legislation then the result in these proceedings would have been no different. The time at which the parties' rights, liabilities and obligations accrued if the by-laws constituted a statutory contract would have been no different.

92 In relation to the owners corporation's *third* ground, a letter dated 16 September 2021 from Mr Hedge, as secretary of the owners corporation, to Mr Sultan sets out payments of $4,000.00 that are appear to have been made by the owners corporation to Mr Sultan. Mr Hedge's statement (exhibit 3) records that "*[p]ending an outcome from these enquiries the owners corporation is*

unable to determine whether there is a debt due or to the applicants" (exhibit 3, p. 5, para 8(a)(i)). There is no evidence that there is any debt due from Mr Sultan. The letter dated 16 September 2021 does not itself establish that a debt is due from Mr Sultan. Indeed, Mr Hedge's statement concedes that the owners corporation is unable at this stage to determine whether there is a debt.

93 In relation to the owners corporation's *fourth* and *fifth* grounds, there is no application before the Tribunal or any court which seeks to invalidate the original Special By-Law or the amended Special By-Law on the basis of the alleged conduct. The Tribunal cannot withhold relief to the applicants under the those Special By-Laws on the basis of the allegations

94 In relation to the owners corporation's *sixth* ground, Mr Hedge properly accepted that there is no application under s 150 of the SSMA and further that the owners corporation, being the respondent in these proceedings, cannot make an application under s 150 of the SSMA.

95 In addition to the amounts identified in Orders 2 and 3, the applicants seek interest on those amounts. The owners corporation charged the applicants $671.00 in interest in relation to 2019/20 strata levies. Since the Tribunal will not grant relief in terms of order 2, there is no basis to order payment of interest as claimed. In relation to 2020/21, the payment of the Lot 30 Fee is not related to the payment of strata levies. This means that the applicants cannot claim any interest that they may have been charged for late payment of strata levies.

96 The owners corporation will be ordered to pay $1,660.00.

Order 4

97 In relation to Order 4, the Tribunal does not have power under s 232 of the SSMA to grant such relief.

Orders

98 The Tribunal makes the following orders:

(1) Pursuant to section 232 of the Strata Schemes Management Act 2015 the respondent pay the applicants $1,660.00 within 14 days;

(2) The application is otherwise dismissed.

****

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