Civil and Administrative Tribunal

New South Wales

Case Name:	GS & CS Holdings Pty Ltd v The Owners – Strata Plan No. 63227
Medium Neutral Citation:	[2022] NSWCATAP 206
Hearing Date(s):	1 March 2022
Date of Orders:	22 June 2022
Decision Date:	22 June 2022
Jurisdiction:	Appeal Panel
Before:	M Harrowell, Deputy President G Burton SC, Senior Member
Decision:	1. The appeal is dismissed. 2. Any application for costs, together with evidence and submissions in support of the application, is to be filed and served within 14 days after the date of these orders. 3. Any evidence and submissions in response to an application for costs is to be filed and served within 28 days after the date of these orders. 4. Any submissions in reply are to be filed within 35 days of the date of these orders. 5. Submissions are to include submissions about whether orders should be made under s 50(2) of the Civil and Administrative Tribunal Act 2013 (NSW) dispensing with a hearing of any costs application.
Catchwords:	LAND LAW – Strata Management – alleged unreasonable refusal of consent by lot owners to proposed amendment – pre-conditions to challenge of

	refusal – proper parties
Legislation Cited:	Civil and Administrative Tribunal Act 2014 (NSW) Strata Schemes Management Act 1996 (NSW) (repealed) Strata Schemes Management Act 2015 (NSW)
Cases Cited:	Jennifer Elizabeth James v The Owners – Strata Plan No. 11478 [No 4] [2012] NSWSC 590 Khadivzad v The Owners – Strata Plan 53457 [2019] NSWSC 157
Texts Cited:	None cited
Category:	Principal judgment
Parties:	GS & CS Holdings Pty Ltd (appellant) The Owners – Strata Plan No. 63227 (respondent)
Representation:	Counsel: P A Horobin (Appellant) A Hopkins (Respondent) Solicitors: Legal Made Easy PL (Appellant) Thomas Martin Lawyers (Respondent)
File Number(s):	2021/00341717
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	NSW Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Citation:	N/A
Date of Decision:	03 November 2021
Before:	S Thode, Senior Member
File Number(s):	SC 21/00190

DECISION

Outcome of appeal

1 This appeal is against a decision of the Tribunal which refused an application for the Tribunal to prescribe a by-law under s 149 of the *Strata Schemes Management Act 2015 (NSW)* (SSMA).

2 For the reasons below we have decided to dismiss the appeal.

3 We have provided for submissions on costs in our orders, as requested by the parties.

Background to appeal

4 The appellant owns Lot 24 in a strata scheme in Hurstville, NSW. The respondent is the owners' corporation for the scheme.

5 By-law 29 was passed in 2004 (original by-law 29). It was a by-law conferring special rights in connection with common property and permitted the carrying out of specific work. A copy of original by-law 29 is found in the appellant's bundle (AB) 110-112.

6 At that time the appellant did not own Lot 24. Original by-law 29 permitted nine lot owners the use of roof top areas adjacent to their lots. The by-law defined the permitted works as follows:

> **Roof Terrace Works** means the additions and alterations undertaken by each Owner (at that owner's cost and to remain the Owner's fixtures) to their respective lot and that part of the common property (including all ancillary structures) affected by the work described therein, and in accordance with drawing No. 4200-DA 01 prepared by McFadyen Architects Pty Ltd (a copy of which are attached to the minutes of the meeting at which this by-law is made).

7 The drawing referred to in the special by-law was not provided to us and does not appear to have been provided to the Tribunal at first instance. However, there appears to be no dispute that the Roof Terrace Works involved the construction of pergolas, not the construction of enclosed areas.

8 Despite the terms of original by-law 29, six of the owners benefitting from the by-law, including the then owner of the appellant's Lot 24, had enclosed their roof top areas to create a bathroom, toilet and two bedrooms. The other lots on which enclosed areas were built were Lots 20, 21, 22, 23 and 25. The

enclosure of each area was not only not permitted by the by-law but also did not comply with a condition of development consent which was for a pergola without enclosure.

9 In 2019, the six lot owners obtained a Building Information Certificate from the Local Council which indicated that the Council would not take action by reason of the non-complying development. The Building Information Certificate is valid for seven years. It indicated that the Council did not propose to seek demolition or alteration orders. It did not prevent the Council from issuing notices concerning fire and other public health and safety issues.

10 Subsequently, in 2020, those six lot owners proposed the owners' corporation pass a resolution to approve an amended form of by-law 29 (amended by-law 29) to authorise the non-complying work. Proposed amended by-law 29 is found at AB 113-117. Inter alia, in the explanatory notes, amended by-law 29 said:

> This special by-law 29 replaces and supersedes the original by-law 29 for the strata scheme.

11 The resolution to approve the proposed amended by-law 29 was in the following terms (AB 327):

> Motion 2- AMENDED BY-LAW 29
>
> That the Owners' corporation RESOLVE by SPECIAL RESOLUTION to pass amended Special By-Law 29 which, pursuant to section 11 of the Strata Schemes Management Act 2015, needs to reflect the issuing of a Building Information Certificate by Georges River Council on 7 July 2019 to Lots 20, 21, 22, 23, 24 & 25.

12 At an extraordinary general meeting on 27 November 2022 the owners' corporation refused to pass the resolution. The motion to amend original by-law 29 was defeated 22 to 6 (by Lot numbers).

13 In its application SC 21/00190 filed 4 December 2020 the appellant sought an order prescribing a change to original by-law 29 under s 149 of the SSMA.

14 The appellant said that the amendment of the by-law had been unreasonably refused by the owners' corporation. In the reasons for asking for the relief sought the appellant said, among other things:

> "1. The OC has unreasonably refused to pass amended by-law 29 (special privilege) on spurious grounds.
>
> 2. The proposed amendments put no additional wording or responsibility on the owners' corporation or the other three lot owners … included on the original by-law 29. In fact it is to indemnify the owners' corporation from costs.
>
> 3. Special privileges by-law 29 needs to reflect the Building Information Certificate issued to [the six lots] in July 2019 by Georges River Council."

15 In the proceedings before the Tribunal it was not disputed that by-law 29 in its original and proposed amended form was a common property rights by-law as defined in s 142 of the SSMA. It is also not in dispute that the three Lot owners who had not enclosed their roof top areas did not consent to the amended by-law.

The Tribunal's decision:

16 The Tribunal dismissed the application. In doing so, the Tribunal reached the following conclusions:

(1) All nine lot owners benefiting from the original by-law were required to consent to the making of amended by-law 29. The owners of lots 38, 39 and 40 had not consented: reasons at [20]-[22].

(2) Such consent was required before a resolution could be passed approving amended by-law 29: reasons at [35]-[37].

(3) The application was brought against the owners' corporation, not those required to consent. The owners of lots 38, 39 and 40 were not parties to the application: reasons at [39].

(4) If consent had not been provided as required by s 143 of the SSMA "there can be no unreasonable refusal of the making of a by-law by the owners' corporation": reasons at [40].

(5) While there had been earlier proceedings against the owners of the lots who did not consent, being application SC 20/01094, those proceedings "resulted in orders for the owners of lots 38 and 42 consent for an GM to be held, not for the making of a special by-law": reasons at [26].

17 Lastly, having referred to evidence from various witnesses, the Tribunal made the following findings at [51]-[52] of the reasons:

> 51 I have had regard to the indemnity provided by the old and the amended by law 29. The effect of the new proposed by law is that the indemnity of each owner of Lot 20-25 is limited to work carried out and "certified" in respect of the lot only. Where previously all nine owners indemnify the owners' corporation in respect of any loss occurred in respect of roof Terrace Works, the amended by law has a different effect. The new by law limits any indemnity in respect of damage to roof Terrace Works to work "certified" in respect of each individual lot only. Whilst the indemnity now offered by Lot 20 to 25 is reasonably clear,

> through the BIC's provided, it remains unclear whether there are remnants of "roof Terrace Works" that remain un- indemnified, and if so, what component of the "roof Terrace Works" now is indemnified by the owners of lots 38, 39 and 40.
>
> 52 I am satisfied that none of the concerns raised by the owners' corporation are unreasonable. It may be that the current by law 29 does not lend itself to "amendment" in the way proposed by the applicant. For these reasons I dismiss the application.

Grounds of appeal

18 The Notice of Appeal recorded the following grounds which were said to be errors of law by the Tribunal:

> (1) The Tribunal erred in concluding that an order under section 149(1) of the *Strata Schemes Management Act 2015* (NSW) ('Act') requires the consent of owners specified in section 143 of the Act and in doing so, incorrectly applied *Khadivzad v The Owners – Strata Plan No 53257* [2019] NSWSC 157 to dismiss the application, including at [34] and [40] of the Reasons for Decision of the Tribunal dated 3 November 2021 ('Reasons').
>
> (2) The Tribunal erred in concluding that the consent required under section 149(3) of the Act was that of the respondent owners' corporation or lot owners and not the applicant, including at [40] and [43] of the Reasons for Decision.
>
> (3) The Tribunal erred in concluding that the owners of lots 38, 39 and 40 in the strata scheme were required to consent to the amended by-law proposed by the applicant ('amended by-law') by misconstruing section 143(1) of the Act, including at [20] and [34] of the Reasons.
>
> (4) The Tribunal erred in misconstruing the amended by-law with respect to indemnity for instance, including at [31] and [51] of the Reasons.
>
> (5) The Tribunal erred by failing to give proper reasons as to why it concluded that none of the concerns of the respondent were unreasonable at paragraph [52].
>
> (6) The Tribunal erred in applying the incorrect test under s 149(1)(a) of the Act by determining whether concerns of the respondent were unreasonable rather than whether the reasons for refusal were unreasonable, including at [50] to [52] of the Reasons.

19 In addition, leave was sought to the extent that any appeal ground was found to involve a question of fact, on the basis that the decision was not fair and equitable or was against the weight of evidence.

Consideration

20 This appeal concerns an amendment to original by-law 29 which is a common property rights by-law.

21 The central question raised by grounds 1-3 concerns whether the Tribunal correctly determined it had no power to make an order prescribing a change to

the by-law under s 149(1)(a) of the SSMA because consent had not been provided to the proposed amended by-law by all nine lot owners on whom had been conferred rights or special privileges under the original by-law.

22 The Tribunal determined that obtaining consent was a precondition to an owners' corporation making or amending a by-law under s 143(1) of the SSMA and, consequently, was a precondition to the Tribunal exercising any power under s 149(1)(a) of the SSMA.

23 In considering whether an error has been made, it is first appropriate to consider how the statutory scheme operates.

The statutory scheme

24 The issues raised in this appeal involve the construction of ss 143 and 149 of the SSMA and their interaction.

25 The interpretation of these sections is to be undertaken in accordance with the general principles set out by the plurality (McHugh, Gummow, Kirby and Hayne JJ) in Project Blue Sky v Australian Broadcasting Authority [1998] HCA 28; 194 CLR 355 at [69]. There their Honours said (citations omitted):

> The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined "by reference to the language of the instrument viewed as a whole".
> In Commissioner for Railways (NSW) v Agalianos, Dixon CJ pointed out that "the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed". Thus, the process of construction must always begin by examining the context of the provision that is being construed.

26 Section 143 provides as follows:

> **143 Requirements and effect of common property by-laws**
>
> (1) An owners' corporation may make a common property rights by-law only with the written consent of each owner on whom the by-law confers rights or special privileges.
>
> Note— Any addition to the by-laws will require a special resolution (see section 141).
>
> (2) A common property rights by-law may confer rights or special privileges subject to conditions specified in the by-law (such as a condition requiring the payment of money by the owner or owners concerned, at specified times or as determined by the owners' corporation).

> (3) A common property rights by-law may be made even though the person on whom the right of exclusive use and enjoyment or the special privileges are to be conferred had that exclusive use or enjoyment or enjoyed those special privileges before the making of the by-law.
>
> (4) After 2 years from the making, or purported making, of a common property rights by-law, it is conclusively presumed that all conditions and preliminary steps precedent to the making of the by-law were complied with and performed.

27 A common property rights by-law is a by-law conferring a right of exclusive use and enjoyment or special privileges in respect of the whole or a specified part of common property. It includes changes to such a by-law: s142. Change to a by-law means "amend or repeal" of a by-law as well as addition of a by-law: s 133 Definitions.

28 Consequently, a by-law that amends an existing by-law is a common property rights by-law to which s 143 applies.

29 In *Khadivzad v The Owners – Strata Plan 53457* [2019] NSWSC 157 (*Khadivzad*) Darke J considered the effect of s 52(3) of the now repealed *Strata Schemes Management Act 1996 (NSW)* (1996 Management Act) and whether consent of a person benefited by a common property rights by-law was a condition or preliminary step precedent to the making of a by-law.

30 Section 52 provided:

> 52 How does an owners' corporation make, amend or repeal by-laws conferring certain rights or privileges?
>
> (1) An owners' corporation may make, amend or repeal a by-law to which this Division applies, but only:
>
> > (a) with the written consent of the owner or owners of the lot or lots concerned and, in the case of a strata leasehold scheme, the lessor of the scheme, and
> >
> > (b) in accordance with a special resolution.
>
> (2) A by-law to which this Division applies may be made even though the person on whom the right of exclusive use and enjoyment or the special privileges are to be conferred had that exclusive use or enjoyment or enjoyed those special privileges before the making of the by-law.
>
> (3) After 2 years from the making, or purported making, of a by-law to which this Division applies, it is conclusively presumed that all conditions and preliminary steps precedent to the making of the by-law were complied with and performed.

31 In Khadivzad, Darke J approved a statement of Ball J in James v The Owners Strata Plan No 11478 (No 4) [2012] NSWSC 590. At [28]-[31] Darke J said:

> 28 The plaintiff stated that no “informative direct authority” concerning s 52(3) could be found. Reference was however made to the observations of Ball J in *James v The Owners Strata Plan No 11478 (No 4)* [2012] NSWSC 590 at [94]-[95].
>
> 29 Ball J there said:
>
> > Section 52 of the SSM Act provides that the owners’ corporation may "make" a by-law under that section "but only" with the written consent of the owner or owners of the lot or lots concerned. The by-law is made by the owners’ corporation, but a pre-condition to making the by-law is the required consent. In my opinion, the owners’ corporation "makes" a by-law when it passes a valid resolution adopting the by-law in accordance with the relevant requirements of the SSM Act. That conclusion is supported by s 52(3) which provides for a conclusive presumption that "all conditions and preliminary steps precedent to the making of the by-law" were complied with after two years. Section 52(3) draws a distinction between the making of the by-law and the conditions and preliminary steps precedent to the making of the by-law. The use of the words "preliminary" and "precedent" indicate that those steps are steps to be taken before the making of the by-law. One such step must be the obtaining of written consent. Section 52(3) is saying (among other things) that that condition or preliminary step precedent is conclusively presumed to have taken place if no challenge is made to the by-law within two years.
> >
> > In my opinion, there is also a practical reason for interpreting s 52 as requiring written consent before a resolution is passed. That reason is that lot owners may well want to know whether written consent is forthcoming before voting on the resolution. The powers conferred by s 52 cannot operate any differently because they are being exercised by Mr Anderson under s 162 rather than by the owners’ corporation.
>
> 30 Ball J made those observations in the context of his determination of a different question, namely, whether a strata scheme manager appointed under s 162 of the Act could give the requisite consents of lot owners for the purposes of s 52(1)(a). However, his Honour clearly states that the required consent is a pre-condition to the making of a by-law to which s 52 applies, and further that the obtaining of the required consent is a condition or preliminary step precedent for the purposes of s 52(3). Accordingly, his Honour said, “that condition or preliminary step precedent is conclusively presumed to have taken place if no challenge is made to the by-law within two years”.
>
> 31 I agree that obtaining the required consent is a condition or preliminary step precedent to the making of a by-law to which Division 4 applies. On that basis, s 52(3) seems to me to provide that after two years from the making or purported making of a by-law to which Division 4 applies, it is conclusively presumed that the consent requirement under s 52(1)(a) has been complied with. That construction appears to me to accord with the plain meaning of the words of the statute, viewed as part of the Act as a whole.

32 The language of s 52 in the 1996 Management Act is substantially the same as the language of s 143 of the SSMA. In these circumstances, we should accept the analysis of the Supreme Court under the previous legislation as applicable to the SSMA. That is, under s 143 of the SSMA it is a condition precedent to

the passing of a resolution to make a by-law under that section that the consent of "each owner on whom the by-law confers rights or special privileges" is first obtained.

33 In doing so, we express no view about whether an owners' corporation could pass a by-law conditional upon the consent of the relevant lot owners being subsequently obtained. This issue does not arise in this case as that was not the form of the resolution about which these proceedings are concerned: see form of special resolution, set out above at [11].

34 Having reached this conclusion it is then necessary to consider how s 149 operates where a by-law, including a by-law that amends an existing by-law, is not made.

35 Section 149 provides as follows:

> **149 Order with respect to common property rights by-laws**
>
> (1) The Tribunal may make an order prescribing a change to a by-law if the Tribunal finds—
>
> > (a) on application made by an owner of a lot in a strata scheme, that the owners' corporation has unreasonably refused to make a common property rights by-law, or
> >
> > (b) on application made by an owner or owners' corporation, that an owner of a lot, or the lessor of a leasehold strata scheme, has unreasonably refused to consent to the terms of a proposed common property rights by-law, or to the proposed amendment or repeal of a common property rights by-law, or
> >
> > (c) on application made by any interested person, that the conditions of a common property rights by-law relating to the maintenance or upkeep of any common property are unjust.
>
> (2) In considering whether to make an order, the Tribunal must have regard to—
>
> > (a) the interests of all owners in the use and enjoyment of their lots and common property, and
> >
> > (b) the rights and reasonable expectations of any owner deriving or anticipating a benefit under a common property rights by-law.
>
> (3) The Tribunal must not determine an application by an owner on the ground that the owners' corporation has unreasonably refused to make a common property rights by-law by an order prescribing the making of a by-law in terms to which the applicant or, in the case of a leasehold strata scheme, the lessor of the scheme is not prepared to consent.

> (4) The Tribunal may determine that an owner has unreasonably refused consent even though the owner already has the exclusive use or privileges that are the subject of the proposed by-law.
>
> (5) An order under this section, when recorded under section 246, has effect as if its terms were a by-law (but subject to any relevant order made by a superior court).
>
> (6) An order under this section operates on and from the date on which it is so recorded or from an earlier date specified in the order.

36 By its terms, s 149 does not grant a general power to the Tribunal to make orders prescribing common property rights by-laws. Nor does it authorise the Tribunal to make an order that a particular lot owner consent to the making of such a by-law.

37 Rather, relevant to this appeal, s 149(1)(a) and (b) permits the Tribunal to make an order prescribing a change to the by-laws where it finds:

(1) on an application by a lot owner, an owners' corporation has unreasonably refused to make a common property rights by-law: SSMA s 149(1)(a); or

(2) on application by a lot owner or owners' corporation, a lot owner has unreasonably refused to consent to the proposed common property rights by-law, or to the proposed amendment or repeal of a common property rights by-law: SSMA s 149(1)(b).

38 In respect of the consent referred to in s 149(1)(b), this must be a reference to the consent required from the person on whom the proposed by-law confers rights as specified in s 143(1) of the SSMA. This is because:

(1) the only consent required for the making of a common property rights is from the person on whom the proposed by-law confers rights as specified in s 143(1) of the SSMA;

(2) the rights of other lot owners are to vote on a resolution to make a by-law in general meeting; and

(3) the SSMA does not otherwise require consent from lot owners other than those on whom rights are to be conferred, in order to make a by-law.

39 Where relevant written consents have not been received, because consent is a precondition, an owners' corporation cannot make a by-law. It follows that, in the absence of written consent, any failure to pass a resolution to make a by-law cannot be unreasonable as there is no power to pass the resolution at all.

40 In these circumstances, a person seeking the making of a by-law may apply to the Tribunal under s 149 of the SSMA for an order prescribing a by-law. In this case, they must show the relevant Lot owner has unreasonably refused consent as required by s 149(1)(b).

41 It might be thought that, where an application is made on the basis of s 149(1)(b) of the SSMA, an owners' corporation is thereby deprived of an opportunity to consider whether the relevant by-law should be passed. This is because the power granted to the Tribunal is to prescribe a by-law if satisfied a lot owner's refusal is unreasonable and this power is independent of the need for a finding under s 149(1)(a), namely, an unreasonable refusal by an owners' corporation.

42 However, this is not the case. While an order made under s 149 based on a finding under s 149(1)(b) operates to by-pass the process of an owners' corporation considering changes to its by-laws in general meeting, the SSMA does not deprive the owners' corporation, or lot owners entitled to vote on such a resolution, from expressing their views about whether the by-law should be made. Rather than this occurring at a general meeting, it is done in the application to the Tribunal.

43 In this regard s 149(2) requires the Tribunal to consider:

(a) the interests of all owners in the use and enjoyment of their lots and common property ; and

(b) the rights and reasonable expectations of any owner deriving or anticipating a benefit under a common property rights by-law.

44 In doing so, the Tribunal would ordinarily make orders to ensure all persons affected by the orders are given notice of any application, have a chance to participate in the hearing and to join necessary parties.

Disposition of the present appeal

45 As stated in the note to amended by-law 29, set out above, amended by-law 29 "replaces and supersedes" original by-law 29. It was not proposed in the resolution to adopt amended by-law 29 nor did amended by-law 29 by its terms propose to make a separate by-law in favour of the owners of Lots 20, 21, 22, 23, 24 and 25, being those lot owners who had impermissibly carried out work.

46 The proposal fell within the terms of a “change” within the meaning of the SSMA. The resolution to effect the change was not expressed to be conditional upon consent being subsequently obtained.

47 Passing the resolution and approving amended by-law 29 had the effect of conferring rights on the owners of Lots 38, 39 and 40. In this regard the owners’ corporation could confer such rights “even though the [owners of Lots 38, 39 and 40] on whom the right of exclusive use and enjoyment or special privileges are to be conferred had that exclusive use or enjoyment or enjoyed those special privileges before the making of the by-law”: s 143(3) SSMA.

48 Consequently, in accordance with our interpretation of the statutory scheme, consent was required from the owners of Lots 38, 39 and 40 before the owners’ corporation could pass the relevant change, namely, to approve amended by-law 29 under s 143 of the SSMA.

49 Because it was a condition precedent to the lawful passing of any resolution to change original by-law 29 that consent first be obtained from the owners of Lots 38, 39 and 40, in the absence of such consent the failure to pass the resolution in question could not be unreasonable. In part, this is what the Tribunal found.

50 The appellant submitted that s 149 granted to the Tribunal a power to prescribe a by-law. In effect, it was said that this power was independent of s 143 and the requirement for consent to be first obtained.

51 We disagree with this submission. As made clear by s 149(1)(a), the Tribunal’s power is only enlivened if the Tribunal is satisfied there has been an unreasonable refusal by the owners’ corporation. In reaching this conclusion, we accept that s 149(3) is concerned with the consent of the applicant in the Tribunal proceedings. This is what that subsection says. However, this does not alter the operation of s 143(1) (namely, the need for consent of lot owners on whom a benefit is conferred) or our view that refusal could not be unreasonable in the absence of such consent.

52 We should briefly deal with the absence of consent of the owners of Lots 38, 39 and 40 and the possibility that an order could have been made to prescribe a by-law on the grounds of s 149(1)(b) of the SSMA.

53 In the application to the Tribunal, reference was made in the orders sought in the application to sections 143(1)(a)-(c). However, the reasons for the appellant asking for the orders (as stated in the application under the heading "Reasons for asking for the orders sought" which we have set out above) were limited to the unreasonable refusal to pass amended by-law 29, not the unreasonable refusal of the owners of Lots 38, 39 and 40 to consent to amended by-law 29.

54 While it was possible for the Tribunal to make a different order to that sought (see 240 of the SSMA), that is to make an order based on the unreasonable refusal of the owners of Lots 38, 39 and 40 to consent to amended by-law 29, it could not have done so in the present case. This is because the owners of those lots were not parties to these proceedings.

55 It would appear that orders concerning unreasonable refusal to consent may have been sought in earlier proceedings brought against the owners of Lots 38, 39 and 40. However, as noted by the Tribunal, these lot owners were not parties to the present proceedings, the subject of this appeal, and there was no contention of which we are aware put forward by the appellant in the proceedings at first instance that a claim was made in those proceedings on the basis that those lot owners had unreasonably refused consent.

56 Therefore, it was not open to the Tribunal in the proceedings at first instance to make an order to prescribe the amended by-law 29 on the basis of s 149(1)(b) as the relevant parties had not been joined as parties or afforded an opportunity to be heard and no relief was sought against them.

57 As noted in the Tribunal's reasons, the orders made in the other proceedings did not otherwise affect this position.

58 It follows that the Tribunal was correct to dismiss the application and this appeal should be dismissed.

Costs of appeal

59 Leave for legal representation on the appeal was granted to both parties on 21 December 2021. As the parties requested, we shall provide the opportunity for costs applications to be made in respect of the costs of the appeal.

Orders

60 The orders we make are as follows:

(1) The appeal is dismissed.

(2) Any application for costs, together with evidence and submissions in support of the application, is to be filed and served within 14 days after the date of these orders.

(3) Any evidence and submissions in response to an application for costs is to be filed and served within 28 days after the date of these orders.

(4) Any submissions in reply are to be filed within 35 days of the date of these orders.

(5) Submissions are to include submissions about whether orders should be made under s 50(2) of the Civil and Administrative Tribunal Act 2013 (NSW) dispensing with a hearing of any costs application.

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