Civil and Administrative Tribunal

New South Wales

Case Name:	The Owners - Strata Plan No 47383 v McCullum
Medium Neutral Citation:	[2022] NSWCATAP 283
Hearing Date(s):	11 July 2022
Date of Orders:	31 August 2022
Decision Date:	31 August 2022
Jurisdiction:	Appeal Panel
Before:	G Blake AM SC, Senior Member L Wilson, Senior Member
Decision:	1. The appeal is dismissed. 2. Each party is to pay their own costs.
Catchwords:	LAND LAW — Strata title — By-laws – Whether installation of structure permitted by by-law
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW), ss 60, 80, 81 Civil and Administrative Tribunal Rules 2014 (NSW), r 25 Strata Schemes Management Act 2015 (NSW) Strata Titles (Freehold Development) Act 1973 (NSW) (formerly Strata Titles Act 1973 (NSW)), ss 57, 58, 75, 77, Sch 1, by-law 16
Cases Cited:	Hope v The Council of the City of Bathurst (1980) 144 CLR 1; [1980] HCA 16 Ryan v BKB Motor Vehicle Repairs Pty Ltd [2017] NSWCATAP 39
Texts Cited:	None cited
Category:	Principal judgment

Parties:	The Owners - Strata Plan No 47383 (Appellant) Hugh James McCullum (Respondent)
Representation:	Solicitors: Bannermans (Appellant) BE Legal (Respondent)
File Number(s):	2022/00035687
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Date of Decision:	10 January 2022
Before:	G Burton SC, Senior Member
File Number(s):	SC 21/32051

REASONS FOR DECISION

Overview

1 This is an internal appeal from the decision of the Consumer and Commercial Division of the Tribunal made on 10 January 2022 in proceedings between The Owners - Strata Plan No 47383, which is the owners corporation responsible for the management of the strata scheme related to strata plan no 47383 (SP47383) at Potts Point (the Owners), and Hugh James McCullum (Mr McCullum), who is the owner of two lots in SP47383. The Tribunal dismissed the proceedings (the Tribunal Decision).

2 We have decided to dismiss the appeal.

The factual background

3 SP47383, which is comprised by 109 lots and common property, is a six storey residential building and was registered on 25 July 1994.

4 The original by-laws of SP47383 (the original by-laws) were those specified in Sch 1 of the *Strata Titles Act 1973* (NSW) (which was subsequently renamed the *Strata Titles (Freehold Development) Act 1973* (NSW) (1973 Act) and

relevantly included by-law 16 entitled “Damage to common property” (by-law 16) which provided:

> “16. A proprietor or occupier of a lot shall not mark, paint, drive nails or screws or the like into, or otherwise damage or deface, any structure that forms part of the common property without the approval in writing of the body corporate, but this by-law does not prevent a proprietor or person authorised by him from installing—
>
> (a) any locking or other safety device for protection of his lot against intruders; or
>
> (b) any screen or other device to prevent entry of animals or insects upon his lot.”

5 Since 1995 Mr McCullum has been the owner of two lots in SP47383 including lot 109 which is a car space on the second floor of the building. In 1995 he enclosed the car space (the lot structure) and adjoining common property (the common property structure). The lot structure comprised two metal sheeting side walls and a roller door front wall within lot property, each bolted into the common property floor and rear wall. The rear of the lot structure was the common property wall of the building.

6 On 28 January 1998, dealing 3750370C entitled Change of By-Law was registered whereby the original by-laws were repealed and by-laws 1 to 31 which had been approved by the Owners on 13 December 1997 were added (the 1997 by-laws), and which relevantly included:

> **“3 Obstruction of common property** An owner or occupier of a lot must not obstruct lawful use of common property by any person except on a temporary and non-recurring basis.”
>
> “**5 Damage to common property**
>
> (1) An owner or occupier of a lot must not mark, paint, drive nails or screws or the like into, or otherwise damage or deface, any structure that forms part of the common property except with the prior written approval of the owners corporation.
>
> (2) An approval given by the owners corporation under subclause (1) cannot authorise any additions to the common property.
>
> (3) This by-law does not prevent an owner or person authorised by an owner from installing:
>
> (a) any locking or other safety device for protection of the owner's lot against intruders or to improve safety within the owner's lot, or
>
> (b) any screen or other device to prevent entry of animals or insects on the lot, or
>
> (c) any structure or device to prevent harm to children, or

(d) any device used to affix decorative items to the internal surfaces of walls in the owner's lot.

…"

"**17 Appearance of lot**

(1) The owner or occupier of a lot must not, without the prior written approval of the owners corporation, maintain within the lot anything visible from outside the lot that, viewed from outside the lot, is not in keeping with the rest of the building.

(2) This by-law does not apply to the hanging of any washing, towel, bedding, clothing or other article as referred to in by-law 10."

7 On 3 December 2014, the Tribunal in proceedings SC 14/35673 between the Owners as the applicant and Mr McCullum as the respondent made an order that Mr McCullum remove his enclosure of the common property adjacent to his car space (the 3 December 2014 order).

8 Pursuant to the 3 December 2014 order Mr McCullum removed the common property structure, and left the lot structure in place.

The proceedings between the parties in the Tribunal

9 On 26 November 2020, the Owners as the applicant commenced proceedings SC 20/50101 against Mr McCullum as the respondent by filing a strata schemes application in which it sought an order for the removal of the lot structure under the *Strata Schemes Management Act 2015* (NSW).

10 On 10 March 2021, the Tribunal made the following order (the 10 March 2021 order):

"1. On or before 24 March 2021 the respondent is to remove the structure enclosing the carspace forming part of Lot 109, and make good the common property."

11 On 6 July 2021, an Appeal Panel quashed the 10 March 2021 order and remitted the matter for hearing on the original evidence before the Tribunal and on the evidence before the Appeal Panel that Mr McCullum said that he would have put on if given the opportunity with appropriate notice of the strata schemes application.

12 On 6 July 2021, the remitted proceedings were renumbered as proceedings SC 21/32051.

13 On 23 December 2021, the hearing took place.

14 On 10 January 2022, the Tribunal made the Tribunal Decision which contained:

(1) the following orders (the 10 January 2022 orders):

> "1. Dismiss the application.
>
> 2. Make no order as to the costs of the proceedings."

(2) reasons for the 10 January 2022 orders.

The Tribunal Decision

15 In the Tribunal Decision, the Tribunal relevantly:

(1) recorded the background and procedural history ([1]-[8]);

(2) set out the Owners' case ([9]-[11]);

(3) set out Mr McCullum's case ([12]-[27]);

(4) summarised the relevant legislative provisions in 1995, being ss 57, 58, 75 and 77 of the 1973 Act and by-law 16 ([28]-[33]);

(5) summarised by-laws 3, 5 and 17 of the 1997 by-laws ([34]-[38]);

(6) set out its consideration and conclusion as follows ([39]-[57]):

(a) Mr McCullum has uncontradicted evidence that he had at least the informal approval and, on his evidence the formal approval that was minuted, of the then executive committee (the EC) to enclose his car space ([39]);

(b) Mr McCullum has uncontradicted evidence that nothing formal was done to attempt to remove the lot structure until 2020. There is uncontradicted evidence that there were good security and pest control reasons for enclosure in 1995 and no evidence that such position has changed. By virtue of these reasons, he was entitled under the provisions of by-law 16 in 1995 to affix the lot structure to the common property without body corporate approval ([40]);

(c) there is presently no evidence of a sustainable reason to seek such removal beyond the fact that no other car space in the scheme is enclosed. Photographic evidence supports the inference that lines of sight are not unreasonably interfered with. The lot structure therefore does not qualify as a breach of by-law 3 of the 1997 by-laws. If there was appropriate approval for the lot structure in 1995 then the Owners have no basis to rely upon breach of by-laws 5 and 17 of the 1997 by-laws ([41]);

(d) Mr McCullum did not require any approval of the Owners via a general meeting or the EC to erect the lot structure in 1995 to provide security and protection against animals for the contents of his car space ([42]);

(e) Mr McCullum had established approval of the relevant decision-making organ of SP47383 in 1995 so as to avoid contravention

of the 1997 by-laws, or has established an estoppel defence to a claim of contravention ([43]);

(f) the provisions for an exclusive use by-law in s 58(7) of the 1973 Act do not appear apposite for enclosure within a lot space that incidentally included affixing at limited points to common property and using without intrusion (except for affixations) the common property rear wall as part of the enclosure. There was no record of other restricted matters being resolved. Accordingly, absent being a restricted matter, the EC had power to approve the lot enclosure in 1995. Consent in accord with the 1973 Act including the original by-laws was given for the lot enclosure, given the lack of challenge since 1995 until 2020 by ECs and strata committees of varying composition and the absence of evidence that authorisation had not been granted in 1995 ([44]-[46]);

(g) alternatively, the same matters give rise to a defence, to the Owners' claim for removal of the lot structure as unauthorised, of authorisation by operation of conventional estoppel, estoppel by conduct (including silence when one could reasonably expect something to be said or done) and estoppel by standing by as the improvement of lot property was made at cost to Mr McCullum ([47]);

(h) these conclusions were supported by the following two matters ([48]-[51]):

  (i) firstly, there was no explanation to rebut, by an appropriate record or other evidence, the more probable inference according to the course of common experience from the contemporary evidence of at least informal approval in 1995 by the EC as the appropriate approving body and a continuous absence of attempt to challenge the validity of the lot structure erected until recent times, including when there was a challenge in 2014 to the adjacent common property structure;

  (ii) second, the presumption of regularity operating on the evidence of at least informal approval in 1995 by the EC, followed by erection of the lot structure which may not have been lawful without such approval, led to a conclusion of regularity of that approval by the appropriate procedures absent any record to the contrary;

(i) the doctrine of unanimous assent does not provide a further and distinct basis for resisting removal of the lot structure ([52]);

(j) for those reasons the Owners' application for relief should be dismissed ([53]);

(k) if this decision was wrong, the Tribunal would have adjourned the proceedings until Mr McCullum's application for a common property rights by-law was considered by the Owners and any

challenge by Mr McCullum to any rejection by the Owners was determined ([54]-[57]);

(l) made no order as to the costs of the proceedings ([58]-[59]);

(m) recorded the 10 January 2022 orders ([60]).

The history of the appeal

16 On 7 February 2022, the Owners as the appellant commenced proceedings 2022/00035687 against Mr McCullum as the respondent by filing a notice of appeal (the notice of appeal) in which it set out:

(1) the following grounds of appeal:

> "*Ground 1*
>
> 1. The Tribunal erred in law by finding that the previous by-law 16 (Previous By-law 16") permitted the Respondent to carry out works to enclose his car space (the "Unauthorised Works") [paragraph 42].
>
> …
>
> *Ground 2*
>
> 9. The Tribunal erred in law by finding that the lot owner was not breaching existing bylaws 5 and 17 by virtue of the Unauthorised Works [Paragraph 41].
>
> …
>
> *Ground 3*
>
> 11. The Tribunal erred in law in finding that the Respondent did not require formal approval of the owners corporation to erect the Unauthorised Works [paragraph 42].
>
> …
>
> *Ground 3* [sic]
>
> 13. The Tribunal erred in law by finding that the Respondent has established or can rely on a defence of estoppel or a presumption of regularity [paragraphs 43, 50 and 51].
>
> …
>
> *Ground 4*
>
> 16. The Tribunal erred in law by finding that the executive committee in 1995 had the power to authorise the Unauthorised Works [paragraph 45].
>
> …"

(2) the following orders that the Appeal Panel should make:

> "1. That all orders in the decision of *OWNERS SP 47383 v McCullum* [2022] NSWCATCD (the "Decision") be set aside;

2. Within 3 months of the date of these orders the Respondent is to remove the structure enclosing the car space forming part of Lot 109 and make good the common property; and

3. Order for costs.

OR IN THE ALTERNATIVE

1. Orders pursuant to sections 229, 232 and 240 of the SSMA that the Respondent lot owner's proposed by-law concerning enclosure of his car space is to be considered in a meeting of the owners corporation and, if rejected, for the lot owner to have the opportunity to bring an application pursuant to section 149 of the *Strata Schemes Management Act 2015*;

2. Order for costs associated with the legal proceedings in relation to the Decision;

3. Order for costs of this Appeal; and

4. Any other order the Tribunal deems fit."

17 On 22 February 2022, Mr McCullum filed its reply to of appeal, in which he contended that the Tribunal had not made any errors of law and sought costs of the appeal.

18 On 25 February 2022, the Appeal Panel gave leave to the parties to be legally represented.

The scope and nature of internal appeals

19 Internal appeals may be made as of right on a question of law and otherwise with leave of the Appeal Panel: s 80(2)(b) of the *Civil and Administrative Tribunal Act 2013* (NSW) (NCAT Act).

20 An internal appeal is not a re-hearing of the original proceedings or a mere opportunity for a party dissatisfied with the outcome in the original proceedings to re-argue its case: *Ryan v BKB Motor Vehicle Repairs Pty Ltd* [2017] NSWCATAP 39 at [10]. To succeed in an appeal, the appellant must establish an error of law has occurred, or otherwise an error of the type that it is appropriate to grant leave to appeal.

21 The question of whether facts fully found fall within the provisions of a statutory enactment properly construed is a question of law: *Hope v The Council of the City of Bathurst* (1980) 144 CLR 1 at 7; [1980] HCA 16 (Mason J).

22 The Appeal Panel may make such orders as it considers appropriate in light of its decision on the appeal, including but not limited to an order that the appeal is to be dismissed: s 81(1)(a) of the NCAT Act.

The hearing of the appeal

23 On 11 July 2022, we heard the appeal by telephone. Mr J Bannerman, a solicitor, appeared for the Owners. Mr E Kranz, a solicitor, appeared for Mr McCullum.

24 The Owners relied on the following written submissions:

(1) Appellant's Submissions dated 18 March 2022;

(2) Appellant's Amended Submissions in Reply dated 2 June 2022.

25 Mr McCullum relied on the Respondent's Submissions dated 5 May 2022.

26 Each of the Owners and Mr McCullum made oral submissions.

27 During the hearing the Owners made the following concessions:

(1) if we rejected ground 1, then the other grounds do not arise for decision;

(2) it was not appealing against order 2 of the 10 January 2022 orders;

(3) the costs of the appeal should be dealt with on the papers;

(4) if the appeal is dismissed it is not seeking an order for the costs of the appeal.

28 During the hearing Mr McCullum made the following concessions:

(1) the costs of the appeal should be dealt with on the papers;

(2) he withdrew his application for the costs of the appeal.

29 At the conclusion of the hearing, we reserved our decision.

The issues

30 We are satisfied that the appeal was commenced within the time of 28 days prescribed under r 25(4)(c) of the *Civil and Administrative Tribunal Rules 2014* (NSW).

31 The five grounds of appeal in the notice of appeal arise for decision. It is convenient to first deal with ground 1 and the first ground 3.

32 Finally, if necessary, we will decide the costs of the appeal.

Ground 1 and the first ground 3

Introduction

33 We accept that ground 1 and the first ground 3 which concern the question of whether facts fully found fall within the provisions of a statutory enactment properly construed raise a question of law, and the Owners can appeal as of right in respect of these grounds.

34 Before considering these grounds, it is appropriate to set out the applicable provisions of the 1973 Act and summarise the submissions of the parties.

The applicable provisions of the 1973 Act

35 Section 58 is headed "By-laws and relevantly provided:

> **"58.** (1) Except as provided in this section the by-laws set forth in Schedule 1 shall be the by-laws in force in respect of each strata scheme.
>
> …
>
> (7) Without limiting the generality of any other provision of this section, a body corporate may, with the consent in writing of the proprietor of a lot, pursuant to a unanimous resolution make a by-law in respect of that lot conferring on that proprietor the exclusive use and enjoyment of, or special privileges in respect of, the common property or any part thereof upon such terms and conditions (including the proper maintaining and keeping in a state of good and serviceable repair of the common property or that part of the common property, as the case may be, and the payment of money by that proprietor to the body corporate) as may be specified in the by-law."

The submissions of the parties

The submissions of the Owners

36 The Owners made the following submissions:

(1) pursuant to s 58(1), the provisions of 1973 Act prevail over the by-laws of SP47383;

(2) paragraphs (a) and (b) of by-law 16 permit lot owners to install locking devices or screen to prevent entry of animals and insects. The lot structure does not fall under this category, as it is corrugated metal sheets that have been affixed to the common property slab, walls and ceiling enclosing Mr McCullum's car space. If it were the case that this type of structure could be considered to fall within paras (a) and (b) of by-law 16, it would mean, for example, that a lot owner could rely on by-law 16 to enclose a balcony, courtyard or terrace without any approval at all;

(3) there is a clear inconsistency between by-law 16 and s 58 of the 1973 Act. The 1973 Act prevails over the Sch 1 by-laws including by-law 16. Therefore s 58 of the 1973 Act prevails and Mr McCullum was not

authorised by by-law 16 to undertake the lot structure without the approval of the Owners.

The submissions of Mr McCullum

37 Mr McCullum made the following submissions:

(1) there is no inconsistency between s 58(7) of the 1973 Act and by-law 16;

(2) no such argument was advanced by the Owners that such an inconsistency exists or that it renders the by-law 16 inoperable;

(3) as a result, by-law 16 should stand as was found by the Tribunal.

Consideration and determination

38 We note at the outset that there is no challenge to the factual findings of the Tribunal that there were good security and pest control reasons for the erection of the lot enclosure in 1995 and no evidence that such position has changed.

39 In the light of these unchallenged factual findings, we are satisfied that on the proper construction of by-law 16 the lot enclosure constituted both a locking or other safety device for protection of the applicable lot against intruders within para (a), and a screen or other device to prevent entry of animals or insects upon the applicable lot within para (b).

40 We do not accept the Owners' submission that there is any inconsistency between s 58(7) of the 1973 Act and by-law 16 with respect to the erection of the lot structure. The Owners did not explain in what respect the affixing of the lot structure to the common property conferred the exclusive use and enjoyment of, or special privileges in respect of, part of the common property on Mr McCullum within s 58(7) of the 1973 Act. We agree with the Tribunal that on the proper construction of s 58(7) of the 1973 Act it does not encompass the incidental affixing at limited points to common property of a structure within lot space and using without intrusion (except for affixations) the common property as a rear wall as part of the enclosure. This construction is consistent with by-law 16 which permits the driving of nails, screws or the like for the purpose of installing devices of the nature specified in paras (a) or (b) of by-law 16.

41 We do not accept that by-law 16 would necessarily permit the enclosure of a balcony, courtyard or terrace within a lot of a strata scheme. The applicability of by-law 16 depends on there being a device within para (a) or (b) and the nature

of the damage to the lot. This is necessarily a fact specific inquiry, and no generalisations can be made as to the proper scope of by-law 16.

42 For these reasons, we reject ground 1 and the first ground 3.

Ground 2, the second ground 3 and ground 4

43 In view of our finding in relation to ground 1 and the first ground 3 and the concession of the Owners at [27(1)] above, it is unnecessary to determine ground 2, the second ground 3 and ground 4.

The costs of the appeal

44 In view of the concession of the Owners at [27(4)] above and the concession of Mr McCullum at [28(2)] above, the costs of the appeal does not arise for determination. It follows that pursuant to s 60(1) of the NCAT Act each of the Owners and Mr McCullum is to pay their own costs of the appeal.

Orders

45 We make the following orders:

(1) The appeal is dismissed.

(2) Each party is to pay their own costs.

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I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.
Registrar