Civil and Administrative Tribunal

New South Wales

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| Case Name: | Coolah Home Base Pty Ltd v Tait |
| Medium Neutral Citation: | [2022] NSWCATAP 324 |
| Hearing Date(s): | 31 March 2022 and 17 May 2022 |
| Date of Orders: | 17 October 2022 |
| Decision Date: | 17 October 2022 |
| Jurisdiction: | Appeal Panel |
| Before: | A Suthers, Principal Member<br>G Burton SC, Senior Member |
| Decision: | (1) The appeal is allowed for the purpose of varying orders 1 and 2 made 5 July 2021 to read as follows:<br>"1. Order that the Retirement Villages Act 1989 (NSW) applies to those parts of Coolah Caravan Park that are subject to the rights of the applicants attached to the shares in Coolah Home Base Pty Ltd.<br>2. Pursuant to s 128(1)(c)(ii) of the Retirement Villages Act 1989 (NSW), order Coolah Tourist Park Pty Ltd to perform the obligations under the Retirement Villages Act 1989 (NSW) of the operator for the time being in respect of the contracts between each of the applicants and Coolah Home Base Pty Ltd including the rights attached to the shares under the constitution of Coolah Home Base Pty Ltd in respect of the applicants' sites and the communal facilities on the land being Lots 130 and 131 in DP 728787."<br>(2) Otherwise dismiss the appeal.<br>(3) Order as follows in respect of costs of the appeal and the primary hearing:<br>(a) Any application in respect of costs is to be filed and served within 14 days, accompanied by any further evidence and submissions in respect of costs.<br>(b) Any further evidence and submissions in response |

to the documents filed and served under order 3(a) are to be filed and served within a further 14 days.
(c) Submissions on the application for costs by each party are not to exceed five pages in length.
(d) The Appeal Panel may dispense with a hearing and determine any application for costs on the basis of the written submissions and evidence provided. If the parties oppose this course they should make submissions on this issue when complying with the directions as to their submissions on the substantive costs application. If a hearing is not dispensed with, the parties will be advised of a date for the hearing of the application.

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| Catchwords: | REAL PROPERTY - RETIREMENT VILLAGES – RESIDENTIAL (LAND LEASE) COMMUNITIES - definition and interpretation – Retirement Villages Act 1989 (NSW) ss 3, 4, 5, 7, 24A, 40, 128, 129, 130, 136, 136A, 138, 139 |
| Legislation Cited: | Civil and Administrative Tribunal Act 2013 (NSW)<br>Civil and Administrative Tribunal Rules 2014 (NSW)<br>Environmental Planning and Assessment Act 1979 (NSW)<br>Local Government Act 1993 (NSW)<br>Residential (Land Lease) Communities Act 2013 (NSW)<br>Residential (Land Lease) Communities Regulation 2015 (NSW)<br>Residential Parks Act 1998 (NSW)<br>Residential Parks Regulation 2006 (NSW)<br>Residential Tenancies Act 2010 (NSW)<br>Retirement Villages Act 1999 (NSW)<br>Retirement Villages Regulation 2009 (NSW) (repealed) |
| Cases Cited: | Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (2009) 239 CLR 27<br>Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321<br>Bondi Beach Astra Retirement Village Pty Ltd v Assem [2020] NSWSC 1814<br>Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd (1982) 149 CLR 600<br>Butterworth v Trustees of the Society of St Vincent de Paul [2012] NSWDC 211<br>Collins v Urban [2014] NSWCATAP 17 |

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| | Commissioner of Stamp Duties (NSW) v JV (Crows Nest) Pty Ltd (1986) 7 NSWLR 529 (CA)<br>Commissioner of Taxation v Consolidated Media Holdings Ltd (2012) 250 CLR 503, [2012] HCA 55<br>McMilllan v Coolah Tourist Park Pty Ltd [2021] NSWCATAP 73<br>McMillan v Coolah Home Base Pty Ltd [No 4] [2022] NSWSC 584<br>Minister for Immigration and Multicultural and Indigenous Affairs; ex parte Palme (2003) 216 CLR 212<br>NSW Land and Housing Corp v Orr (2019) 100 NSWLR 578, [2019] NSWCA 231<br>Owners SP 63341 v Malachite Holdings Pty Ltd [2018] NSWCATAP 256<br>Prendergast v Western Murray Irrigation Ltd [2014] NSWCATAP 69<br>Project Blue Sky v Australian Broadcasting Authority (1998) 194 CLR 355<br>Soulemezis v Dudley (Holdings) Pty Ltd (1987) 10 NSWLR 247 (CA)<br>SZTAL v Minister for Immigration and Border Protection (2017) 262 CLR 362<br>Vincent v IOOF Friendly Society NSW Ltd [2013] NSWCTTT 482<br>Wainohu v NSW (2011) 243 CLR 181 |
| Texts Cited: | Halsbury's Laws of Australia (online ed)<br>Macquarie Dictionary (current and former eds)<br>Oxford English Dictionary (2nd ed) |
| Category: | Principal judgment |
| Parties: | Coolah Home Base Pty Ltd and 3 others (Appellants)<br>Lee Marilyn Tait and 14 others (Respondents) |
| Representation: | Counsel:<br>Mr T Bateman (Appellants)<br>Mr P Vogel, solicitor (Respondents)<br><br>Solicitors:<br>Bridges Lawyers (Appellants)<br>The People's Solicitors (Respondents) |
| File Number(s): | 2021/00207979 |

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| Publication Restriction: | Nil |
| Decision under appeal: | |
| Court or Tribunal: | Civil and Administrative Tribunal |
| Jurisdiction: | Consumer and Commercial Division |
| Citation: | N/A |
| Date of Decision: | 5 July 2021 |
| Before: | J Ringrose, General Member |
| File Number(s): | RV 20/03821 re-numbered on remitter RV 20/32988 |

## DECISION

### Outcome of appeal

1 We have decided, for the reasons given below, that the appeal should be dismissed, except for a variation of wording in primary order 1 made 5 July 2021 which does not change its substance and a variation in primary order 2 made 5 July 2021 to remove from the ambit of its operation all of the appellants presently included, except for Coolah Tourist Park Pty Ltd.

2 The effect of the decision is success for the appeal respondents in upholding the application of the *Retirement Villages Act 1999* (NSW) (RV Act) to their shares in the first appellant Coolah Home Base Pty Ltd (CHB) and the occupation and other rights attached to those shares, and success for the present appellants in removing from the ambit of performing operator obligations the two directors Mr Graeme Booker and Ms Janet Kelly and the companies CHB and Home Base Solutions Pty Ltd (HBS), leaving Coolah Tourist Park Pty Ltd (CTP) as the present operator subject to the obligations.

3 We have made provision in the orders for submissions as to costs of the appeal and costs of the primary hearing, including as to whether a hearing is sought on costs. Those submissions should take into account the nature of the relief claimed and in dispute (in the primary hearing and on appeal) in conjunction with the wording of s 60 of the *Civil and Administrative Tribunal Act 2013* (NSW) (NCAT Act), rules 38 and 38A in the *Civil and Administrative*

*Tribunal Rules 2014* (NSW) and the analysis in *Owners SP 63341 v Malachite Holdings Pty Ltd* [2018] NSWCATAP 256 esp. at [2]-[5], [75]-[111].

**Background, previous proceedings, applicable legislative provisions**

*Background*

4 The property the subject of these proceedings (the Park) is located on riverside land in Coolah in central western NSW. It contains an intermingled mixture of residential dwelling sites (some with dwellings already on them), managerial sites, caravan and camp sites (some powered) and communal facilities, with roads and open space.

5 In April 2012 the land on which the above facilities are situated was purchased by the first appellant (CHB). The directors of CHB were, and remain, Mr Booker and Ms Kelly, who also owned the two ordinary shares in CHB.

6 Shortly after purchase, CHB advertised for sale A class shares in CHB in various media, locations and events with a potential to reach retirees.

7 In some advertisements it was represented that one bought an "ASIC registered share in the real estate (caravan park) … that share gives you: 1. Proportional ownership of the whole property. 2. Exclusive use of your chosen allotment. 3. Entitlement to sell your shares at any time. … " and in other advertisements "You own a share of the land – a share in the whole Park! To our knowledge, no other retirement village, caravan park, etc gives you 'real estate security', ie., a share in the land".

8 In a four-page document titled "The 'CHB Dream' Explained" signed by Ms Kelly as a director of CHB, there were representations that "the dream" for potential purchasers was "to be part of a like-minded community where you can be debt free in your own home with security of tenure. In our case 'like-minded' means we are all retired, or semi-retired, and enjoy the relaxed lifestyle of travelling in this great country of ours whilst still having a 'home base' to return to. The Dream is to achieve all this without the risk that someone else can sell it out from under you".

9 The relevant description in the document went on, as follows: the Park was an established operating caravan park offering a full range of short and long-term

accommodation options, including un-powered and powered sites, cabins and houses; CHB owned all the Park; under the *Corporations Act* CHB was treated as a "'real estate company' that subdivides specified Allotments or Sites in The Park to individual Shareholders by way of 'Company Title'. This is the company that we, as Shareholders, own – this company owns the Park". There were said to be 62 shares, each of which was tied to a "Powered Site or Dwelling Allotment"; all shares in CHB were owned by people who "own Sites or Allotments"; a shareholder was "entitled to 'exclusive use and enjoyment' of their Site/Allotment – they own it by virtue of Company Title"; a shareholder "sells their Site/Allotment by selling their share in The Company"; a shareholder "owns their Site/Allotment plus what's on it, plus their proportion of the Park 'common property' (Amenities, Roads, Camp Sites, etc)"; "Thus, the people who own the Sites/Allotments own the whole of The Park, there is no developer or investor behind the scenes seeking to maximise their return on investment".

10 The document then summarised the CHB constitution with relevant features as follows: CHB was a "Real Estate Company" with the "prime purpose of subdividing The Park by way of 'Company Title' (both as defined by ASIC as regulator of the *Corporations Act*)"; the Park could only be sold if agreed to by way of a special resolution at a CHB general meeting with 80% majority which also applied to constitutional changes that may affect rights of shareholders.

11 Further explanation, consistent with the foregoing, was provided later in the document. In particular, under the heading "Can The Park be sold?", there appeared the following:

> "This is very unlikely. Any decision to sell The Park or diminish the rights of Shareholders requires a Special Resolution to be passed with an 80% majority at a General Meeting of The Company (ie at a Special General Meeting or an Annual General Meeting). Considering that all shareholders of The Company are those who own Sites/Allotments then the intending purchaser would need to be making an extremely lucrative offer for such a proposal to get up. 13 votes out of 62 will stop such a move."

12 The document was silent on what happened if the land on which the Park stood was sold without the need for a shareholder vote, for instance, because CHB was in liquidation or voluntary administration.

13 The document then said, under a heading "Retail Tourist Activities", that "The Park operates as a commercial caravan park offering Camp Sites, Powered Sites, Cabins and even Cottages/Houses to the travelling public. Whilst they are travelling, Shareholders may offer to make their Cabin/Cottage/House available for rental". Further, CHB was said to own the Park "but does not itself operate the Retail Tourist Activities. The tourism side and the day-to-day management of The Park are sub-contracted to a separate business which has a special Management Rights agreement with The Company".

14 The sub-contracted manager was HBS, which had a common directorate with CHB of Mr Booker and Ms Kelly. Under its agreement with CHB it collected site fees from shareholders, operated rental of sites including for shareholders, retained a management fee from any surplus and paid any excess of operating expenses for shareholder and other sites out of retail rentals. It also controlled the process of supply and installation of dwellings on shareholder sites and other managerial activities for the Park.

15 Under the heading "What can I build?" it was said that CHB held a development consent (DC) that allowed the Park to operate as a caravan park: "This consent covers Retail Tourist Activities as well as short and long-term residential sites". Construction of dwellings onsite was said not to be allowed although the State Government had foreshadowed possible change. All dwellings had to be manufactured offsite by a licensed provider and then trucked onsite "(ie. a transportable home)".

16 Apart from "one-time costs" associated with purchase of shares and any existing structure, or placement of structures on site, "repetitive costs" for shareholders were said to be site fees covering rubbish disposal, sewerage, water, administration and maintenance.

17 An elected shareholders advisory group was said to be effective as an "interface" between shareholders and directors.

18 The par value of the ordinary shares in CHB was $2; the par value of the A class shares was $742,227.46. The rights attached to shares were set out in Sch 2 to the CHB constitution, with the version in evidence said to contain an amendment of 9 July 2014. The A class share rights included the exclusive

right to use, enjoy and occupy the allocated site for that share (specified in Sch 3 to the CHB constitution for 62 sites) and to use the common property in common with all others similarly entitled. The ordinary shares, which did not have an allocated site in Sch 3, were to be "recalled" when the initial loan to buy the Park and the land on which it was located was repaid in full and when all shares were issued.

19 A site plan of the Park was Sch 4 to the CHB constitution. At the time of the versions of that plan in evidence before the primary member it showed 20 "Powered sites (short term sites)" designated by a caravan symbol set out in two rows except for one such site which was adjacent to a row. The rest were shown as "Cabins (long term sites)" which were in groups or rows. The camping and facilities areas were shown adjacent to the other groups or rows. The title across the top of the site plan was "Coolah Caravan Park and Coolah Home Base". There was an affidavit from one of the present appeal respondents (Mr McMillan) which identified the site plan as being provided to him on acquisition of his share as part of the CHB constitution.

20 The first-named appeal respondent (Ms Lee Tait) with her now-deceased husband purchased a share in CHB attached to site 33 on 26 March 2013 and agreed for HBS to place a cabin on site. The other appeal respondents (whom we shall call the present appeal respondents for reasons described below) had similarly purchased shares, each with one (totalling 13) site allocation prior to 28 July 2014. The Taits bought their shares for $23,120 and the cabin cost them (with split system air conditioning and other specified features and exclusions) $76,890. Others appear to have paid significantly more. Site allotments were specified by number and dimensions rather than by subdivision of the registered land title which remained with CHB for the entire land on which the Park was located.

21 On 12 April 2014 the common directors issued 19 shares in CHB to HBS for a "nominal sum" (as described in the primary reasons) thereby gaining control of CHB. Although we do not know the allocated sites for those shares from the evidence before us, we note that the number almost equated to the 20 designated powered sites.

22 Certain shareholders from that point questioned the financial management of CHB and sought but did not obtain access to financial records.

23 Supreme Court litigation was filed on 15 October 2018 by two shareholders who applied under s 247A of the *Corporations Act 2001* (Cth) to inspect the CHB financial records. In a hearing on 14 August 2019 questions were raised by Black J as to CHB's solvency. The directors resolved to place CHB into voluntary administration on 21 August 2019.

24 As at 14 December 2019, 29 A class shares were owned by individuals and 32 shares were owned by Residential Cluster Pty Ltd which had a common directorate with CHB and HBS and of which Mr Booker and Ms Kelly were the shareholders. It was not clear from the evidence before us whether the 32 shares included the 19 shares issued to HBS in 2014 referred to above, but the inference from the total number of shares is that such could be the case.

25 Under a Deed of Company Arrangement (DOCA) made 27 November 2019 the land on which the Park stood was sold to CTP for $473,000 including GST which included all improvements, fixtures and fittings owned by CHB. CTP again had a common directorate with CHB, being Mr Booker and Ms Kelly. The major creditors of CHB, who voted in favour of the DOCA, were the common directors.

26 Clause 52 of the CHB sale contract to CTP contained an acknowledgement and agreement that the sale of the land was subject to the rights of CHB shareholders to occupy, let and/or use part of the land including common property and that the purchaser could only obtain vacant possession subject to any rights which the shareholders in CHB may still have. CTP also agreed that, on or before completion, it would enter into a residential site agreement, including conditions disclosed in the form of that agreement attached to the contract, with each shareholder who irrevocably and unconditionally agreed to enter into the residential site agreement.

27 By letters dated 2 and 11 December 2019 the directors of CTP advised CHB's shareholders of the sale of the land which was said to include improvements at the Park including the sites attached to shares and improvements located on the sites. The letters said that, after completion on 18 December 2019, each

shareholder's rights to use the land "cease as at settlement on 18 December 2019. However, each shareholder is being offered the continued use of the allotment occupied by the shareholder" by CTP under a residential site agreement pursuant to the provisions of the *Residential (Land Lease) Communities Act 2013* (NSW) (RLLC Act) from that date. This involved paying site fees at market value going forward; those who did not sign a residential site agreement would have to leave the premises, the inference being without any payment for exit and without any dwelling or other structures located onsite. For Mrs Tait, weekly site fees would increase from $64.75 to $184.33.

28 The letter claimed that "This regrettable situation has arisen as a direct result of court action taken by [some shareholders] against your company [CHB]". Neither these letters nor a letter dated 24 December 2019 disclosed that the DOCA was approved by the majority creditor vote of the common directorate.

29 The sale completed and HBS's management agreement ended.

*The acquisition documentation*

30 The acquisition documentation in evidence before the primary member as provided on appeal comprised the following central documents:

- A document between the purchasing resident(s) and CHB called (colloquially) at times in the proceedings the site purchase agreement: The document referred at the outset to CHB selling "the share for [the specific allotted site]". It said that, on completion of payment for supply and installation of a transportable home onsite, "the Cabin is the property of the Purchasers". It stated that "The purchase price for [the specified allotted site] includes one A Class Share, in [CHB]. A separate share certificate will be issued within 28 days of final payment." The final paragraph said "The Constitution and By-laws of [CHB] apply to the on-going possession of [the specific allotted site]. Copies available on request." This was acknowledged at the end of the CHB by-laws mentioned below.

- Share certificate: This recorded ownership by the resident(s) of one A class share and stated: "This Class A Share represents exclusive use of [the specific allotted site]".

- CHB by-laws and shareholder residential site agreement in Sch 5 to the CHB constitution: This stated: "The shareholder/resident acknowledges that Coolah Home Base/Caravan Park is managed under an agreement between the ownership company [CHB] and the management company [HBS]. The shareholder/resident acknowledges that any reference in this agreement to the ownership company also refers to the authority of the management company under the management agreement." There was a similar acknowledgement in

respect of the ownership company. Both descriptions had the description of the Park "Coolah Home Base/Caravan Park" that appeared on the site map in Sch 4 to the CHB constitution earlier described. There was also an acknowledgement that structures and fittings were "the property of the shareholder".

*The start of the Tait proceedings*

31 On 22 January 2020 Mrs Tait then as sole applicant filed RV 20/03821 which on remitter (as explained below) was re-numbered RV 20/32988 and is the primary (meaning first instance) proceeding the subject of the present appeal (the *Tait* proceedings). Against CHB she sought various orders that she claimed could be made under the *Retirement Villages Act 1999* (NSW) (RV Act): a declaration that the premises were a "retirement village" within the meaning of the RV Act s 5; a declaration that the existing residential site agreement between CHB and Mrs Tait and her late husband under the RV Act had not been terminated; an order under s 84 of the RV Act appointing an administrator; an order under s 128(1)(c)(ii) of the RV Act that CHB continue to perform the existing residential site agreement; orders under ss 128(2), 129 and 139 of the RV Act concerning compensation, apology and retraction of the statement that a new residential site agreement must be signed, and imposition of a penalty for non-registration as a retirement village under s 24A of the RV Act.

32 The *Tait* proceedings were first heard on 8 May 2020 in Dubbo with a decision to dismiss the proceedings and that each party pay their or its own costs delivered 20 May 2020. That decision was appealed on 22 May 2020 and was set aside by the Appeal Panel in [2020] NSWCATAP 146 (heard 14 July 2020 with decision 21 July 2020) (the first *Tait* appeal), with remitter for hearing before a differently constituted Tribunal.

33 In essence, the Appeal Panel held that essential preliminary matters were required to be resolved: the proper parties to the proceedings given that CHB had sold the land; what was required to permit proceedings to be continued against CHB given its status in administration when the proceedings were commenced, and who could give instructions on behalf of CHB. Only part of the primary claim had been heard because there had been no decision to determine the applicable legislation and associated jurisdictional issues as

separate questions and a part of the issue concerning applicable legislation had not in any event been determined. That issue was whether s 5(1)(a) of the RV Act captured the sites and improvements located on the sites as a retirement village because they were residential premises "intended" to be predominantly or exclusively occupied by retired persons – what had been determined was the alternative of occupation rather than intention to occupy by the class of retired persons.

*Applicable legislative provisions contended for in the Tait proceedings by the present appeal respondents (the applicants in the primary proceedings)*

34 The appeal respondents in the present appeal, being those who joined Mrs Tait as applicants in the *Tait* proceedings after the remitter following the first *Tait* appeal, whom from now on we shall call "the present appeal respondents", contended that the RV Act applied to their sites and improvements located on the sites. This gave them the rights for which they claimed relief even though there was no registration as a retirement village as required by s 24A of the RV Act.

35 The RV Act was said to apply to the parties to the proceedings and their legal relationships, because of the following definitions within that Act:

> "4. Definitions
>
> (1) …
>
> "close associate of an operator of a retirement village means – … (b) if the operator is a body corporate – (i) a director or secretary of the body corporate or of a related body corporate (within the meaning of the *Corporations Act 2001* of the Commonwealth), or … (iii) a related body corporate … ".
>
> "operator" of a retirement village means the person who manages or controls the retirement village, and includes – (a) a person (other than a resident …) who owns land in the village, and (b) any other person or class of persons prescribed by the regulations for the purposes of this definition". [Regulation 6 of the *Retirement Villages Regulation 2009* (NSW) applicable at the relevant time contained no relevant prescription.]
>
> "residence contract" means a contract that gives rise to a residence right.
>
> "residence right" of a person means the person's right to occupy residential premises in a retirement village, being a right arising from a contract - … (b) under which the person purchased shares entitling the person to occupy the residential premises, or (c) in the form of a lease, licence, arrangement or agreement of any kind, other than a residential tenancy agreement in [certain forms excluded from the operation of the RV Act] … ".

> "resident" of a retirement village means a retired person who has a residence right in respect of residential premises in the village … ".
>
> "residential premises" means any premises or part of premises (including any land occupied with the premises) used or intended to be used as a place of residence.
>
> "residential tenancy agreement" has the same meaning as it has in the *Residential Tenancies Act 2010*.
>
> "retired person" means a person who has reached the age of 55 years or has retired from full-time employment.
>
> "service contract" means a contract under which a resident of a retirement village is provided with general services or optional services in the village.
>
> "village contract" means (a) a residence contract, or (b) a service contract, or … (d) any other contract of a kind prescribed by the regulations for the purpose of this definition.
>
> (3) In this Act, a reference to the sale, the sale price, or a contract for the sale, of residential premises in a retirement village that were or are to be occupied under a company title scheme is taken to be a reference to the sale, the sale price, or a contract for the sale, of the residence right in respect of the premises.
>
> (6) A reference in this Act to the operator of a retirement village extends to the operator for the time being.
>
> 5. Meaning of "retirement village"
>
> (1) For the purposes of this Act, a retirement village is a complex containing residential premises that are: (a) predominantly or exclusively occupied, or intended to be predominantly or exclusively occupied, by retired persons who have entered into village contracts with an operator of the complex … .
>
> (2) It does not matter that some residential premises in the complex may be occupied by employees of the operator or under residential tenancy agreements containing a term to the effect that this Act does not apply to the premises the subject of the agreement (instead of being occupied under residence contracts), or that those premises do not form part of the retirement village.
>
> (3) However, a retirement village does not include any of the following: … (d) a community within the meaning of the *Residential (Land Lease) Communities Act 2013*, … (h) any residential premises the subject of a residential tenancy agreement in the form prescribed under the *Residential Tenancies Act 2010* to which the operator of a retirement village is a party and that contains a term to the effect that this Act does not apply to the residential premises the subject of the agreement"."

36 There was no significant dispute that the Taits, and then with them the present appeal respondents, were at least predominantly retired persons and that CHB then HBS and, on sale, CTP was an operator. There was controversy whether Mr Booker and Ms Kelly were, as individuals, also operators in their own right. There appears to be no room to dispute (to the extent it is relevant, which was

controversial) that, to the extent any of the foregoing was an operator, the others were close associates of that operator.

37 There appeared to be no controversy that a “company title scheme” as defined in s 4(1) applied to the documentation:

> “means a scheme under which a group of adjoining or adjacent premises (including residential premises) is owned or leased by a corporation each of whose shareholders has, by virtue of his or her shares, an exclusive right (under a lease or otherwise) to occupy one or more of the residential premises”.

38 The Appeal Panel in the first *Tait* appeal had said that the description in *Halsbury’s Laws of Australia* (online ed) at [355-9010] was “apt” to describe the proposed structure. That description was substantively similar except it added that the exclusive right was a personal, not proprietary, right against the company.

39 The present appeal respondents said and say that the sale agreements for a share with associated site and improvement rights with each present appeal respondent and the by-laws and residential site agreement in Sch 5 to the CHB constitution qualified as residence contracts and the Sch 5 documents also qualified as a service contract under the definitions in the RV Act. They said and say that the sale agreements to the present appeal respondents applied the CHB constitution and by-laws to the ongoing possession of the specified site associated with a particular share. As such, they were defined village contracts, which did not need to be in a standard form prescribed pursuant to RV Act s 43 with *Retirement Villages Regulation* 2009 (NSW) reg 15A or *Retirement Villages Regulation 2017* (NSW) reg 17(2)(b) because company title schemes were exempted from compulsory use of the standard form.

40 The present appeal respondents contended and contend that the other elements of the definition of “retirement village” were satisfied, being occupation or intended occupation of “a complex containing residential premises” that is predominantly or exclusively occupied or intended to be occupied by retired persons with village contracts entered into with a complex operator.

41 As a result, all or some of the following provisions of the RV Act were said to apply:

- Section 40: which provided that a village contract could be enforced by a resident against any operator for the time being of the village, and also against a land owner not involved with the management or control of the village who was a close associate of an operator if the operator failed to satisfy a judgment for the enforcement of residents' rights.
- Section 129: which provided that a residence right arising from a contract relating to residential premises in respect of which the resident is a registered interest holder … terminated only on "the completion of the sale of the premises" – this had not occurred because the sale agreement between CHB and CTP excluded the Park itself.
- Section 130(a) (we add with s 7(1)(b)): the Tribunal cannot terminate a residence contract with a registered interest holder (which includes a shareholder in a company title scheme).
- Section 136: requiring termination of a residence contract to be by the Tribunal in its discretion ("may") and only if satisfied on the following: substantial works or for a new purpose, on at least 12 months' notice, equivalent alternative accommodation and right of return on the same contractual terms.
- Section 136A: requiring termination of village contracts to be by the Supreme Court in its discretion ("may") and only if satisfied of no reasonable prospect of finding an alternative operator.
- Section 138: the operator cannot commence proceedings in a court to obtain possession.
- Section 139: a resident cannot be removed other than in accordance with the RV Act or any other applicable Act or law.

42 Additional potentially significant provisions of the RV Act relevant to note are:

- Section 7(1)(b) relevantly defined a "registered interest holder" as "the owner of shares in a company title scheme that give rise to a residence right in respect of residential premises within a retirement village".
- Section 11(2) which extends the RV Act to various persons in a former retirement village, subject to exclusions within s 5(3) such as s 5(3)(d) set out above.
- Section 197A which sanctions an operator who gives a resident knowingly false or misleading information.

*The McMillan proceedings - interlocking events with the Tait proceedings*

43 Seven days after the remitted *Tait* proceedings were heard and reserved before a primary member in the Tribunal on 17 March 2021, a differently constituted Appeal Panel (from the Panel which determined the first *Tait*

appeal) on 24 March 2021 upheld an appeal in AP 20/35619 re-numbered 2020/00370997 *McMilllan v Coolah Tourist Park Pty Ltd* [2021] NSWCATAP 73. The presiding member on the Panel hearing this present appeal, Principal Member Suthers, also was the presiding member on the Panel in the *McMillan* appeal. No party raised any objection to Principal Member Suthers hearing the present appeal.

44 The *McMillan* primary proceedings RC 20/00917 had been filed about five weeks before the *Tait* proceedings, on 16 December 2019. The *McMillan* proceedings were heard on 31 July 2020, ten days after the *Tait* proceedings had been remitted, by the same Member who had first heard the *Tait* proceedings and whose decision had been overturned in the first *Tait* appeal. On 5 August 2020 the decision of that Member directed the McMillans and CTP, in what was said to be pursuant to s 27(5) of the RLLC Act, to enter into a residential site agreement under *that* Act without one element of a non-disparagement clause that was in the draft agreement.

45 The appeal by the McMillans filed on 20 August 2020 was (as already said) successful, the relief under the RLLC Act granted by the Tribunal was set aside but the McMillans' originating application to declare void particular terms of the draft residential site agreement under the RLLC Act and to restrain CTP from engaging in conduct as an operator (including alleged high pressure tactics of eviction unless they signed residential site agreements with CTP) were also dismissed.

46 Eleven days after the *McMillan* appeal was filed, on 31 August 2020 an order was made in the remitted *Tait* proceedings for the joinder of additional applicants who (as already said) are now the present appeal respondents. The McMillans were two of those joined additional applicants and are among the present appeal respondents.

47 On 14 September 2020, the then Chief Judge in Equity granted the applicants in the *Tait* proceedings leave to continue proceedings against CHB (in administration) on condition that the applicants did not seek to enforce any judgment against CHB without further leave of the Court. It was noted that it was claimed that the CHB directors were by then back in control of CHB since

the administration had completed and that CHB was likely to be devoid of assets. At that hearing it was also said that HBS had not traded since the Park sale agreement and had no income or assets.

48 Also on 14 September 2020 the present appeal respondents filed an amended application in the *Tait* proceedings which formed the basis of the primary decision from which this present appeal is brought. A significant addition was an alternative claim to the relief under the RV Act, being for a declaration that the existing agreements between CHB and the applicants were enforceable against CTP in accordance with the provisions of the RLLC Act which, as will be seen, had substantive similarities in terms of successor enforceability to those in the RV Act. The primary relief sought appeared to remain under the RV Act.

49 On 3 November 2020 the *McMillan* appeal was heard and reserved. On 23 November 2020 CTP, HBS, Mr Booker and Ms Kelly were joined to the *Tait* proceedings as additional respondents to CHB. As already said, on 17 March 2021 the *Tait* proceedings with all additional parties were heard and reserved, on 24 March 2021 the *McMillan* appeal decision was delivered on 5 July 2021 the *Tait* proceedings primary decision from which the present appeal is brought was delivered, with reference (considered below) to the *McMillan* appeal decision, and on 19 July 2021 the present appeal was filed by CHB alone.

50 The two sets of proceedings leap-frogged each other, which is unfortunate. The McMillans represented themselves in the *McMillan* appeal and a different firm of solicitors represented CTP in that appeal from the representation of the present appellants in the present appeal in the *Tait* proceedings.

51 The *McMillan* proceedings involved the same land and Park as the *Tait* proceedings and a substantially similar suite of documentation between the McMillans and CHB. The respondent in the *McMillan* proceedings was CTP not CHB, but after the *McMillan* appeal decision was reserved and before the *McMillan* appeal decision was delivered, CTP had been joined as a respondent to the *Tait* proceedings.

52 *Decision and legislation in the McMillan appeal:* The *McMillan* proceedings focused on CTP's requirement that the McMillans enter into site agreements

under the RLLC Act. The Tribunal had deleted parts of one term of the propounded draft site agreement as unlawful but otherwise ordered entry into the residential site agreement under RLLC Act s 27(5).

53 The Appeal Panel in the *McMillan* appeal for reasons discussed below set aside the primary orders and otherwise dismissed the appeal.

54 The focus in the *McMillan* appeal proceedings was on the following legislative provisions in the RLLC Act:

> "4 Definitions
>
> … "Community" or "residential community" means an area of land that comprises or includes sites on which homes are, or can be, placed, installed or erected for uses as residences by individuals, being land that is occupied or made available for occupation by those individuals under an agreement or arrangement in the nature of a tenancy, and includes any common areas made available for use by those individuals under that agreement or arrangement.
>
> "Resident" means a person who is a home owner or tenant in a community.
>
> "Residential site" means a site in a community for a home that is used, or is intended to be used, as a residence by an individual.
>
> "Site agreement" means an agreement under which the operator of a community grants to another person for value a right of occupation of a residential site in the community. [A note that does not form part of the Act said that a site agreement gives rise to a tenancy.]
>
> "Tenancy agreement" means a residential tenancy agreement within the meaning of the *Residential Tenancies Act 2010* (NSW).
>
> "Tenant" has the same meaning as in the *Residential Tenancies Act 2010.*"

55 The Panel noted that the community may be a caravan park "(as it is in this case)". That seemed to arise from the definition in s 4(1) of "home" to mean, among other things, in (a) "any caravan" used for human habitation. Other aspects of the legislation were considered:

- Section 27(1) with para 6 of and Sch 1 to the *Residential (Land Lease) Communities Regulation 2015* (NSW) prescribed a standard form of residential site agreement. Under s 28(1), parties could add terms to the standard agreement only if they were not inconsistent with the terms in the standard agreement, did not contravene the RLLC Act and were set out in a separate and clearly-labelled part of the agreement.
- Section 27(5) provided that the Tribunal "may, on application by a home owner under a site agreement that is entered into after the commencement of this section and is not in the relevant standard form, order the operator to prepare and enter into a site agreement that is in the relevant standard form".

- Schedule 1 para 4 to the RLLC Act prohibited an operator from engaging in “high pressure tactics, harassment or harsh or unconscionable conduct”. Section 54(1) required an operator to observe the rules of conduct in Sch 1. Sch 1 para 8 sanctioned solicitation by an operator of prospective residents through known false or misleading advertisements or other communications; s 25 sanctioned false, misleading or deceptive inducements to enter a site agreement by an operator.
- Section 52 provided, in substantially similar effect to s 40 of the RV Act, that if another person becomes the operator of the community then the benefits and obligations under existing site agreements “pass from the old operator to the new operator”.
- Sections 156 and 157 conferred jurisdiction and powers on the Tribunal for applications to resolve certain disputes by a “home owner” or “former home owner”. A “home owner” was defined relevantly in s 4(1) para (a) of the definition to mean “a person who owns a home on a residential site in a community that is the subject of a site agreement (whether or not the person resides at the site)”.

56 The definition cross-referred to, by both the RV Act and the RLLC Act, in the *Residential Tenancies Act 2010* (NSW) (RTA) is found in s 13 with s 3(1) of the RTA:

> “13. Agreements that are residential tenancy agreements
>
> (1) A ***residential tenancy agreement*** is an agreement under which a person grants to another person for value a right of occupation of residential premises for the purpose of use as a residence.
>
> (2) A residential tenancy agreement may be express or implied and may be oral or in writing, or partly oral and partly in writing.
>
> (3) An agreement may be a residential tenancy agreement for the purposes of this Act even though—
>
> (a) it does not grant a right of exclusive occupation, or
>
> (b) it grants the right to occupy residential premises together with the letting of goods or the provision of services or facilities.
>
> Note— See section 8 for agreements that are not covered by this Act. Section 7 sets out premises not covered by this Act.
>
> (4) For the purpose of determining whether an agreement is a residential tenancy agreement, it does not matter that the person granted the right of occupation is a corporation if the premises are used (or intended for use) as a residence by a natural person.”

57 Other potentially relevant provisions of the RLLC Act not expressly dealt with in *McMillan* but significant to note here are as follows:

- Section 4(1) relevantly defined “close associate” of an operator to include a company of which the operator was a director, employee or agent.

- Section 4(1) relevantly defined “operator” and “owner” in substantially similar terms to the RV Act definitions but also expressly included a successor in title.
- Section 8(1) provided that the RLLC Act does not apply to “(c) a place owned by a company title corporation occupied by shareholders of the corporation”. Section 8(2) defined a company title corporation to mean “a company registered under the *Corporations Act 2001* of the Commonwealth that is the owner of land if ownership of a share or shares in that company entitles the owner of the share or shares to the exclusive use and occupation of residential premises on that land”.
- Section 9 empowered the Tribunal, among other matters, to make an order declaring whether or not a specified place was a “community” or whether or not a specified agreement was a “site agreement”.
- Section 13 said that the RLLC Act did not apply to, among others, tenancy agreements except to the extent that the Act otherwise provided and that the RV Act did not apply to “communities” occupied by retired persons or predominantly retired persons (being those 55 years and over or who had retired from full-time employment).
- Section 31 provided that a site agreement could be for a fixed period (renewable) that exceeded three years (the minimum period), but whether fixed or not could be terminated only in accord with the provisions of the RLLC Act.
- Section 164 was in substantially similar terms to s 84 of the RV Act in terms of the Supreme Court’s power to appoint an administrator on application by the relevant Commissioner or departmental secretary.

58 CTP had submitted that the Tribunal had no jurisdiction because there was no site agreement in place and that the dwelling was a fixture and accordingly not owned by the McMillans. The McMillans stated in response that they owned and lived in the home and jurisdiction was enlivened because the dispute was over CTP’s request and their refusal to sign a site agreement either at all or in its current form. The Tribunal primary reasons did not deal with these matters and the recording failed so it could not be objectively determined whether these matters were debated at the primary hearing.

59 The Appeal Panel in *McMillan* found that the McMillans’ cabin on their specified allotment was a transportable home, there was no evidence that it was fixed to the land, the McMillans had paid $135,000 to HBS in 2015 for delivery and installation of the home on the McMillans’ specified allotment and the share sale agreement between CHB and the McMillans, to which the specified allotment occupation right was attached, provided that “[o]n completion of payment the Cabin is the property of the Purchasers”. RLLC Act s 42(6) also

provided that a home located on a residential site was not for any purpose to be regarded as a fixture, regardless of the manner of attachment to the land (not applying to homes owned by the owner of the community).

60 Accordingly, the cabin was not a fixture and was owned by the McMillans either at law or in equity. The common directors had at least constructive knowledge of the contract provision between CHB and the McMillans. Further, the sale agreement between CHB and CTP contained an express exclusion from the sale of improvements by shareholders.

61 The McMillans' improvements were within the definition of "home" within RLCC Act s 4(1) and, since the question of whether the relevant site occupied by them was "in a community" was not in issue between the parties, the Appeal Panel proceeded on the basis that a "residential site" under the definition in the RLLC existed (set out above):reasons in the *McMillan* appeal, at [72].

62 The McMillans submitted that they had a site agreement with CTP on two bases despite accepting that the agreement provided by CTP remained in draft and unsigned by them.

63 The first was that they had a "residential site agreement" as defined in s 3(1) of the *Residential Parks Act 1998* (NSW) which was repealed and replaced as at 1 November 2015 by the RLLC Act, such an agreement becoming a site agreement under RLLC Act, Sch 2 para 5(3). The Panel found that, for the purposes of the "residential site agreement" definition in s 3(1) of the *Residential Parks Act*, the McMillans' home was a "relocatable home" and that other elements of the definition were present. The relevant parts of the definitions in s 3(1) were:

> ""Residential site agreement" means a residential tenancy agreement under which: (a) the park owner grants to the resident: (i) a right to install, on a residential site, a relocatable home … (being a relocatable home … owned by the resident), and (ii) a right to use the home or dwelling as a residence; and (b) the resident occupies the premises as the resident's principal place of residence, and (c) [such occupation being with the consent of CHB as park owner was not contentious] … .
>
> "Residential tenancy agreement" means any agreement under which a person grants to another person for value a right of occupation of residential premises for the purpose of use as a residence: (a) whether or not the right is a right of exclusive occupation, and (b) whether the agreement is express or implied, and (c) whether the agreement is oral or in writing, or partly oral and partly in

> writing, and includes such an agreement granting the right to occupy residential premises together with the letting of goods."

64 Accordingly, as at 1 November 2015, the McMillans had a site agreement with CHB under the RLLC Act. Under RLLC Act s 52(1), benefits and obligations under existing site agreements passed to a new operator such as CTP. CTP did not terminate the site agreement by proper notice under s 118 of the RLLC Act, so the McMillans were "home owners" and the Tribunal had this element of jurisdiction. If, contrary to that view, the site agreement was properly terminated, then the McMillans were "former home owners" and the Tribunal had that element of standing.

65 It is notable that, in respect of this contested issue, the McMillans achieved such standing under legislative definitions in the former statute that did not include reference to "community" contained within the corresponding definitions in the RLLC Act set out above.

66 The Appeal Panel then said at [101] of its reasons, in respect of the McMillans' alternative jurisdictional argument:

> "In these circumstances, there is no need to deal with Mr and Mrs McMillan's submission that the community was a retirement village to which the *Retirement Villages Act* applied."

67 The Appeal Panel had earlier noted at [77]:

> "Alternatively, Mr and Mrs McMillan say that the community was a retirement village to which the *Retirement Villages Act 1999* (NSW) applied, and, by operation of s 11(2) and 40(1) of that Act, the agreements remain in force with [CTP] becoming a party to them. Mr and Mrs McMillan state that there are proceedings in the Tribunal which will consider whether the community was a retirement village on 17 March 2021."

68 The Appeal Panel however went on to find that, despite their having standing as owners, the McMillans' claims were not within what the Tribunal had jurisdiction to hear and determine under s 156 of the RLLC Act. The application was in respect of and related to rights and obligations under a draft site agreement, not the existing site agreement. The dispute also did not relate to a right or obligation under the RLLC Act: the language of RLLC Act ss 28(2) and 29(4) indicated that the Tribunal's power extended to declarations only in respect of existing site agreements; s 27(5) enabled the Tribunal to order entry into a standard site agreement, which was not applicable here. Section 157

conferred order-making power when the Tribunal had jurisdiction and was subject to a more specific order-making power such as in s 27(5).

69 Accordingly, at [123]-[124] the Appeal Panel set aside the Tribunal's order under s 27(5) of the RLLC Act for absence of jurisdiction without determining the merits of the McMillans' objection that they were required to be the moving party for relief under s 27(5).

70 The challenge to specific clauses of the draft site agreement was therefore unnecessary to decide on the merits (at [125]). When dealing with costs at [146], the Panel noted that, had it found jurisdiction, "we would likely have granted the appellants relief".

71 The challenge to the Tribunal's refusal of relief on "pressure tactics", even when narrowed to such alleged tactics against the McMillans, was rejected because the Tribunal had given adequate reasons (leaving aside whether it was required to give reasons when not asked to do so). Leave to appeal was also refused on the findings of fact relevant to this topic.

**The primary decision in the remitted Tait proceedings**

72 The primary decision, in the remitted *Tait* proceedings with the addition of parties noted above, is the subject of this appeal. It was delivered on 5 July 2021. The Tribunal made orders to the following effect:

> 1. The Tribunal was satisfied that the RV Act "applies to those parts of Coolah Caravan Park occupied by each of the applicants who held company title shares in [CHB].
>
> 2. The Tribunal directed the operators "being" HBS, CTP, Mr Booker and Ms Kelly "to perform their obligations under the contracts with the applicants in accordance with the provisions of s 128 of the [RV Act]."

73 In what follows, some typographical misdescriptions of legislation and parties (including CTP's name), that are clear inadvertent errors which do not change the sense and appear to be accepted as such by the parties at least as to CTP's name, are not reproduced. The parties will largely be described by their designation in the present appeal proceedings: thus, the applicants before the primary member will be called the present appeal respondents and the respondents before the primary member will be called the present appellants, as has occurred to this point in these reasons.

74 At [45] of the primary reasons (PR), the primary member noted “that the terms of the communication [on 2 December 2019 set out above] appears to be inconsistent with the undertakings of [CTP] under the contract for sale [from CHB (in administration) to CTP]”. This was expanded on at PR [130]:

> “Although the letter [of 2 December 2019] suggested that the rights of shareholders had been terminated upon the sale of the company it is noted that the contract for sale to [CTP] contained an acknowledgement by the purchaser that each shareholder had constructed or held … or placed improvements on their allotment and that the vendor acknowledged that it had no interest in the shareholder improvements and the shareholder improvements were expressly excluded from the sale of the property.”

75 The primary member noted at PR [52] the present appeal respondents’ submission that “there were two businesses being conducted at premises namely Coolah Home Base and the Coolah Caravan Park”. The present appellants were said in the submissions to have frustrated the original purpose (with only 13 sites being occupied by 17 retirees (one said to be working full time)) by transferring shares with allocation rights for another 26 sites to a company also controlled by the common directorate of Mr Booker and Ms Kelly for what appeared to be a nominal consideration. At PR [135] it was noted that s 40 of the RV Act was relied upon to enforce the agreements with CHB against CTP and ss 129, 130, 136 and 136A were relied upon to prevent termination without the remedies for residents there specified.

76 The primary member noted the present appellants’ initial submission and evidence (prepared by their then solicitor although Ms Kelly presented the case at the primary hearing). That evidence included a site summary plan which indicated 67 sites in total analysed as follows: 40 tourist sites; 13 residential sites; 9 unoccupied sites; 5 camping sites along the river. Later evidence presented the Council approval dated 26 November 2015 for CHB to operate a “caravan park or camping ground” which contained a restriction on persons staying in a moveable dwelling that occupied a short-term site for more than 150 days in any twelve-month period. The operation of a retirement village was said to be inconsistent with that approval.

77 The primary member recited the present appellants’ submission that the present appeal respondents’ contention of a retirement village within the Park (which was otherwise a differently-regulated structure) was inconsistent with

three elements to be satisfied to constitute a retirement village: there was no "complex" because there was no building with a single or number of related purposes; there were only a limited number of sites for retired persons; the RV Act definitions of village contract and service contract could not be given legal effect in the circumstances in the Park. Further, the entire Park was properly characterised as coming under the RLLC Act or as exempt being company title.

78 During his recitation of the present appellants' submissions and evidence the primary member pointed out that more sites had been allocated for permanent use. (It will be recalled that there were originally 62 sites offered under the explanatory document.)

79 The primary member's section of his reasons titled "Decision" started at PR [82]. The relevant facts found as to the origins of the project substantively accord with what has been set out earlier.

80 At PR [83] the primary member said that several versions of the site plan were provided in the evidence and indicated that the Park comprised 62 sites of which 40 were described as cabins and long-term living sites, a further 20 were designated as caravan-powered sites or short-term sites; there were three general camping sites and camp kitchens and other facilities including manager's residence and office. The representation in the explanatory document "The 'CHB dream' explained" to 62 sites being available was said at [90] to be erroneous in number from what was the reality.

81 At PR [126]-[127] the primary member found that in 2015 the original concept was substantially altered without any explanation by the present appellants for the reallocation of CHB shares and that there appeared to be no evidence of marketing of company title for permanent residence after about 2015. Until that time the Park was clearly distinguished between the 40 permanent sites and the caravan park which included appropriate facilities for that latter use.

82 At PR [103]-[115] and [131]-[132] the *McMillan* Appeal Panel decision was paraphrased and, as to fixtures, quoted. At PR [111] the primary member noted what the Appeal Panel had said about the McMillans' further claim concerning the RV Act quoted earlier in these reasons and said: "The Appeal Panel in

*McMillan* did not address that issue any further". This was spelled out in PR [132]: because the McMillans had been found to have a deemed site agreement under the RLLC Act (from the preservation of the existing residential site agreement under the *Residential Parks Act*), their rights under that agreement were enforceable against CTP under s 52(1) of the RLLC Act; accordingly, there was no need to determine the applicability, submitted for by the McMillans, of the RV Act.

83 At PR [112] the primary member said:

> "It is noted that the documentation provided by Mr and Mrs McMillan in those proceedings was in the same form as the documents relied upon by each of the applicants in the present proceedings. The Tribunal accepts and adopts the findings made by the Appeal Panel in the *McMillan* case in relation to the status of the shares and the ownership of the cabins under the [RLLC Act]."

84 At PR [115] the primary member said:

> "The Tribunal is satisfied, based upon the evidence which relates to a purchase of a site under what could be described as company title that each of the applicants acquired rights which were either rights under the *Residential Parks Act 1998* or rights under the *Retirement Villages Act 1999*, by reason of evidence provided, which would give the applicants protections under one or both of those Acts."

85 The primary member then referred to the first Appeal Panel decision in the *Tait* proceedings, including the facts there recited. This included the initial representation of 62 sites available under the scheme as initially promoted (found to be incorrect as there were only 40 such sites) and the unilateral and unexplained reduction by CHB and its directors by 2015 of the number of such sites to two (beyond those already sold by then to the present appeal respondents), with no further marketing of the "Coolah Home Base Dream". Also referred to at PR [130] (cited earlier in these reasons) was the inconsistency between the sale contract and the letter to shareholders of CHB.

86 At PR [133], having noted at [132] that there was no need to deal with the submission that the RV Act applied in the *McMillan* appeal proceedings, the primary member said:

> "It now becomes necessary to consider that issue in these proceedings."

87 At PR [134] the primary member cited the concern expressed by the responsible minister in the second reading speech for what became the RV

Act, to forestall pressure to alter or replace resident contracts and to enforce village contracts against "an operator for the time being of the village" if a village operator went broke.

88 At PR [137] the primary member noted that "complex" is not defined in the RV Act. The primary member referred to a definition in an earlier edition of the *Macquarie Dictionary* as "a building or building complex which houses a number of related specified services" and to the definition in the *Oxford English Dictionary* (2nd ed) "consisting of or comprehending various parts united or connected together, formed by a combination of different elements". The primary member at PR [139] accepted that the property on which the Park was situated was "clearly" a complex containing residential premises within the definition in s 5 of the RV Act. "Premises" at PR [138] had been noted as not defined but reference was made to the inclusive definitions of a building of any description and of land whether built on or not in the *Environmental Planning and Assessment Act 1979* (NSW) and the *Local Government Act 1993* (NSW).

89 Having canvassed the application of non-controversial definitions such as retired person and residence, the primary member at PR [142]-[143] said that HBS was the original operator and that its successor appeared to be CTP or the directors. The primary member at PR [155] referred to his earlier decision in *Vincent v IOOF Friendly Society NSW Ltd* [2013] NSWCTTT 482 to demonstrate that the rights under the RV Act of persons in the position of the present appeal respondents continued and at PR [163] also referred to s 40 of the RV Act to that effect. At PR [156]-[157] he found that the CHB constitution and by-laws created a residence contract for each present appeal respondent and that Sch 1 to the constitution contained a service contract.

90 At PR [143]-[146], the primary member discussed the application of the interpretative provisions in the RV Act to the contractual terms between the parties as required by *Butterworth v Trustees of the Society of St Vincent de Paul* [2012] NSWDC 211 at [109]-[111]. On that basis he rejected at PR [147] the present appellants' argument that the definition required a determination that the majority of occupants of the entire Park came within the definition of "retirement village" in s 5 of the RV Act. At PR [149] he referred to the map in

Sch 4 to the CHB constitution which indicated that the 40 long-term sites were "effectively separate entities". He referred at PR [151] to Ms Kelly's evidence that she had created a home base for "grey nomads" which included communal property shared by both the caravan park and the company title permanent sites. At PR [154] he referred to the marketing from 2012 to 2015 of two separate areas within the Park, being the caravan park for casual use and the shares in CHB which "provided a more substantial right to persons seeking to acquire" those shares.

91 At PR [148] with [150] the primary member rejected the present appellants' further argument that, because the DC did not approve use for a retirement village and contained conditions forestalling such use, the Park or parts of it could not attain approval as a retirement village and could not be a retirement village as defined.

92 At PR [152]-[153] the primary member referred to *Bondi Beach Astra Retirement Village Pty Ltd v Assem* [2020] NSWSC 1814, which he said supported the proposition that the reference in the RV Act definitions to intended occupation applied to premises where none of the premises was yet occupied or where progress to fill the premises had begun but not concluded.

93 The primary member concluded at the end of PR [154]:

> "The Tribunal is accordingly satisfied that the *Retirement Villages Act* can properly be applied to that part of the complex where sites for permanent occupation were marketed predominantly if not exclusively to 'grey nomads' seeking to buy a company share which gave them a right to permanently occupy the site."

94 Having then referred at PR [158] et seq to the compulsory application of the RV Act and the Tribunal's jurisdiction and order-making power under s 128 of the RV Act, the primary member turned to the relief sought by the present appeal respondents. The foregoing findings led to his declaration, recited earlier, that the RV Act applied to those parts of the Park occupied by each of the present appeal respondents since all those persons held shares in CHB.

95 At PR [166] the primary member said that it was appropriate that findings be made that the present appeal respondents had contractual rights against each of the present appellants as an operator or former operator. An order

to this effect was said to be appropriate against CHB because it was not presently in “liquidation” (administration may have been intended), against HBS as the “former manager” and against “the directors named as respondents Ms Kelly and Mr Booker on the basis that such an order would be permitted under s 40 of the [RV] Act where the owner is a close associate of the operator in circumstances where the enforcement of the proposed order is not undertaken by” CTP, HBS or CHB.

96 However, in PR [168] the primary member found that CHB was never the operator of the Park or the retirement village component and that it was inappropriate to make an order against CHB “in administration” and which now had no proprietary interest in the Park or the retirement village.

97 At PR [167] the primary member refused relief sought appointing an administrator under s 84 of the RV Act because that was beyond the Tribunal’s jurisdiction, being reserved for the Supreme Court on the application of the Secretary of the Department of Fair Trading, with provision for inquiry and report. A similar refusal for similar reasons in respect of a “commissioner” was stated in PR [172].

98 At PR [169] the primary member said that it was appropriate, consistent with the finding that all present appellants were or (we infer) had been operators, that all present appellants retracted the statements that the present appeal respondents must sign new residential site agreements and ought to be paid compensation by Mr Booker and Ms Kelly. There was no order to implement these matters, no reasons for the view expressed on compensation and who should pay it and no amount of compensation found.

99 At PR [170] the primary member said that no orders relating to possession were necessary since there had been no evictions.

100 At PR [171] the Tribunal was said not to have jurisdiction to penalise non-registration of the retirement village under s 24A of the RV Act.

**Nature, scope and powers in respect of internal appeals**

101 Internal appeals, being appeals from a decision of a Division of the Tribunal (as is the case here), may be made as of right on a question of law, and otherwise

with leave (that is, the permission) of the Appeal Panel: s 80(2) *Civil and Administrative Tribunal Act* 2013 (NCAT Act).

102 In *Prendergast v Western Murray Irrigation Ltd* [2014] NSWCATAP 69 the Appeal Panel set out at [13] a non-exclusive list of questions of law:

(1) Whether there has been a failure to provide proper reasons;

(2) Whether the Tribunal identified the wrong issue or asked the wrong question;

(3) Whether a wrong principle of law had been applied;

(4) Whether there was a failure to afford procedural fairness;

(5) Whether the Tribunal failed to take into account relevant (ie., mandatory) considerations;

(6) Whether the Tribunal took into account an irrelevant consideration;

(7) Whether there was no evidence to support a finding of fact; and

(8) Whether the decision is so unreasonable that no reasonable decision-maker would make it.

103 In relation to adequacy of reasons, it is essential to expose the reasons for resolving a point critical to the contest between the parties so that it is possible for an appellate court to review it for error: *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 (CA) at 259, 270-272, 280-281; *Minister for Immigration and Multicultural and Indigenous Affairs; ex parte Palme* (2003) 216 CLR 212 at [40]; *Wainohu v NSW* (2011) 243 CLR 181 at [58]; *NSW Land and Housing Corp v Orr* (2019) 100 NSWLR 578, [2019] NSWCA 231 at [65]-[77]; CATA s 62(3).

104 The circumstances in which the Appeal Panel may grant leave to appeal from decisions made in the Consumer and Commercial Division are constrained by cl 12(1) of Sch 4 to the NCAT Act. In such cases, the Appeal Panel must first be satisfied that the appellant may have suffered a substantial miscarriage of justice on the basis that:

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

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

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

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

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

106 Even if an appellant from a decision of the Consumer and Commercial Division has satisfied the requirements of cl 12(1) of Sch 4, the Appeal Panel must still consider whether it should exercise its discretion to grant leave to appeal under s 80(2)(b).

107 In *Collins v Urban*, the Appeal Panel stated at [84] that ordinarily it is appropriate to grant leave to appeal only in matters that involve:

> "(a) issues of principle;
>
> (b) questions of public importance or matters of administration or policy which might have general application; or
>
> (c) 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;
>
> (d) a factual error that was unreasonably arrived at and clearly mistaken; or
>
> (e) 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."

108 The Appeal Panel has the following powers in respect of an internal appeal:

> "80. …
>
> (3) The Appeal Panel may—
>
> > (a) decide to deal with the internal appeal by way of a new hearing if it considers that the grounds for the appeal warrant a new hearing, and
> >
> > (b) permit such fresh evidence, or evidence in addition to or in substitution for the evidence received by the Tribunal at first instance, to be given in the new hearing as it considers appropriate in the circumstances.
>
> 81 Determination of internal appeals
>
> (1) In determining an internal appeal, the Appeal Panel may make such orders as it considers appropriate in light of its decision on the appeal,

including (but not limited to) orders that provide for any one or more of the following—

(a) the appeal to be allowed or dismissed,

(b) the decision under appeal to be confirmed, affirmed or varied,

(c) the decision under appeal to be quashed or set aside,

(d) the decision under appeal to be quashed or set aside and for another decision to be substituted for it,

(e) the whole or any part of the case to be reconsidered by the Tribunal, either with or without further evidence, in accordance with the directions of the Appeal Panel.

(2) The Appeal Panel may exercise all the functions that are conferred or imposed by this Act or other legislation on the Tribunal at first instance when confirming, affirming or varying, or making a decision in substitution for, the decision under appeal and may exercise such functions on grounds other than those relied upon at first instance."

**Grounds in this appeal – nature of alleged errors**

109 The appeal grounds in the notice of appeal filed 19 July 2021 appear to have been prepared with legal assistance. We note leave was granted on 6 August 2021 to both appellants and respondents for legal representation on appeal and there was legal representation for all parties at the appeal hearing.

110 The appellants were all the respondents below and we have referred to them throughout these reasons as the present appellants.

111 The core of the present appellants' complaint, as stated in the body of the notice itself, was that "The requirements of the Act, including in respect of infrastructure, are incapable of being properly applied only to parts of the Coolah Caravan Park or the Coolah Caravan Park". It was said that the inevitable consequence would be closure of the Park including because of having to obtain an amended DC (if such could be obtained at all) and dispossession of the present appeal respondents and residents.

112 The grounds were said in the body of the notice to require leave. The Tribunal was said to have given inappropriate weight to the evidence that the caravan park had communal property shared by both the caravan park and the permanent sites. How this evidence, even if given more weight, figured in the application of the RV Act provisions to the sites occupied by the present appeal respondents was not articulated. Nor was it articulated how Supreme Court

proceedings between the parties set down for the end of August 2021 interacted with the proceedings.

113 The notice of appeal contained nine specific grounds of appeal which became the focus of submissions. At final hearing two of those grounds were not pressed and another ground (the first) was said to be a summary of other grounds raising matters of statutory interpretation.

114 The remaining specific grounds attached to the notice of appeal in our view all raised alleged errors on a question of law and were interlinked. This was made clear in the present appellants' submissions discussed below. Adequacy of reasons and findings not being available on the evidence were raised entirely within the contentions about interpretation and application of the RV Act.

115 The interlocking appeal grounds can be consolidated and stated as follows, which the present appellants said (as to the first two) were errors on a question of law and which we regard entirely as such:

(1) The interpretation and application of the RV Act, particularly ss 4, 5 and 40, as reflected in primary order 1 and as reflected in primary order 2 against CHB, Mr Booker and Ms Kelly.

(2) Inadequacy of reasons.

(3) Findings not available on the evidence before the Tribunal.

116 We note that the present appellants said that the ground concerning the findings not being available on the evidence before the Tribunal required leave to appeal, which they sought. That ground appears to us to be in the category of alleged error on a question of law (no basis in the evidence for the findings made: *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 355-6) rather than the lesser criticism, requiring leave, that the Tribunal made factual errors in its findings which were not fair and equitable or which were against the weight of evidence.

117 Nevertheless, we would have refused leave to appeal for the alternative characterisation of that ground. It seems to us that no findings of primary fact relevant to interpretation and application of the RV Act were made against the weight of evidence or that were not fair and equitable or, if so found, would have led to a substantial miscarriage of justice if not corrected. Indeed, the

facts relevant to interpretation and application of the RV Act were largely clear on the documents and facts set out earlier in these reasons that were not the subject of substantive challenge. The parties' contentions differed as to whether they meant that the RV Act did or did not apply, which is either a question of law or (on the interpretation of the RV Act that we have found) leads to no error in applying that interpretation to the facts.

118 The reply to the notice of appeal filed 16 August 2021 put in issue all the grounds in the notice of appeal.

**Procedural issues on the present appeal**

119 During some of the time that the Tribunal proceedings described above were in progress, Supreme Court litigation involving the same parties was in preparation to determine claims to title of the land on which the Park including the present appeal respondents' sites were located and claims of oppression of CHB shareholders. A final hearing was set down for five days commencing 30 August 2021 and then for further hearing periods (totalling, together, 14 days) ending in November 2021.

120 On 6 August 2021 directions were made in the Appeal Panel of the Tribunal to prepare the present *Tait* appeal for final hearing set down for half a day on the morning of 25 October 2021. A stay application was dismissed with oral reasons. The present appeal respondents had opposed a stay including on the ground that there was no substantive overlap between the litigation in each forum except that it was pleaded as a fact in the Supreme Court proceedings that the present appeal respondents' sites were a retirement village (as had been found by the primary member in the primary decision on 5 July 2021 and as was being challenged in the present appeal).

121 On 30 September 2021 the Appeal Panel hearing set for 25 October 2021 was vacated by consent due to the impact on the parties of the ongoing Supreme Court preparation. Directions made on 21 October 2021 reset preparation dates for an appeal hearing on 31 March 2022 for half a day commencing at 10.15am.

122 On 28 March 2022 the present appeal respondents filed an application to vacate the hearing date which was opposed by the present appellants at the start of the hearing on 31 March 2022.

123 The ground for the application was delay of a month in the present appellants' appeal documentation (due to severe flooding in the Park) and non-receipt of the present appellants' submissions until three days before the hearing, both being substantial non-compliance with directions that was said to constitute prejudice to the present appeal respondents.

124 The present appellants said that the present appeal respondents had substantial time to serve their material for the appeal apart from responsive submissions, had not done so and had not communicated whether they intended to file and serve material for the appeal, with the present appellants therefore not serving their submissions. They agreed to the present appeal respondents' filing and serving their submissions after the appeal hearing. They said that they were prejudiced by further delay since it also delayed enforcement proceedings concerning unpaid site fees which included the higher rate said to apply if the RLLC Act applied and new site agreements under that legislation were required to be signed.

125 Neither party had applied for an extension of time. The present appeal respondents wished to reply in writing to the present appellants' written submissions.

126 After hearing argument, which occupied a significant portion of the allotted half day for final hearing, we allowed the adjournment for a further hearing date that was set immediately and for written submissions prior to that set date by the present appeal respondents and in reply by the present appellants. We considered that there were special circumstances justifying an order that the present appellants pay the present appeal respondents' costs thrown away by reason of the adjournment on the ordinary basis as agreed or assessed. Neither party required reasons for the adjournment or costs decision.

127 The adjourned hearing occupied most of a day on the second hearing date.

**Contentions on this appeal**

128 The present appellants contended in substance that the primary member erred in the following ways, which brought together the grounds of appeal summarised earlier in these reasons:

(1) The primary member erred in his interpretation and application of the word “complex” in the definition of “retirement village” in s 5(1) of the RV Act. In particular: first, the Park was not a complex because it did not meet the ordinary meaning in the statutory text and context of complex; secondly, the primary member found at PR [139] that the entire Park was the relevant “complex” and then applied s 5(1) to part of the “complex”, being the subject of the present appeal respondents’ claims as to sites and rights.

(2) The primary member did not recognise that the exclusion in s 5(3)(d) of the RV Act applied because the *McMillan* appeal decision adopted by the primary member meant that the documentation relied upon by the present appeal respondents had been found to give rise to rights in a “community” under the RLLC Act.

(3) The primary member erred in his interpretation and application of ss 4 and 40 of the RV Act in finding that anyone but CTP was an operator at present.

129 The present appellants relied upon the orthodox principles of statutory interpretation which are enunciated, among much other authority, in Project Blue Sky v Australian Broadcasting Authority (1998) 194 CLR 355 at 381-382, [69]-[71], [78]; Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (2009) 239 CLR 27 at [47]; Commissioner of Taxation v Consolidated Media Holdings Ltd (2012) 250 CLR 503, [2012] HCA 55 at [39]; SZTAL v Minister for Immigration and Border Protection (2017) 262 CLR 362 at 368, 374. The text of particular provisions must be construed consistent with the language and purpose of the statute as a whole which provides the context for the particular provisions. Context also includes legislative history and extrinsic materials but they cannot displace the meaning of the statutory text and they have utility if, and in so far as, they assist in fixing the meaning of the statutory text.

130 As said by the majority in *Blue Sky* at [78]:

> "… the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a

> literal or grammatical construction, the purpose of the statute or the canons of construction (eg, the presumption that, in the absence of unmistakable and unambiguous language, the legislature has not intended to interfere with basis rights, freedoms or immunities) may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning."

131 The present appellants also correctly expounded the test for adequacy of reasons set out earlier in these reasons.

132 The present appellants contended that the primary member failed to expose his reasoning for his conclusion that the Park fitted within the dictionary definitions that he cited.

133 In particular, it was contended that the primary member did not identify a building or building complex which housed a number of related specified services and did not explain how the relevant parts of the Park and the land on which it was located in its different elements were united or connected together. This left no work for "complex" to do once the elements of residential premises predominantly occupied by retired persons with village contracts were identified. The properties in the two cases cited by the primary member (*Butterworth* and *Bondi Beach*) were physical structures with those physical matters clearly evident, being respectively a strata title property with residential and commercial lots and a purpose-built cluster of residential units.

134 In contrast, it was contended, the present Park and land contained an interspersed mix of the present appellants' sites with shorter-term sites for caravans and camping and communal facilities, with the land historically having been a caravan park with DC and Council approval for that purpose. The present appellants' sites paid more for use above a certain level of the communal facilities. The relevant Minister's second reading speech referred to the mischief intended to be cured by a "much tighter definition of what a 'retirement village' is" – that caravan parks had claimed to be retirement villages in order "to make a greater financial return".

135 It was further contended that, if the Park and the land on which it was located was correctly identified as a complex, then it was not on the primary member's findings coincident, as the definition required, with the sites of the present appellants that otherwise satisfied the definition; rather, the primary member

assumed two separate areas within the Park with the RV Act applying to only one of those areas.

136 Further, in accepting and adopting certain findings as to the McMillans' ownership of their cabin (set out earlier in these reasons) the primary member expressly or implicitly adopted that the Park was a "community" under the RLLC Act so the exclusion in s 5(3)(d) of the RV Act applied, not only to the sites but also to the communal areas and facilities such as access roads.

137 The primary member was said to have erred in that: there was no evidence that Mr Booker and Ms Kelly managed or controlled and therefore were operators under the RV Act definition in s 4 in their personal capacities and no reasoning to support that conclusion, and s 40 did not apply in the circumstances to any of CHB, HBS or Mr Booker or Ms Kelly even if they were within the definition of "close associate" under s 4. In oral submissions it was said that there was no evidence sufficient to pierce the corporate veil to make the directors personally the operators.

138 The present appeal respondents said that the history and approval status of the Park was irrelevant if the RV Act definitions applied to the relevant sites. The RLLC Act could not apply because the relevant rights were attached to shares owned by the present appellants and were not in the nature of a tenancy, nor were monies paid for recurrent expenditure in the nature of rent (that is, the right of occupation). Reference was made to another part of the second reading speech, cited by the primary member, where a mischief intended to be addressed was said to be pressure by operators to amend or replace prior contracts with residents.

139 "Complex" was said to be able to contain relevant residential premises along with other things: i.e the whole Park with the relevant sites being a defined retirement village within the Park. In this case however, the complex was coincident with the sites owned by the present appeal respondent shareholders in CHB, together with the rights of use of communal facilities, and were united or connected together and with those communal facilities by access roads and other facilities within the Park. The primary member made clear findings on the underlying facts leading to the conclusion on the existence of a complex and

therefore needed to say no more when applying the meaning of complex to them. Primary order 1 applied only to the present appeal respondents' sites which rendered the question about the extent of the complex unnecessary to determine.

140 The present appeal respondents acknowledged that s 5(3)(d) of the RV Act made a retirement village and a residential land lease community under the RLLC Act mutually exclusive. They said that the *McMillan* appeal decision did not address the RV Act and addressed only aspects of the application of the RLLC Act (implicitly because the Appeal Panel found it did not have jurisdiction to address the proposed residential site agreement the subject of complaint).

141 The present appeal respondents pointed to Mr Booker and Ms Kelly being "the alter egos of the operators" who managed or controlled through the corporate vehicle and who "should be required to cause their companies to comply with the Act". Reference was made to the historic status of CHB and HBS as operators.

142 In reply, the present appellants said, centrally, that the related specific services and communal facilities were primarily directed to the operation of the short-term and camping sites in the Park, with limits on use by the long-term sites allocated to the present appeal respondents. The primary member was also said to have failed to consider and reason how to limit the RV Act so as not to apply to the rest of the Park.

143 Further, the findings in the *McMillan* appeal proceedings necessarily encompassed a finding of "community" under the RLLC Act as that was inherent in what was found for the RLLC Act definitions to apply. It was inappropriate to seek to canvass whether the agreements were in the nature of a tenancy as that should have been done in the present proceedings at primary level. In any event, the recurrent payments and term coincident with share ownership in CHB meant that what was documented was in the nature of a tenancy. An explanatory note (not part of the RLLC Act: s 4(4)) was called in aid.

144 The "alter ego" argument was said not to address the present appellants' other objections.

145 Four days before the resumed hearing, on 13 May 2022, Parker J delivered judgment in *McMillan v Coolah Home Base Pty Ltd [No 4]* [2022] NSWSC 584. His Honour dismissed the plaintiffs' estoppel and other title claims in respect of the land on which the Park was based and certain monetary claims, leaving open (on his findings of some oppressive actions by the CHB directors) an application to wind up CHB.

146 Apart from reference to a summary of the CHB constitution at [34] of the judgment, no party relied upon the judgment or findings in it as relevant to the present appeal proceedings.

**Consideration and conclusions on this appeal**

*Appeal against primary order 1*

147 As said earlier in these reasons, the Appeal Panel in the *McMillan* appeal found that, despite their having standing as owners under existing residential site agreements to which the RLLC Act was said to apply, the McMillans' claims for relief were not within what the Tribunal had jurisdiction to hear and determine under s 156 of the RLLC Act. The existing residential site agreements qualified as such under definitions in the previous legislation that did not require recourse to the definitional requirement of "community". Further, there was no consideration of the position under the RV Act which is at the core of the *Tait* proceedings. .The *McMillan* proceedings did not have the other parties to the present proceedings.

148 The expression of acceptance and adoption in the primary decision in the present *Tait* proceedings of two findings in the *McMillan* proceedings was, in our view, simply a recognition that findings to the same effect were made to the extent that the RLLC Act was argued in the present proceedings, prior to the consideration in the present proceedings of the application of the RV Act and without consideration of the interaction between the two statutes if both applied.

149 It would in any event be open to us and necessary for us to revisit on the present appeal that acceptance and adoption since it is an element in what is challenged by the grounds of appeal.

150 Under the definitions cited earlier from each current statute and the legislation preceding the RLLC Act, shares and rights attached to them have a status under the RV Act that has some similarity to rights under the RLLC Act only because the right of exclusive occupation attached to a share is similar in some respects to the right in the nature of a tenancy that governs occupation within a community under the RLLC Act.

151 The exclusive occupation right under the RV Act and the right "in the nature of a tenancy" under the RLLC Act are similar in terms of exclusive contractual occupation rights to a particular location. They are not similar in the origin, length and nature of that right or in what sustains the continuance of the right.

152 The right under the RLLC Act arises from a contract dealing with that right alone, for a term (fixed or not fixed) by reference to no other right and for payment of monies that are in the nature of rent, that is, a usually recurrent payment for the right to occupy or possess land or to possess other property to the exclusion of others except in limited circumstances: *Booker Industries PL v Wilson Parking (Qld) Pty Ltd* (1982) 149 CLR 600 at 610-611; *Commissioner of Stamp Duties (NSW) v JV (Crows Nest) Pty Ltd* (1986) 7 NSWLR 529 (CA) at 538-540 and authority there cited.

153 The right under the RV Act arises from a contract dealing with the occupation right as an incident of a contract between shareholders and the company that contains other rights relating to governance of the company, that provides for no end to the duration of the right except as arising from the duration of the share ownership and that provides for no recurrent payment for the continuance of the share ownership right itself.

154 The intrinsic tie between the rights of occupation, access to common areas and other matters and share ownership was recognised, set out and explained in the documents described earlier in these reasons.

155 It therefore seems to us that there is insufficient substantive similarity between the occupation rights under the two statutes to find that both the RLLC Act and the RV Act potentially can apply to the present appeal respondents' rights and to determine what happens if both apply. Since the *McMillan* appeal proceedings did not determine rights under the RV Act nor, contrary to the

present appellants' submissions, make a finding resolving a contest between the parties that there was a 'community' encompassed by the whole area of land where the Park operates, that is open to be determined in the present appeal proceedings. It is not precluded by the primary member's acceptance and adoption of certain findings in the *McMillan* appeal proceedings for reasons already canvassed.

156 We consider that, on the above analysis, the rights of occupation provided by the documentation between CHB and the present appeal respondents exhibited the features that give rise to rights under the RV Act rather than the RLLC Act, if both were under consideration. In our view, the distinction between the retirement 'complex', and the residential 'community', allowing application of the RV Act is permissible despite s 13(2) of the RLLC Act, because the rights of the present appeal respondents attach to their ownership of shares in CHB, taking them outside the ambit of the RLLC Act because they are not, in that context, "an agreement or arrangement in the nature of a tenancy": RLLC Act, s 4, definition of 'community'.

157 The present appellants said that the primary member found that the entire Park was the relevant "complex" for purposes of the RV Act definitions but then impermissibly carved out of that complex (if it was a complex, which itself was disputed) the present appeal respondents' sites. It is open to us and necessary for us to revisit on the present appeal the primary member's reasoning in this respect since it is an element in what is challenged by the grounds of appeal.

158 First, the primary member's finding is correct on one characterisation of the facts recited earlier in these reasons which are substantively similar to those found by the primary member.

159 The documents establishing the "dream" allocated to each of the 62 sites (whatever its then current use) in the Park a right to exclusively occupy those sites as a residence and to use co-located communal facilities as a means of enhancement of that use that was attached to shares to be issued or intended to be issue predominantly to retired persons. For the reasons given below, the Park came within the meaning of "complex" containing residential premises with those rights that qualified as village contracts. The documentary basis for

that finding was unaltered on the evidence even if it apparently ceased to be marketed in that way from 2015 by CHB and its directors.

160 It is not to the point that certain areas such as the communal facilities and camping sites were not themselves residential premises. The complex under s 5(1)(a) of the RV Act is required to "contain" the qualifying residential premises, not to the exclusion of other premises or uses. If that were not so, one could not have communal facilities within a retirement village and meet the definition.

161 This in fact appears to be what occurred under the original documentation. One operator administered the entire scheme, with cross-subsidisation of sites acquired by shareholders from revenue derived from other sites in the Park to the extent necessary.

162 The primary member did not need to make orders on the application in the *Tait* proceedings before him beyond those he did. Having found that the Park came within the definition of a retirement village, he had the basis for granting relief under the RV Act to the present appeal respondents that the protections of the RV Act applied to them.

163 Further and alternatively, in our view there is nothing in the RV Act to prevent the areas occupied by the present appeal respondents' sites with their rights to communal facilities qualifying as a "complex" and otherwise coming within the RV Act, with other sites in the Park being regulated under, for example, the RLLC Act if they formed a "community" that otherwise so qualified, or under other applicable legislation. This would still enable one operator to administer the various schemes within the Park, including in respect of communal facilities, with, for example, different charges and usage rules for each regime and potential cross-subsidisation being the subject of agreements.

164 We respectfully disagree with the present appellants' contentions about the meaning of "complex" that have been set out earlier in these reasons.

165 In its ordinary meaning (*Macquarie Dictionary* current edition) "complex" simply denotes an assembly or combination or composite of integers or parts. Such meaning is apposite in the legislative context. The RV Act is remedial in its regulatory character and on its face is not confined in its operation to particular

physical models or structures that are an assembly or combination or composite of integers or parts.

166 In our view, the combination, assembly or composite may be managerial, administrative, financial or physical in character, or some or all of the foregoing. It does not strictly require adjacent or contiguous location or closed bounds within which other structures, elements or integers cannot be found. If such was intended, the exception in s 5(2) of the RV Act that recognises there may be tenancies within the physical location of the retirement village that are not part of the retirement village would be otiose.

167 Those other structures, elements or integers may well qualify as a community under the RLLC Act, in which case they would be precluded from being within the retirement village by reason of s 5(3)(d) of the RV Act, or they may be excluded tenancies under s 5(3)(h) of the RV Act.

168 Finally, it is necessary to note a provision that did not feature in the parties' submissions. Pursuant to s 8(1)(c) with s 8(2) of the RLLC Act set out earlier, the sites when owned by CHB and occupied by its shareholders (the present appeal respondents) were excluded from having the RLLC Act apply to them. This reinforces that there was nothing to prevent the sites forming a retirement village under the RV Act. While the transfer of the land to CTP divorced share ownership from land title, so that s 8 no longer directly applies, the definitional requirements discussed above for a retirement village have not changed and there has been no process under Pt 9 of the RV Act to terminate the retirement village residence contracts.

169 To say that the relevant parts of the Park were not approved and could never be approved as a retirement village under the DC conditions and Council approval is not a reason for denying the application of statutory provisions to objective interpretation of contractual rights that were marketed to and signed up with the present appeal respondents. It simply means that CHB and its directors did not obtain the necessary approvals that matched what was marketed and the rights that were contractually created, if it is the case that the current approvals do not suffice.

170 In that last respect, there was no relevant evidence placed before us that the current approvals were infringed or that altered approvals could not be obtained. Even if they could not, so that registration under s 24A of the RV Act could not be achieved, that would give rise to rights and relief beyond the subject of the present proceedings including by parties different from at least some of the parties to the present proceedings.

171 We are satisfied that the primary member made no error of law (nor any error of fact) in finding that the RV Act applied to the sites of the present appeal respondents. Accordingly, primary order 1 was appropriately made and the appeal against it, which was the principal focus of the present appeal proceedings, should be dismissed except for a variation in language from expression of satisfaction to an order. The Appeal Panel's powers under s 80 of the NCAT Act extend to such a variation.

*Appeal against primary order 2*

172 It does however appear to us that the primary member erred in law in respect of the utility and reach of primary order 2.

173 As to utility, primary order 2 simply required the present appellants to do what the Tribunal found they were obliged by law to do, namely, to perform whatever contractual obligations (if any) that each had under the contracts with the present appeal respondents. RV Act s 128, the order-making power relied upon for this primary order, empowers the Tribunal to make (relevantly) orders directing the "operator" to comply with "a" requirement of the RV Act or regulations and to require performance of "any" village contract.

174 It appears from his reasons, described earlier, that the primary member intended primary order 2 to be consequential on primary order 1, to make it clear that the application of the RV Act meant that the operator or operators of the retirement village had obligations to perform. However, this is embodied within primary order 1 itself in relation to whichever party or parties is or are the "operator".

175 It therefore seems that the correct primary order should identify which of the present appellants is an operator or are operators and therefore subject to the

contractual obligations of village contracts. This again can be done under the Appeal Panel's powers under s 80 of the NCAT Act.

176 RV Act, s 40 empowers enforcement of a village contract with a former operator against "any operator for the time being" of the village. The language limits the enforcement right to the current operator, not former operators. CTP, rather than CHB or HBS is the current operator. The relevant village contracts were with CHB which by definition was the original operator – as owner of the land on which the sites subject to village contracts were located, it had initial sole management and control. As sole manager and controller it granted that power to HBS under contract. This is expressly referred to in the by-laws and shareholder residential site agreement that is Sch 5 to the CHB constitution which itself is binding on the residents/shareholders under corporations law and by application under the site purchase agreement. There accordingly has been a series of operators subject to s 40, with the current operator being CTP.

177 CTP is an operator because it is involved in the management and control of the Park and, contrary to its contentions, has therefore been involved and continues to be involved in the management and control of those sites of the present appeal respondents which have been found to have rights under the RV Act. Although CTP is also the owner of the land on which the Park exists and the relevant sites are within the Park, there is no work for s 40(2) to do in this situation since CTP is the operator in its own right. If CTP was not the operator in its own right, it would be a close associate of another operator such as its directors or CHB or HBS and s 40(2) could give rise to future proceedings if that other operator failed to satisfy enforcement orders.

178 Accordingly, an order should be made, varying primary order 2, that pursuant to s 128(1)(c)(ii) the Tribunal orders CTP to perform the obligations under the RV Act of the operator for the time being in respect of the contracts between each of the present appeal respondents and CHB including the rights under the constitution of CHB.

179 There is no provision in RV Act s 40 (nor that we have otherwise been pointed to) that extends accessorial liability to close associates of the operator such as the directors of CTP.

180 The primary member was correct in refusing to appoint an administrator under s 84 of the RV Act, or a “commissioner”, and in declining to make orders related to possession and penalty for non-registration. No cross-appeal in respect of those matters is brought.

181 Appeals are against orders that constitute the relevant “decision” (s 5 of the NCAT Act) and no further orders were made. There was no basis expressed in the primary decision for an order concerning retraction or compensation and no order for a process concerning quantification of compensation. No cross-appeal in respect of these issues was brought, despite there having been a proposal in the present appeal respondents’ final points of claim for separate determination of quantum of any compensation or directions concerning preparation for this aspect of the claim.

**Orders**

182 We make the following orders:

(1) The appeal is allowed for the purpose of varying orders 1 and 2 made 5 July 2021 to read as follows:

> “1. Order that the *Retirement Villages Act 1989* (NSW) applies to those parts of Coolah Caravan Park that are subject to the rights of the applicants attached to the shares in Coolah Home Base Pty Ltd.
>
> 2. Pursuant to s 128(1)(c)(ii) of the *Retirement Villages Act 1989* (NSW), order Coolah Tourist Park Pty Ltd to perform the obligations under the *Retirement Villages Act 1989* (NSW) of the operator for the time being in respect of the contracts between each of the applicants and Coolah Home Base Pty Ltd including the rights attached to the shares under the constitution of Coolah Home Base Pty Ltd in respect of the applicants’ sites and the communal facilities on the land being Lots 130 and 131 in DP 728787.”

(2) Otherwise dismiss the appeal.

(3) Order as follows in respect of costs of the appeal and the primary hearing:

(a) Any application in respect of costs is to be filed and served within 14 days, accompanied by any further evidence and submissions in respect of costs.

(b) Any further evidence and submissions in response to the documents filed and served under order 3(a) are to be filed and served within a further 14 days.

(c) Submissions on the application for costs by each party are not to exceed five pages in length.

(d) The Appeal Panel may dispense with a hearing and determine any application for costs on the basis of the written submissions and evidence provided. If the parties oppose this course they should make submissions on this issue when complying with the directions as to their submissions on the substantive costs application. If a hearing is not dispensed with, the parties will be advised of a date for the hearing of the application.

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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

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