



Civil and Administrative Tribunal
New South Wales

Case Name: Knight v The Owners - Strata Plan 208

Medium Neutral Citation: [2022] NSWCATCD 170

Hearing Date(s): 7 June 2022

Date of Orders: 20 July 2022

Decision Date: 20 July 2022

Jurisdiction: Consumer and Commercial Division

Before: G Ellis SC, Senior Member

Decision:

1. Pursuant to s 149(1) of the Strata Schemes Management Act 2015, the Tribunal makes the common property rights by-law tabled by the applicants at the meeting of the first respondent held on 4 November 2021.
2. Pursuant to s 246 Schemes Management Act 2015, within 28 days (ie on or before 17 August 2022) the first respondent is to do all things necessary to register that by-law.
3. Any submissions in support of an application for costs (not exceeding five pages), together with any supporting evidence, are to be filed and served by 3 August 2022.
4. Any submissions in response to any such application (not exceeding five pages), together with any supporting evidence, are to be filed and served by 17 August 2022.
5. Any submissions in reply (not exceeding two pages) are to be filed and served by 24 August 2022.

6. Any such submissions should indicate whether the party accepts that costs should be determined on the papers, ie without the need for a further hearing.

Catchwords:	LAND LAW - Strata title - Whether proposed by-law unreasonably refused
Legislation Cited:	Strata Schemes Management Act 2015
Cases Cited:	Beckett v The Owners – Strata Plan No 74637 [2020] NSWCATCD Bruce v Knight [2021] NSWCATAP 225 Capcelea v The Owners Strata Plan No 48887 [2019] NSWCATCD 27 Endre v The Owners – Strata Plan No 17771 [2019] NSWCATAP 93 Gelder v The Owners – Strata Plan No. 38308 [2020] NSWCATAP 227 Macey’s Group Pty Ltd v The Owners – Strata Plan No 33591 [2021] NSWCATAP 7 Makita (Australia) Pty Ltd v Sprowles [2001] NSWCA 305 Mitchell v Cullingral Pty Ltd [2012] NSWCA 389 The Owners – Strata Plan No 12289 v Donaldson [2019] NSWCATAP 213 The Owners – Strata Plan No 69140 v Drewe [2017] NSWSC 845
Category:	Principal judgment
Parties:	Alexander Knight, Cleo Knight (Applicants) The Owners – Strata Plan 208 (First Respondent) Anthony Bruce (Second Respondent) Liza Rybak (Third Respondent) Stephen Nash (Fourth Respondent)
Representation:	Strata Title Lawyers (Applicants) First Respondent – no appearance Sachs Gerace Lawyers (Second, Third and Fourth Respondents)
File Number(s):	SC 21/51950
Publication Restriction:	Nil

REASONS FOR DECISION

Outline

- 1 The applicants sought an order under s 149 of the *Strata Schemes Management Act 2015* (SSMA) for the Tribunal to make a common property rights by-law which was alleged to have been unreasonably refused, and an order under s 246 for the registration of that by-law. As the owners corporation did not participate in the proceedings, it is convenient to refer to the second, third and fourth respondents as the respondents.
- 2 After considering the evidence and submissions of the parties, the Tribunal determined that:
 - (1) It was not necessary to consider whether the by-law proposed at the meeting held on 1 June 2020 was unreasonably refused.
 - (2) The by-law proposed at the meeting held on 4 November 2021 was unreasonably refused.
 - (3) The by-law proposed at the meeting held on 9 December 2021 was unreasonably refused.
 - (4) The by-law that was presented to the 4 November 2021 meeting should be made and registered.
 - (5) Directions should be made for the lodgement of written submissions in relation to costs.

Background

- 3 The strata-tilted building which is the subject of these proceedings is a two-storey Georgian mansion, built in about 1860, which has been converted into six residential lots: three on Level 1 (the ground floor) and three on Level 2.
- 4 Each lot has one unit entitlement. As a result, four votes are needed to pass an ordinary resolution and five to pass a special resolution. Conversely, two votes are needed to block a special resolution and three to prevent an ordinary resolution from being passed.
- 5 Lot 1 is owned by Mr Bruce and Ms Bayes. Dr Nash and Dr Rybak own Lot 2. Lot 3 is owned by Mr and Mrs Knight who are the applicants. Mr Cook owns Lot 4 while Lots 5 and 6 are owned by Mr and Mrs Race.

- 6 Following a first instance decision in favour of the applicants on 21 January 2021, an appeal from that decision was allowed on 23 July 2021 and the application was remitted for re-hearing by a different member of the Tribunal.
- 7 The previous hearing related to a proposed by-law considered at a meeting held on 1 June 2020 which related to (1) creating an en suite in bedroom 1, (2) a bathroom renovation, (3) relocation of the laundry, (4) a kitchen renovation, (5) installing bedroom air-conditioning (6) installing timbered flooring, and (7) other miscellaneous work (A22, page 22 of Exhibit A).
- 8 Minor renovations forming part of that by-law were approved on 4 November 2022. By reason of s 110 of the SSMA, that work only required an ordinary resolution and neither a special resolution nor a by-law. Those minor renovations covered (1) a kitchen renovation, (2) the installation of cupboards, rails, and wardrobes as well as new electrical sockets in bedrooms 1 and 2, (3) the installation of new, reverse-cycle air-conditioner to service those two bedrooms, (4) the installation of new joinery and cupboards in the living/sitting rooms, and (5) the installation of new, engineered timber flooring throughout the lot, except for the kitchen and bathroom areas (A229 at [9]).
- 9 The by-law proposed on 4 November 2021 (A250-281) sought approval to (1) renovate an existing bathroom, (2) construct a new ensuite bathroom in bedroom 1, (2) renovate an existing bathroom, (3) relocate the existing laundry, (4) re-open an existing doorway, (5) renovate the kitchen, (6) install new timber external steps, (7) replace the existing plantation shutters, (8) remove an existing internal door and install a new internal door, (9) install new lighting, (10) install ceiling fans in bedrooms, and (11) repair and replace the timber-framed glass roof in the light atrium (A231 at [25]).
- 10 The by-law proposed on 9 December 2021 (A301-306) only sought approval to (1) renovate an existing bathroom, (2) construct a new ensuite bathroom in bedroom 1, and (3) relocate the existing laundry (A232 at [36]).
- 11 Since the minor renovations have been completed, the focus of the application is now on the proposed by-laws presented to the meetings held on 4 November 2021 and 9 December 2021.

Hearing

- 12 The hearing was conducted using audio-visual link (AVL) facilities due to the Covid pandemic. A joint tender bundle of documents was admitted, without objections, as Exhibit A. It is convenient to here note that, as the copy of the Appeal Panel decision at A203-212 was a singled-sided copy of a double-sided document, the Tribunal inserted a complete copy at A202A. A copy of A267 with the relevant area marked in red, as was the case with the original of that page, was added at A266A. The applicants' chronology (MFI 1) and written submissions (MFI 2) were marked for identification as indicated.
- 13 Following cross-examination of Mr Knight, Dr Nash, and Mr Bruce, oral closing submissions were delivered. The usual sequence of applicants, respondents and applicants in reply was followed so that each party could make submissions in support of their own case and in response to the case of their opponents.

Jurisdiction

- 14 As these proceedings relate to premises at Bellevue Hill which are the subject of a strata scheme that was registered on 24 September 1962, the SSMA applies, and the Tribunal has jurisdiction to hear and determine the proceedings.

Relevant law

- 15 *Section 149 is in the following terms:*
- (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, ...
 - (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.

- 16 A refusal will be unreasonable when there is no rational basis for it in that it was not guided by sound judgment or good sense: *The Owners – Strata Plan No 69140 v Drewe* [2017] NSWSC 845 (*Drewe*) at [43]. As was indicated in *Capcelea v The Owners Strata Plan No 48887* [2019] NSWCATCD 27 (*Capcelea*) at [52], the question is not whether the proposed change is reasonable but, rather, whether the refusal was unreasonable.
- 17 After referring to the decisions in *Beckett v The Owners – Strata Plan No 74637* [2020] NSWCATCD (*Beckett*), *Capcelea*, *Endre v The Owners – Strata Plan No 17771* [2019] NSWCATAP 93 (*Endre*), *Macey’s Group Pty Ltd v The Owners – Strata Plan No 33591* [2021] NSWCATAP 7 (*Macey’s*), *The Owners – Strata Plan No 12289 v Donaldson* [2019] NSWCATAP 213 (*Donaldson*), and *Drewe*, the Appeal Panel summarised the principles applicable in this case as follows (*Bruce v Knight* [2021] NSWCATAP 225 at [53]):
1. reasonableness must be assessed by reference to circumstances known at or prior to the passing of the relevant resolution: *Maceys*; *Beckett*; *Drewe*;
 2. the determination of whether a refusal is unreasonable depends on the conduct of the owners corporation and all the relevant circumstances: *Endre*;
 3. “circumstances” are different to “material”. Subsequent evidence or “material” which goes to the circumstances existing at the time of the meeting is admissible: *Donaldson*;
 4. the Tribunal is not confined to examination of the material before the meeting: *Donaldson*; *Beckett*;
 5. individual owners can provide evidence of their reasons: *Capcelea*.

Applicant’s evidence

- 18 Mr Knight provided five affidavits, three for the initial hearing and a further two for this hearing. The first of those affidavits (A10), dated 14 August 2020, served to provide copies of the strata plan (A17-19) and a copy of the by-law that was proposed at the 1 June 2020 (A8-40) together with a copy of the minutes of that general meeting (A71-75).

- 19 Dated 8 September 2020, the second affidavit (A82) attached a copy of the minutes of a general meeting held on 6 August 2020 (A86-90) together with a same day email from Dr Nash to the strata managing agent (A91-92) in which he indicated his response to the by-law that was proposed at the 1 June 2020 meeting. So far as is presently relevant, that email said:

Owners of Lot 3 have submitted new drawings by newly commissioner architects (MCK Architects), which contain significant departures from plans previously proposed (JJ Drafting). These drawings do not incorporate measurements, or proximity of proposed works to adjacent properties. Accordingly, a full informed decision cannot be made at this stage. Lot 2 requests this information to better assist deliberation.

- 20 The third affidavit of Mr Knight (A93), dated 4 November 2020, replied to the affidavits of Dr Nash and Ms Bayes. He suggested that the reasons set out in those affidavits were never raised at the 1 June 2020 meeting and went on to respond in detail to each of those reasons.
- 21 The first of the two affidavits prepared for the re-hearing, dated 16 February 2022 (A228) indicated that a further general meeting was held on 4 November 2021. As it had been suggested that part of the proposed works should not be included in the proposed by-law as they were minor renovations, those aspects were proposed as a separate resolution at that meeting. The owners of Lots 1 and 2 voted against those minor renovations but they were approved since there were four votes in favour and only an ordinary resolution was required.
- 22 A revised by-law was presented to that 4 November 2021 general meeting. It sought to address the opposition to the atrium area by obtaining a valuation and offering to pay the \$14,500 suggested by that valuation as compensation. However, that by-law was not approved as Lots 1 and 2 again voted against it.
- 23 According to Mr Knight, the only reasons advanced against that by-law at that meeting were (1) that there were two by-laws relating to the same renovation because the position in relation to the 1 June 2020 proposed by-law has not been finalised, and (2) that the areas of common property for which the applicants required exclusive use had not been indicated. There was no objection at that time to the proposed compensation.

- 24 The Tribunal was provided with copies of the notice of that meeting, including the accompanying documents (A238), the proposed by-law (A250-281), and the minutes of that meeting (A291).
- 25 A further revised by-law was presented to a general meeting held on 9 December 2021. Again, the proposed by-law was defeated due to opposition from the owners of Lots 1 and 2. A typed copy of Mr Knight's contemporaneous notes was provided (A309). It is to be noted that an independent solicitor, Mr Goddard, was present at this meeting, and he provided a letter to the secretary the following day (A318). Again, the Tribunal was provided with copies of the notice of that meeting, including covering letter and accompanying documents (A293), the proposed by-law (A301-306), and the minutes of that meeting (A312).
- 26 In his last affidavit (A348), dated 13 May 2022, Mr Knight responded in detail to what was said in the affidavits of Mr Bruce and Dr Nash and annexed supporting photographs.
- 27 When cross-examined, Mr Knight explained that amendments were made to the works proposed at the November 2021 meeting to accommodate matters raised by the owners of Lots 1 and 2. Those changes included retaining the heritage tiles on the kitchen floor in response to concern expressed by Ms Bayes and an intended change to a bedroom window that was removed in answer to an objection raised by Dr Nash. Thirdly, the proposed bathroom renovation was amended to "*meet the requirements*" of Ms Bayes and Dr Nash. Another change was to provide compensation for the light atrium. Definitions for Compensation, Exclusive Use Area and Plans were added (A252 cf A24).
- 28 Plans for the proposed work were included in the proposed by-law (A256-261). Those plans describe a new timber step with paint finish "*to provide legal egress that meets the BCA and to conceal some of the surface mounted pipework*" (A256, 259). New kitchen windows were also proposed.
- 29 Mr Knight accepted that the valuation obtained only related to the light atrium as that was the only area for which exclusive use was sought. He also indicated that there was an alteration made to the work that was put to the

December 2021 meeting in the bathroom “*to try to move this matter forward*” and the drawing for the intended work (A305-306) was included in the proposed by-law. (It was agreed page A307 was not presented to the December 2021 meeting.)

- 30 The change to the floor level described on the plan at A305 in the new laundry area was, consistent with what was said in that plan, to enable the revised floor level to marry with the adjacent door, which is currently bricked in and tiled over. It is noted that A305 is an enlargement of a portion of A307 which, in relation to this aspect of the proposed works, matches the plan at A256 which was presented to the November 2021 meeting. It was observed, during cross-examination, that page A305 does not contain the wording on A256 and A307 in relation to the door, namely “*Reinstate opening to existing door*”.
- 31 In re-examination, Mr Knight clarified that the wording in relation to that door was not in the by-law proposed in December 2021 as that only related to the bathrooms.
- 32 By reference to the photograph at A356, Mr Knight indicated that he did not know if the pipe which it appears may prevent the existing door from opening served any purposed or if it could be moved.
- 33 The question of whether the kitchen windows could be replaced in a manner that did not protrude was raised. In response to the suggestion that Dr Nash had requested a diagram which indicated the extent to which the proposed works would encroach on common property, Mr Knight maintained that the request of Dr Nash related to the areas for which exclusive use was sought.
- 34 In that regard, Mr Knight indicated that it was only the area referred to as the light atrium for which exclusive use was sought and that a definition of Exclusive Use Area had been added. It was Mr Knight’s evidence that exclusive use was not sought in respect of either the area where the new step was proposed, or any addition area occupied by the replacement windows.

Respondent’s evidence

- 35 Ms Bayes only provided an affidavit for the first hearing (A140). She was not required for cross-examination. In that affidavit, she indicated that she voted on

behalf of Lot 1 against the proposed by-law at the June 2020 meeting, which her partner (Mr Bruce) attended.

- 36 She noted that, after it was suggested that the A4 size plans prepared by JJ Drafting were illegible, larger versions of those plans were later provided. Further, that after concern was expressed that JJ Drafting was not an architect, plans from MCK Architects were provided.
- 37 The matters Ms Bayes raised in relation to the by-law proposed at the meeting in June 2020 may be summarised as: (1) the plans from MCK Architects were different, (2) work was proposed to the light atrium area, (3) windows and doors at the boundaries were to be changed, (4) there were proposed changes to the kitchen and bathroom, (5) there were no measurements provided, and (6) she considered that the text of the proposed by-law did not correlate with the plans.
- 38 It was the evidence of Ms Bayes and she and Mr Bruce spoke against the proposed by-law at the June 2020 meeting. Their objections were said to be that: (1) works requiring ordinary and special resolutions should be separated, (2) the new plans did not have measurements, (3) there was no measurements in the “*glass dome area*” (ie the light atrium), (4) insufficient time to seek advice regarding the proposed changes, and (5) an inability to reconcile the text of the proposed by-law with the plans.
- 39 The affidavit dated 27 October 2020, after referring to the 22 October 2020 affidavit of Dr Nash and expressing agreement with what he said, raised further objections to the proposed by-law: (1) the French doors in Lot 3 have security grill doors and the step between the floor in that area and the ground level was quite high, (2) the proximity of those French doors to a window in the second bedroom or study of Lot 1 would mean that “*Somebody standing on the steps would look straight into the bedroom/study*”, (3) the current bath level is about 80 to 90 cm above the rest of the bathroom and any change may have a structural impact and a report from a structural engineer should be obtained, (4) the potential impact of kitchen cupboards on the structural integrity of a common property wall, (5) the proposed kitchen windows encroach on the common property, (6) the suggested need to address a bricked in door, (7)

concerns in relation to the proposed step outside the French doors, (8) the plans do not show the proposed ducting for the air-conditioning system, (9) the proposed steel-framed glazed window in the light atrium was not mentioned in the proposed by-law.

- 40 Dr Nash provided an affidavit at each of the hearings (A146 and A323). In the former affidavit, dated 22 October 2020, Dr Nash set out his reasons for opposing the by-law that was proposed at the meeting held on 1 June 2020. They were: (1) that the reference to “*common property affected*” did not indicate what parts of the common property were affected, (2) that the area referred to as the light atrium had value which would be gifted without compensation, (3) in relation to the kitchen, an inability to determine responsibility for repair and maintenance, (4) retrospective approval should be sought for any work previously carried out without approval, (5) the removal of mosaic tiles with heritage significance, (6) potential noise from both the proposed air-conditioners and the proposed flooring system, (7) vagueness arising from the use of the words “*substantially as depicted*” and “*all works incidental thereto including the installation of cabling wiring piping and ducting*”, (8) obtaining the opinion of a structural engineer should be mandatory and not “*if required by the strata committee*”, (9) permitting amendments with the approval of the strata committee rather than the owners corporation, (10) there should be specified times (ie hours) within which the work is to be carried out, (11) there should be a specified time (ie date) by which the work should be carried out and not “*within a reasonable period*”, (12) the absence of a provision for indemnifying lot owners for any damage caused by the works, (13) there should be a requirement for the provision of certificates as to engineering waterproofing and acoustics, (14) the absence of a provision for materials handling during the work, (15) replacement of a window with a door potentially gives a right of exclusive use of the common property outside that door, (16) the use of doors facing the courtyard, with the addition of steps, could affect the amenity of other lot owners, notably the owner(s) of Lot 1, and (17) the absence of a provision for the owners of Lot 3 to pay any costs reasonably incurred by the owners corporation if it needed to enforce the by-law.

- 41 The second affidavit of Dr Nash (A323) was made after the by-laws proposed at meetings held on 4 November 2021 and 9 December 2021. He noted the members of the strata committee, which did not include any owner of Lot 1 or Lot 2. After setting out what documents he considered, Dr Nash outlined the reasons for Lot 2's opposition to those by-laws which were: (1) the use of the words "*a right of exclusive use and enjoyment of that part of the common property affected by the building and refurbishment works*" being too broad, with reference to s 142 of the SSMA which refers to a "*specified part of the common property*", (2) requests for the proposed areas of exclusive use to be specified, with reference to the light atrium, the door leading to the courtyard, the French doors, the kitchen windows and the door from the bathroom, (3) complaints in relation to the valuation and a suggested ambiguity of the light atrium area to which the proposed compensation and exclusive use relate, (4) under the heading "Air conditioning", a claim that installed cabling and ducting was unauthorised and unsightly, (5) the lack of specification of what is proposed in relation to external pipes that would be affected by the proposed use of an existing door near the clothes line, and (6) a suggested need for a diagram to indicate the areas of common property sought for exclusive use.
- 42 Cross-examination revealed Dr Nash to have a pugnacious approach, reflected by his answering questions with questions, as if he were an advocate and not a witness. On many occasions he gave non-responsive answers, revealing a preference to say what he wanted to say rather than answer the question that was asked.
- 43 Dr Nash sought to suggest that the meeting on 9 December 2021 was not advised what the strata committee did in relation to the attendance of a solicitor at that meeting, contrary to a next day letter from that solicitor (A318). When his attention was directed to what the solicitor set out in that letter under the heading for the proposed by-law (on A321), Dr Nash did not suggest what was said was wrong. However, when asked if it was an accurate summary to say that lots 1 and 2 voted against the proposed by-law because of "*an inadequate description of the impact on the common property*", being words use by the solicitor in that letter, Dr Nash took time before giving a non-responsive answer

and only when the question was repeated did Dr Nash suggest those words were not accurate and inadequate.

- 44 When taken to a plan (A305) and asked what further information he required, the answer of Dr Nash included that there was no “*north indicator*” despite it being clear to which part of Lot 3 and which part of the building the plan related. He later disagreed with a suggestion he was nit-picking. He also suggested there should be measurements included and claimed he was not aware that the owners of Lot 3 were taking on a repair and maintenance obligation that would otherwise be a matter for the owners corporation.
- 45 Dr Nash did concede that the paragraphs numbered 4-6 in the proposed by-law (A304), which included liability and indemnity plus costs, appeared to be reasonable. He expressed, on multiple occasions, his desire to have a document which set out the areas for which the owners of Lot 3 sought exclusive use and suggested that only a simple diagram was needed which, if provided, “*would solve the issue tomorrow*”. That aspect was plainly the focus of his current opposition to the by-laws that were proposed at the meetings of the owners corporation held on 4 November and 9 December 2021.
- 46 Mr Bruce only provided an affidavit for this hearing (A335), ie after the meetings held on 4 November and 9 December in 2021. He suggested the reasons for his opposition were: (1) the plans were misleading, (2) the potential for exclusive use by Lot 3 of the courtyard adjacent to Lot 1 and Lot 3, (3) that people using the French doors and step(s) would be able to look into Lot 1, (4) exclusive use of the light atrium would impact on his use of three windows which provide light and air for two bathrooms in Lot 1.
- 47 As to the 1 June 2020 meeting, Mr Bruce said the opposition of the owners of Lot 1, in addition to what appears in the minutes, was that (1) the plans are inaccurate and misleading, and (2) did not specify the areas of common property affected. He went on to refer to a meeting held on 6 August 2020.
- 48 In relation to opening the French doors, it was suggested that someone standing on the proposed steps outside those doors would be able to look straight into the bedroom/study in Lot 1, which would adversely impact on the

privacy of that room, and that the proposed changes involved changing the entry/exit point from an existing kitchen door to those doors.

- 49 The proposed modifications to the kitchen were said to involve windows which encroach onto common property and reference to the change in the entry/exit point were repeated.
- 50 On the topic of the bathroom, it was said that the plans did not indicate what would be done in relation to the pipework outside the existing door that was intended to become functional again. Mr Bruce expressed concern that such a change *“potentially gives the owner a right of exclusive use and enjoyment of common property outside that door without defining the manner in which those rights can be exercised”*.
- 51 The proposal in relation to the light atrium was also opposed. It was suggested the area affected had not been adequately defined and that it was unclear what area was involved. Further, that the opinion of a structural engineer should be mandatory and not only if required by the strata committee because that committee was controlled by the *“Race/Knight family group”*, plainly a reference to the fact that the owners of Lots 3, 5 and 6 held a majority of votes on the strata committee. It was noted that Mr Knight is the chairman and Mr Race, the secretary, is his father-in-law.
- 52 From the last paragraph in the affidavit of Mr Bruce, it appears that his primary concern is that the proposed areas of exclusive use have not been identified.
- 53 Cross-examination established that Mr Bruce’s partner, Ms Bayes, voted at the 1 June 2020 meeting while he voted at the meetings held on 4 November and 9 December in 2021. He accepted that the solicitor who attended the 9 December 2021 meeting provided a fair summary in his letter (A318 at A321) relation to what was said on the topic of the proposed by-law at that meeting.
- 54 Like Dr Nash, Mr Bruce suggested that if a further diagram was provided then *“that would solve all problems”*. He did concede that the minor renovations, approved on 4 November 2021 had been carried out and were no longer relevant. Mr Bruce also conceded that, having in 2020 requested five weeks in

which to look at the plans and obtain architectural advice, he had not done so but had instead sought legal advice.

- 55 When taken to clause 4.1 (c) of the proposed by-law (A253), Mr Bruce accepted that there was a requirement to obtain the report of a structural engineer. When it was suggested to Mr Bruce that his aim was to prevent the owners of Lot 1 from carrying out renovations, the only point he made was that he wished to know the common areas for which exclusive use was sought.

Applicant's submissions

- 56 By reason of the approval of minor renovations, the applicants sought an order in respect of the form of the by-law that was considered at the meeting held on 4 November 2021.
- 57 In relation to the light atrium, it was noted that compensation of \$14,500 was now being offered, that being an area which appeared to part of Lot 3 when the applicants purchased that lot in 2020.
- 58 It was noted that, even though an independent solicitor attended the 9 December 2021 meeting, and suggested the proposed by-law was reasonable, the votes cast for Lots 1 and 2 opposed such a by-law. It was also noted that Dr Nash sought a diagram despite that not being required by either the SSMA or the Registrar-General.
- 59 Mr Bacon submitted that there had been five meetings, with repeated demands, because the owners of Lots 1 and 2 held the balance of power in relation to the passage of a special resolution.
- 60 As to any construction noise, it was submitted that would only be temporary and would not be near either Lot 1 or Lot 2. Reference was also made to the fact that an indemnity for the owners corporation was provided and the Tribunal was reminded that the only purpose of the step outside the French doors was to achieve compliance with the Building Code of Australia (BCA).
- 61 It was observed that plans for the kitchen renovation proposed at the meeting in November 2021 were at A256-260 while the plans proposed at the meeting held in December 2021 were at A305-306. Further, that the proposal to make

use of the laundry door was included in the November 2021 proposal but not in the December 2021 proposal.

- 62 As to the shaded strip on the plan at A256, it was suggested that it was not reasonable to oppose the proposed renovation on that basis when time was provided for the objecting lot owners to obtain architectural advice which they chose not to do. It was suggested there was confused confusion in relation to this aspect.
- 63 On behalf of the applicants, it was submitted that the applicants tried to take out contentious aspects in the November 2021 proposal and were surprised when the December 2021 proposal was voted down. Further, it was contended that Mr Bruce had resiled from his opposition to the by-law proposed in December 2021.
- 64 Mr Bacon noted that the light atrium area in question was a 3.1 square metre internal area that was clearly marked in red on the relevant plan (A267A) which formed part of the valuation report, that being an area that was “taken” by the previous owner of Lot 3 and was raised by the owners of Lots 1 and 2 at the previous hearing that was the subject of an appeal. He suggested the work proposed by the applicants, as the owners of Lot 3, was primarily internal and should not warrant opposition from the owners of Lots 1 and 2.
- 65 In closing, it was submitted that, when the wording of the proposed by-law, the plans, the valuation and the heritage report are considered, any reasonable person would not oppose that by-law.

Respondent’s submissions

- 66 The Tribunal’s attention was directed to two paragraphs in the proposed by-law: the first under the heading “*Building Works in Lot 3*” (A250) and the first paragraph under the heading “*Grant of Exclusive Use Right*” (A252). It was contended that the exclusive use areas were to be ascertained by reference to the description of work and the plans. It was noted that the words “*Existing Light Well*” on a plan (A256) suggested an area greater than what was described in the submissions for the applicants and that the valuation only covered part of that area.

- 67 It was also suggested the applicants' plans (A256) included an area extending out from the kitchen, being an L-shaped area outside the kitchen windows labelled W1 and W2 and that the wording of the by-laws operated to give the applicants exclusive use of that area in addition to the light atrium area. The same point was made for the new steps shown on the same plan. This was said to explain why Dr Nash and Mr Bruce had been relentless on the need to identify the exclusive use area. Further, these two additional areas were said to render the proposed compensation of \$14,500 inadequate.
- 68 Criticism was made on the valuation, based on what was said in relation to expert evidence in *Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 305 (*Makita*). Aspects of the valuer's method were also questioned, and a submission was made that it was, on its face, an under-valuation.
- 69 It was also contended there was a lack of measurements on the plans which was said to explain why Dr Nash and Mr Bruce wanted plans prepared by a surveyor. This was said to be consistent with s 142 of the SSMA which referred to a "*specified part of the common property*". As to the lack of specificity, it was said that there was a description missing above the two arrows outside the proposed new laundry on a page of the plans presented to the December meeting (A305).
- 70 A submission was made that, before making an order for the by-law sought by the applicants, it was necessary for the Tribunal to find that the owners corporation acted unreasonably. Further, that the applicants' proposal involve a loss of amenity for the owner(s) of Lot 1 which rendered opposition by any lot owner reasonable, especially the owner(s) of Lot 1.
- 71 The respondents' case was that a by-law with ambiguities should not be made because, even if the position was clear to current lot owners, the position needed to be clear for successors in title who may form the view that the owner(s) of Lot 3 were entitled to exclusive use of the whole of the light atrium area.

Consideration

- 72 In reaching a decision in relation to this application, the Tribunal has considered the entirety of the documents admitted as evidence and the

submissions. These reasons focus on the material central to the issues but, to the extent that any evidence or a submission is not referred to, it should not be assumed that evidence or submissions has been ignored.

- 73 That approach is consistent with what was said by Allsop P in *Mitchell v Cullingral Pty Ltd* [2012] NSWCA 389 at [2]:

[A] judge may, in dealing with large bodies of evidence, be forced to economise in expressions and approach in order to be coherent in resolving the overall controversy. The need for coherent and tolerably workable reasons sometimes requires a truncation of reference and expression. Judgement writing should not become a process that is oppressive and produces unnecessary prolixity. Not every piece of evidence must be referred to. That said, central controversies put up for resolution by the parties must be dealt with. The competing evidence directed or relevant to such controversies must be analysed or resolved ...

- 74 While s 149(1)(a) refers to a situation where “*the owners corporation has unreasonably refused to make a common property rights by-law*”, clearly the reasons for refusal will be those of the lot owners who voted against the common property rights by-law at the relevant meeting of the owners corporation. Thus, it is not surprising that, in *Capcelea* at [37], it was indicated that individual owners can provide evidence of their reasons. That was said, in *Capcelea* at [36], to be in addition to the minutes of the relevant meeting, noting that such minutes may not adequately or completely record the reasons unless a full transcript is available.
- 75 The decision of the Appeal Panel (*Bruce v Knight* [2021] NSWCATAP 225) suggests a need to determine the subsequent evidence and material which go to the circumstances existing at the time of the meeting which requires findings in relation to the evidence given.
- 76 Only then can the Tribunal determine whether the proposed by-law was unreasonably refused as the first step in a two-step approach, consistent with what was said in *Donaldson and Gelder v The Owners – Strata Plan No. 38308* [2020] NSWCATAP 227, which requires a consideration of whether the proposed by-law was unreasonably refused, and an assessment of the matters set out in s 149(2).
- 77 A lot owner may, after the meeting, perhaps with the assistance of a lawyer, present all manner of reasons for opposition to a proposed by-law but it is only

those accepted by the Tribunal as being a reason taken into consideration at the relevant meeting which can go to the question of whether the proposed by-law was unreasonably refused at that meeting. Of course, it must be observed that a lot owner can also provide evidence relevant to what may be called the s 149(2) matters.

- 78 Three meetings have been referred to in the evidence and submissions, being the meetings held on 1 June 2020, 4 November 2021, and 9 December 2021. However, it is not necessary to make any determination in relation to the meeting held on 1 June 2020. First, since the applicants did not maintain the request for an order in relation to the by-law rejected at that meeting. Secondly, since what was proposed at that meeting was been subsequently divided into minor renovations, that were passed at the 4 November 2021 meeting, and remaining matters, which were rejected. Thirdly, since there have been revisions following the June 2020 meeting, as the applicants sought to address matters that had been raised, such as compensation and heritage issues.
- 79 It is necessary to first consider the by-law that was proposed at the meeting held on 4 November 2021.
- 80 The proposed by-law sought approval to (1) renovate an existing bathroom, (2) construct a new ensuite bathroom in bedroom 1, (2) renovate an existing bathroom, (3) relocate the existing laundry, (4) re-open an existing doorway, (5) renovate the kitchen, (6) install new timber external steps, (7) replace the existing plantation shutters, (8) remove an existing internal door and install a new internal door, (9) install new lighting, (10) install ceiling fans in bedrooms, and (11) repair and replace the timber-framed glass roof in the light atrium. (A231 at [25]).
- 81 The form of the proposed by-law (A250-281) included (1) a wording covering five typewritten pages, (2) six A3 pages of plans, (3) a five-page heritage report, and (4) a fifteen-page valuation report.
- 82 In the minutes of that meeting (A291) do no more than record that the proposed by-law was defeated and do not contain any indication of the reasons for that outcome: they only record that the votes cast against were those for the owners of Lots 1 and 2 for which the attending representatives were Mr Bruce

and Dr Nash respectively. They both provided evidence suggesting why they voted as they did at that meeting. Mr Knight also gave evidence relevant to that meeting.

- 83 The oral evidence of Dr Nash gave the Tribunal the distinct impression that he was seeking to put before the Tribunal every reason he could find for opposing the proposed by-law rather than evidence of what were his reasons for voting against that by-law at the relevant meeting. Support for that view is found in matters such as his suggestion, made for the first time in cross-examination, that the relevant plans did not have a north indicator.
- 84 That Dr Nash had a bias against the proposed by-law was suggested by his claim, during cross-examination, that he was not aware that the owners of Lot 3 were taking on a repair and maintenance obligation that would otherwise be a matter for the owners corporation. The Tribunal is unable to accept that Dr Nash considered the proposed by-law so closely prior to or at that 4 November 2021 meeting as to be able to raise all the matters set out in his affidavit without observing that aspect.
- 85 It appears to the Tribunal that the position of Dr Nash at the time of the 4 November 2021 meeting is to be found in the answer he gave in cross-examination when he said that if a simple diagram was provided by Lot 3, showing their desired exclusive use areas, that “*would solve the problem tomorrow*”. That answer, which was consistent with what was said by Mr Bruce, will be referred to as the narrow basis for rejection.
- 86 However, for the sake of completeness, the Tribunal considers below each of the reasons suggested by Dr Nash and Mr Bruce in their affidavits relevant to the reasons for the decision made at the meeting held on 4 November 2021. The six additional reasons given by Dr Nash followed by the four additional reasons given by Mr Bruce, which will be referred to as the broad basis, may be summarised as follows:
- (1) That the words used to describe exclusive use were too broad.
 - (2) That exclusive use was sought for the light atrium, the door to the courtyard, the French doors, the kitchen windows and the door from the bathroom.

- (3) Ambiguity in relation to the area covered by the valuation and the comparable sales used by the valuer.
- (4) Installed cabling was unauthorised and unsightly.
- (5) Lack of specification in relation to a pipe outside a door near the clothes line.
- (6) The need for a diagram to indicate the areas of common property sought for exclusive use.
- (7) The plans were inaccurate and misleading.
- (8) The potential for exclusive use of the courtyard adjacent to Lots 1 and 3.
- (9) People using the French doors being able to look into Lot 1.
- (10) Exclusive use of the light atrium would impact on Lot 1.

87 The evidence of Mr Knight was that the reasons given at the meeting on 4 November 2021 were that (1) there were two proposals because the 1 June 2020 proposal had not been finalised and that (2) the areas of common property for which the applicant sought exclusive use had not been indicated. The second reason is consistent with what was said by both Dr Nash and Mr Bruce.

88 The first reason cannot be considered a reasonable basis for refusal since the evidence of Mrs Bayes was that what she said at the 1 June 2020 meeting included that work requiring an ordinary resolution (ie minor renovations) and work requiring a special resolution (ie a common property rights by-law) should be separated. It would be a perverse finding if the Tribunal were to consider it reasonable to refuse the 4 November 2020 by-law which was amended in response to a complaint from a lot owner at the 1 June 2020 meeting. Lot owners cannot complain on the basis that a change should be made and then complain when the change they sought is made.

89 In oral submissions for the respondents, there was no reference to material other than the affidavit evidence other than an additional submission made by the solicitor for the respondents who made a variety of criticisms of the valuation.

90 The first was that it did not satisfy the requirements set out in *Makita*. However, that decision relates to expert evidence given in proceedings before a court and even though that decision is relevant to expert evidence given in the

Tribunal, where the rules of evidence do not apply, this valuation was not prepared for legal proceedings but for consideration at a meeting of an owners corporation.

- 91 Other criticisms made for the first time in closing submissions rise no higher than reasons advanced by the respondents' solicitor at the close of the hearing and do not constitute reasons upon which the proposed by-law was rejected on 4 November 2021.
- 92 The Tribunal does not accept the evidence of Mr Nash and Mr Bruce that each of the matters contained in their affidavits completed after the 4 November 2021 meeting record matters upon which their decision at that meeting was based. Their evidence presented as providing the Tribunal with whatever reasons could be advanced rather than reasons upon which they voted at that meeting.
- 93 The fact that Dr Nash and Mr Bruce both suggested the same, single reason during oral evidence, consistent with what was said by Mr Knight to have been the reason warrants a finding in favour of what has been referred to as the narrow basis, ie that reason why the by-law proposed at the 4 November 2021 meeting was rejected was that it was considered to not set out the areas of common property for which the applicants sought exclusive use.
- 94 In the text of the by-law, the definition of "*Exclusive Use Area*" (on A252) was linked to the payment of compensation of \$14,500 and the accompanying valuation clearly indicated (on A267A) that amount related to an area which was the area on the plan (at A256) on which there appear the words "*Glass roof over*", and not to the area on which there appear the words "*Existing light well*".
- 95 While that area may not have been marked in red on the copy of the valuation report provided to Dr Nash, it was so shown in the original. Further, beneath the plan on which that area was indicated, there appear the words: "*Portion of strata area shown in red*" and it is reasonable to expect anyone interested in the area indicated to have inquired at the meeting as to what area was so indicated, if they were in any doubt as to what area was indicated.

- 96 It was therefore sufficiently clear that the only area for which the applicants sought exclusive use was that area, which was an area which had been appropriated by a previous owner of Lot 3. In relation to that area, the proposed work included (A251 at (w)): “*removal of the existing timber framed glass roof near the entry door and installation of a steel framed glazed roof in its place*”. The evidence revealed that what was proposed was “*to replace the existing leaking timber structure with a durable steel structure to match*” ((A352 at [17]) with the same colour paint finish.
- 97 It is convenient to here note that, while the strata plan (A18) shows a single area as “LA” in between Lot 1 and Lot 3, the plan provided to the 4 November 2021 meeting (A256) clearly indicated two distinct areas: an area described as “Glass roof over” and an area described as “*Existing light well*”. The valuation clearly shows those two distinct areas (A267A), with exclusive use only sought for the former area, ie the area described as “*Glass roof over*”. Further, the photos provided to the Tribunal make it clear there are two distinct areas: the photos at A373 and A376 shows both areas, the photo at A374 shows the area for which exclusive use was sought, and the photos at A376-378 and A380-385 show the area for which no exclusive use is sought.
- 98 Accordingly, on the narrow basis, the Tribunal considers the by-law proposed at the 4 November 2021 meeting of the owners corporation was unreasonably refused.
- 99 If it be considered that the by-law proposed at that meeting should be assessed by reference to what has been termed the broad basis, the Tribunal remains of the view that the refusal was unreasonable by reason of the matters set out below, using the same numbering to refer to the ten matters listed above.
- (1) That the words used to describe exclusive use were too broad. For the reasons set out above, this claim is rejected.
 - (2) That exclusive use was sought for the light atrium, the door to the courtyard, the French doors, the kitchen windows, and the door from the bathroom. Exclusive use was only sought for an area that defined in clause 3 of the wording and was clearly indicated on the first page of the valuation report. That area was plainly not the area described on the relevant plan (A256) as “*Existing light well*”.

- (3) Ambiguity in relation to the area covered by the valuation and the comparable sales used by the valuer. There is no ambiguity in the area covered by the valuation. The complaint in relation to the use of comparable sales was to the use of properties in New South Head Road. Apart from the sales of Lot 3 to the applicants, the comparable sales listed in the valuation comprised four properties in New South Head Road and four properties not so situated. However, in his report, the valuer noted "*although some of the sales evidence could not be considered as directly comparable to the subject property, they are of some assistance ...*" which words suggested the matter suggested by Dr Nash was taken into consideration.
- (4) Installed cabling was unauthorised and unsightly. As this reason appears to related to work that has been done rather than to work that was proposed to be done if the subject by-law was passed, it is difficult to see how this adds a reasonable basis to Dr Nash's opposition.
- (5) Lack of specification in relation to a pipe outside a door near the clothes line. This horizontal pipe, depicted in photos such as the one at A356, will plainly require attention since the door shown in that photo is intended to open out from Lot 3, as is clearly indicated on the plans at A256. That work is covered by the wording of the proposed by-law in paragraph (l) of clause 1 which summarised the proposed work to "*permit the existing door to be functional and replacement of the external door as necessary*". It is noted, from clause 4.1 that Council approval and a report from a structural engineer will be required.
- (6) The need for a diagram to indicate the areas of common property sought for exclusive use. No such diagram is required as the diagram included in the valuation sets out the only area for which exclusive use is sought.
- (7) The plans were inaccurate and misleading. If this reason is based on the lack of a north indicator, it is rejected. If it is based on a lack of measurements, it is noted that not only did the plans include measurements (see A256) but also each of the plans (A256-261) was drawn on a 1:50 scale which enabled any desired measurement to be obtained. To the extent that this reason is based on the plans presented to the 9 December 2021 meeting, that is considered below.
- (8) The potential for exclusive use of the courtyard adjacent to Lots 1 and 3. There is no potential exclusive use of that courtyard by Lot 3. The only encroachment on that courtyard would be the installation of steps to achieve compliance with the BCA and such steps can be used by any lot owner or occupier. Further, the unchallenged evidence is that Lot 4 has a door and steps leading to the same courtyard (A353 at [23]).
- (9) People using the French doors would be able to look into Lot 1. Assuming a person sought to look into Lot 1, prior to 4 November 2021 they could do so from either the floor of Lot 3, just inside the French doors, or from the courtyard, just outside those doors. The difference created by a person being able to stand on a step a small distance outside the French doors and an even smaller distance lower than the

floor of Lot 3 is not considered such as to provide a reasonable basis for opposition to the by-law. It is noted that, in this courtyard area, there is potential for any person to look into Lot 3 as well as into Lot 1.

- (10) Exclusive use of the light atrium would impact on Lot 1. No exclusive use was sought for what may be termed the uncovered atrium area: only for the covered atrium area. The proposed by-law would have no impact on the uncovered atrium area: the position would be the same before and after 4 November 2021 if the by-law had been approved. It appears this objection is based on the incorrect view that the area for which exclusive use is sought included the area referred to on the plan at A256 as "*Existing light well*", ie the uncovered atrium area.

- 100 Other matters were raised during the hearing. The noise during construction was raised but, even assuming there would be some impact on the owners or occupiers of Lots 1 and 2, that would be for a limited time, and it is difficult to see how any such noise would be significantly greater than the noise that would arise if work was carried out on a neighbouring property. By reference to the strata plan (A18) it also appears that work would be well away from Lot 1 and Lot 2.
- 101 There was also a suggestion that there was encroachment on common property, that a map should be provided to show the extent of any encroachment on common property, and that shaded areas in a plan (A256) indicated areas of encroachment. However, the shaded area outside the French doors only showed where the step would be located and the L-shaped area around the perimeter of the kitchen was only the result of the installation of four supports, with a minimal protrusion, within the area under the eaves.
- 102 Any suggestion that the proposed re-use of a doorway to the area where the clothes line is situated would enable the applicants to have exclusive use of that area is rejected: the use of that door would do no more than provide the applicants with easier access to that area.
- 103 The plans provided appear to be sufficient and are not such as to reasonably require plans to be prepared by a surveyor. It is noted that, having had plans prepared by JJ Drafting, the applicants were requested, at the 1 June 2020 meeting, to have plans prepared by an architect which they did. That request was said to have been made by Ms Bayes ([10] on A142). To then suggest that

plans prepared by a surveyor are required rather than an architect is what is commonly referred to as 'shifting the goalposts'.

104 Any suggestion that a structural engineer only had to be used by the applicants if the strata committee so required is rejected: the proposed by-law provided that the applicant *"must obtain and provide to the Owners Corporation ... the opinion of a structural engineer (reasonably acceptable to the strata committee) to the effect that if the Works are carried out in a good and workmanlike manner in accordance with the Plans and the description in clause 1, the Works will not adversely affect the structural integrity of the building or any part thereof."* Plainly the only role of the strata committee is to approve the structural engineer the applicants intend to use and the provision of a report before the work is commenced, is mandatory.

105 It was said that the by-law does not satisfy s 142 of the SSMA which provides as follows:

For the purposes of this Act, a common property rights by-law is a by-law that confers on the owner or owners of a specified lot or lots in a strata scheme:

(a) A right of exclusive use and enjoyment of the whole or any specified part of the common property, or

(b) special privileges in respect of the whole or any specified part of the common property (including, for example, a licence to use the whole or a specified part of the common property in a particular manner or for particular purposes,

or that changes such a by-law.

106 Having reviewed the entire by-law, the Tribunal does not consider its words are too broad, noting that what falls within the words *"specified part of the common property"* in the proposed by-law is not confined to the words appearing on the first five pages but includes the plans.

107 Further, the Tribunal is satisfied that the proposed by-law, if made and registered, would provide sufficient clarity not only for existing lot owners but also for future lot owners.

108 Since the Tribunal considers the by-law proposed at the 4 November 2021 was unreasonably refused, either on the narrow basis or the broad basis, it is therefore necessary to consider the matters set out in s 149(2) of the SSMA.

- 109 As to the interests of all lot owners, there is minimal impact from the proposed works. It is difficult to see any impact on Lots 4, 5 and 6 on the floor above. No real impact on either Lot 1 or Lot 2 was suggested by the evidence or submission: there being no impact in relation to the existing light well and no material impact from the addition of steps outside the French doors. Effects of the proposed by-law include that the owners corporation would be indemnified in relation to that work and that the applicants would shoulder the repair and maintenance burden arising from the areas of common property affected by that work.
- 110 It is noted that the applicants have taken steps to address concerns expressed at the meeting held on 1 June 2020 which include the payment of compensation and heritage considerations. Further, by providing for exclusive use rights in relation to the area covered by a glass roof and for compensation, the by-law will regularise what appears to have been unauthorised work undertaken by a previous owner of Lot 3.
- 111 In relation to the rights and reasonable expectations of the applicants as the owners of Lot 3, it is reasonable for a lot owner to be able to renovate a lot.
- 112 Having regard to those matters, the Tribunal is satisfied that the applicants are entitled to have an order made in their favour under s149(1) in relation to the by-law that was proposed by them at the meeting held on 4 November 2021.
- 113 Next the Tribunal considers the by-law that was proposed at the meeting held on 9 December 2021.
- 114 The proposed by-law only sought approval to (1) renovate an existing bathroom, (2) construct a new ensuite bathroom in bedroom 1, and (3) relocate the existing laundry (A232 at [36]). The description of the work covered the first three of the six sections in clause 1 of the by-law proposed to the 4 November 2021 meeting (A301-302 cf A250-252). As a result, the December 2021 proposal was for a scope of work reduced from what was proposed in November 2021.
- 115 The form of the proposed by-law (A301-306) included (1) a wording covering four typewritten pages, and (2) two A4 pages of plans.

- 116 Again, the minutes of that meeting (A312) do no more than record that the proposed by-law was defeated and do not contain any indication of the reasons for that outcome: they only record that the votes cast against were those for the owners of Lots 1 and 2 for which the attending representatives were Mr Bruce and Dr Nash respectively.
- 117 The submissions of the parties did not contain any reference to material other than the affidavit evidence. The affidavits of Dr Nash dated 8 April 2021 and Mr Bruce dated 7 April 2022 do not provide separate reasons for their opposition to the 4 November 2021 and 9 December 2021 proposed by-laws.
- 118 However, an additional consideration in relation to the by-law that was put to the meeting held on 9 December 2021 is that a solicitor was present to provide advice and answer questions. His next day letter (A318) serves to provide evidence which indicates that he advised the meeting he had been instructed by the strata committee for the purpose of providing independent legal advice.
- 119 In relation to the proposed by-law, he wrote (at A321):

I confirmed to the meeting that special privilege/exclusive use by-laws can be a “lawyers picnic” in that such by-laws are easy enough to pick apart under challenge in the NS W Civil and Administrative Tribunal (NCAT). That said: I confirmed to the meeting I considered the by-law to be an appropriate document because:

- (a) The common property over which exclusive use was being obtained was that part of the common property “[a]ffected by the building and refurbishment works” set out in the scope;
- (b) The scope of works had the appearance of accurately describing the proposed works also set out in drawings attached to the proposed by-law;
- (c) The by-law incorporated conditions which rendered the proposed works the owners['] ongoing maintenance responsibility;
- (d) The O had the benefit of an indemnity against any ongoing damage being caused by the works to the common property.

On balance, I considered the by-law to be fair and reasonable. The proposed by-law imposed relevant terms and conditions. The works were described.

The Chair confirmed the owner of Lot 3 had signed a consent to be bound by the terms and conditions set out in the proposed by-law.

The motion failed because Lots 1 & 2 were of the view there was an inadequate description of the impact of the proposed works on the common property.

- 120 Accepting that evidence, from a practising solicitor who was independent of the owners of Lots 1,2 and 3, the Tribunal finds that the only reason why the proposed by-law was refused was that there was an inadequate description of the impact of the proposed works on the common property.
- 121 Having reviewed the proposed by-law, and having considered both the evidence and the submissions, the Tribunal is satisfied that there was an adequate description of the proposed work. Considered on this narrow basis, the Tribunal determines that there was an unreasonable refusal of the by-law that was proposed at the meeting held on 9 December 2021.
- 122 While the Tribunal considers that sufficient to warrant a finding of unreasonable refusal in favour of the applicants, the reasons set out above for what has been termed the broad basis are also considered, using the same numbering.
- (1) That the words used to describe exclusive use were too broad. The words used were sufficient to indicate that any right of exclusive use or enjoyment was confined to the common property affected by the proposed works.
 - (2) That exclusive use was sought for the light atrium, the door to the courtyard, the French doors, the kitchen windows, and the door from the bathroom. This is not applicable as the light atrium was not included.
 - (3) Ambiguity in relation to the area covered by the valuation and the comparable sales used by the valuer. The valuation is not relevant to this proposal.
 - (4) Installed cabling was unauthorised and unsightly. As indicated above, it is difficult to see how work that has been done provides a reasonable basis for opposing work that is proposed to be done.
 - (5) Lack of specification in relation to a pipe outside a door near the clothes line. This is irrelevant since the work proposed in December 2021 did not include re-establishing the door opening outward from the laundry.
 - (6) The need for a diagram to indicate the areas of common property sought for exclusive use. The wording and plans are considered sufficient.
 - (7) The plans were inaccurate and misleading. It was suggested that the plan at A305 was misleading because there were no words accompanying the two arrows outside the laundry door. However, the absence of those words, which arises from that page being an enlarged extract from the plan at A256, does not detract from what was proposed since the work proposed in December 2021 did not include any work on the laundry door.

- (8) The potential for exclusive use of the courtyard adjacent to Lots 1 and 3. Again, this is not applicable since the December 2021 proposal did not involve any work in or around the French doors.
 - (9) People using the French doors being able to look into Lot 1. As just indicated, this aspect is also irrelevant.
 - (10) Exclusive use of the light atrium would impact on Lot 1. Apart from the fact that there is no such impact, this potential reason does not apply since the December 2021 proposal did not involve the light well area.
- 123 The Tribunal is satisfied that the three-page wording of the proposed by-law, when combined with the two pages of plans, is sufficiently specific as to the common property affected by the proposed works. Again, the Tribunal is satisfied that the proposed by-law, if made and registered, would provide sufficient clarity not only for existing lot owners but also for future lot owners.
- 124 In such circumstances, as was the case with the by-law proposed at the 4 November 2021 meeting of the owners corporation, the Tribunal considers the by-law proposed at the 9 December 2021 meeting of the owners corporation was unreasonably refused in that it was not guided by reasonable good sense and was not based on or in accordance with reason or sound judgment.
- 125 It appears that the reason advanced in opposition to the by-law proposed at the November 2021 meeting, namely that the areas of common property for which exclusive use was sought by the applicants, had changed by the time of the December 2021 meeting to the areas of common property affected by the proposed by-law. Had the opposition based on exclusive use been maintained then, given the absence of the area described as "*Glass roof over*", the opponent would have no longer had any reason to oppose the December 2021 proposal. That appears to be another 'shifting of the goalposts' which is consistent with the owners of Lots 1 and 2 being determined to oppose any proposal put forward by the applicants, as the owners of Lot 3, rather than to consider the applicants' proposals on their merits.
- 126 Having determined that the December 2021 proposal was refused, it is necessary to again consider the matters set out in s 149(2) of the SSMA. As to the interests of all lot owners, the work proposed (namely to construct an en suite bathroom in bedroom 1, to renovate the existing bathroom, and the

relocated the existing laundry) does not appear to impact on other lot owners beyond any short-term, temporary construction noise.

- 127 In relation to the rights and reasonable expectations of the applicants as the owners of Lot 3, the creation of an en suite for the master bedroom and the renovation of the existing bathroom and laundry are proposals which carry a reasonable expectation of approval, especially when the proposed by-law includes protections for the owners corporation and other lot owners, including an indemnity, requirement of both Council approval and a report from a structural engineer, and an obligation on the part of the owners of Lot 3 to maintain and repair the installed additions and alterations.
- 128 Having regard to those matters, the Tribunal is satisfied that the applicants are entitled to have an order made in their favour under s149(1) in relation to the by-law that was proposed by them at the meeting held on 9 December 2021.
- 129 It remains to consider the exercise of the Tribunal's discretion as to whether an order should be made, which arises because of the inclusion of the word "may" in s 149(1). Having decided that there has been unreasonable refusal of a common property rights by-law and having decided that a consideration of the matters set out in s 149(2) favours an order being made, the Tribunal is unable to discern any reason why an order should not be made in favour of the applicants.
- 130 The question which arises in this case is which of the proposed by-laws should be made: the wider by-law put to the 4 November 2021 meeting, or the narrower by-law considered at the meeting held on 9 December 2021.
- 131 As the scope of work proposed at the December 2021 meeting was only part of what was proposed at the November 2021 meeting, the Tribunal considers the applicants are entitled to have a by-law made in the form that was presented to the earlier of those meetings, pursuant to s 149(1) of the SSMA, and to have that by-law registered, pursuant to s 246.

Costs

- 132 Since costs orders have previously been made in the litigation between these parties, it is reasonable to anticipate an application for costs and the orders will

provide an opportunity for written submissions to be filed and served. Such submissions should address the question of whether it is accepted that costs can be determined on the papers, without the need for a hearing.

Orders

133 For the reasons indicated above, the Tribunal makes the following orders:

- (1) Pursuant to s 149(1) of the *Strata Schemes Management Act 2015*, the Tribunal makes the common property rights by-law tabled by the applicants at the meeting of the first respondent held on 4 November 2021.
- (2) Pursuant to s 246 *Schemes Management Act 2015*, within 28 days (ie on or before 17 August 2022) the first respondent is to do all things necessary to register that by-law.
- (3) Any submissions in support of an application for costs (not exceeding five pages), together with any supporting evidence, are to be filed and served by 3 August 2022.
- (4) Any submissions in response to any such application (not exceeding five pages), together with any supporting evidence, are to be filed and served by 17 August 2022.
- (5) Any submissions in reply (not exceeding two pages) are to be filed and served by 24 August 2022.
- (6) Any such submissions should indicate whether the party accepts that costs should be determined on the papers, ie without the need for a further hearing.

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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