Civil and Administrative Tribunal
New South Wales

Case Name(s):	Knight v The Owners – Strata Plan 208 & Anor
Medium Neutral Citation:	[2020] NSWCAT
Hearing Date(s):	11 November 2020
Date of Decision:	21 January 2021
Jurisdiction:	Consumer and Commercial Division
Before:	S Thode Senior Member
Decision:	The Tribunal orders: 1. Pursuant to s149(1)(a) of the Strata Schemes Management Act 2015 (NSW) to make the common property rights by-law tabled by Lot 3 at the Extraordinary General Meeting held on 1 June 2020. 2. Pursuant to s 246 of the Strata Schemes Management Act 2015 (NSW) for the respondent to do all things necessary to register the by-law referred to in order one above on the common property certificate of title.
Catchwords:	Strata – Unreasonable refusal of the making of a by-law– s149
Legislation Cited:	Strata Schemes Management Act 2015
Cases Cited:	*The Owners – Strata Plan 33591 v Macey's Group Pty Ltd [2020] NSWCATCD; Capcelia v The Owners – Strata Plan 48887 [2019] NSWCATCD 2; Ainsworth v Albrecht [2016] HCA 40; (2016) 261 CLR 167 The Owners – Strata Plan No 69140 v Drewe [2017] NSWSC 845; The Owners-Strata Plan No. 12289 v Donaldson [2019] NSWCATAP 213; Gelder v The Owners – Strata Plan No 38308 [2020] NSWCATAP 227*
Category:	Principal judgment

Parties:	Alexander and Cleo Knight (Applicants) The Owners – Strata Plan 208 (First Respondent) Anthony Bruce (Second Respondent)
Representation:	Mr T Bacon (Applicants) Mr D Sachs (Respondent);
File Number(s):	SC 20/26294
Publication Restriction:	Nil

REASONS FOR DECISION

1 By application filed on 22 June 2020 the applicants seek an order pursuant to s149 of the Strata Schemes Management Act 2015 (the Act) that the by-law described and contained in the minutes of the extraordinary general meeting of the owners corporation held on 1 June 2020 are made and prescribed as changes to the by-laws of Strata Plan 208.

2 That the owners of Strata Plan 208 promptly do all acts necessary to register the by-law pursuant to section 246 of the Act.

3 An order for costs.

4 The respondents oppose the application.

Background facts

5 The applicants are the registered proprietors of xx Ginaghulla Rd, Bellevue Hill. The applicants applied to carry out additions and alterations to their lot to the ground floor unit and the owners corporation's refused to permit those renovations. The strata title scheme located in Bellevue Hill comprises 6 residential lots and the building is a Georgian mansion built around 1860 that has been converted and subdivided into separate residential units. Each lot has an equal unit entitlement. The applicant submitted a by-law to the owners corporation together with a consultant heritage report and plans and drawings from an architect for consideration. The owners corporation defeated the by-law 3 votes to 2 (one lot owner was under financial and could not cast a vote).

6 The applicants submit the owners corporation acted unreasonably in defeating the special resolution motion for the by-law. The scope of the work is set out in the by-law submitted by the applicants to the owners corporation. It includes works to an ensuite bathroom, works to renovate the existing bathroom, works to relocate the existing laundry, works to renovate the kitchen, works to install an air-conditioning unit to service both bedrooms, flooring works and other words including the installation of new timber steps

outside the 2 rear doors of the living/dining room and installation of rails and ceiling fans.

The applicants' submissions

7 I refer to the applicants' written submissions dated 11 September 2020. It is the applicants' submission that they put forward the by-law at no less than 3 general meetings namely on 24 March 2020, 1 June 2020 and 6 August 2020. On each occasion the by-law was defeated with the owners of lots one and 2 of the property, Mr Anthony Bruce and Ms Liza and Stephen Rybak and Mr Stephen Nash opposing the motion.

8 At the first general meeting on 24 March 2020 the parties all agreed to an adjournment to enable lot 3 to obtain legible plans. The applicants were also asked to address heritage concerns because the mosaic in lot 3 were a unique feature of the premises; the previous plans tabled at the last EGM were illegible; concerns were expressed about a sliding window.

9 At the general meeting of 1 June 2020 Mr Nash stated that the owners of lot 3 had made significant departures from the plans previously proposed and had appointed a new architect; the owner of lot 1 advised they had insufficient time to seek architectural advice in relation to the new plan submitted by MCK Architects. They would like MCK Architects to include measurements on the plans; the owner of lot 1 questioned the accuracy of the measurements of the plans.

10 At the general meeting on 6 August 2020, for the first time, the issue was raised whether the plans proposing the alterations and additions were within title or whether common property is affected. The owner of lot 4 advised that he had renovated his property and as long as the proposed works did not encroach on common property he had no problems with the plans as they stood at 6 August 2020.

11 It was noted that the MCK Architects plans provided on 15 July with partial measurements did not include the glass roofed area or atrium which is

common property. The glass roofed area refers to a common property atrium that is solely within the confines of lot 3. No other owner has access to it.

12 It is submitted that in deciding whether the respondent's refusal was unreasonable, the term unreasonable is to be understood as it would be in the common everyday meaning of that word, being not endowed with reason, not guided by reasonable good sense, not based on or in accordance with reason or sound judgment, immoderate, capricious or exorbitant. The test of what is reasonable is an objective test, based upon a review of what was before or reasonably available to the owners corporation or owners at the time they refused consent and guided by the reasons for refusal provided, as evidenced by the meeting minutes (see *The Owners – Strata Plan 33591 v Macey's Group Pty Ltd [2020] NSWCATCD* and *Capcelia v The Owners – Strata Plan 48,887 [2019] NSWCATCD 27*).

13 The applicants submit that the bases on which the respondent refused the by-laws were all unreasonable:

(1) the plans were too small;

(2) there are heritage concerns including in relation to the mosaics in the enclosed verandah,

(3) the affixation of air-conditioning pipes and ducting to the common property,

(4) the sliding windows to replace existing windows,

(5) details about the replacement floor boards;

(6) a misunderstanding regarding the role of a draughtsman and the role of an architect and the differences between those plans;

(7) the lot owners' wish to seek architectural advice in relation to 'new' plans and a five week timeframe for the owners to seek independent

investigations and architectural advice to allow them to read and understand the plans submitted in March 2020.

14 It was also submitted that it was unreasonable of the owners corporation to compel the applicants to explain the difference between a special resolution and an ordinary resolution and that lot owners seeking the making of a special by-law are not required to provide legal advice to lot owners or the owners corporation, and in circumstances where the applicants themselves are not lawyers and the scheme has a strata manager.

15 It is submitted that all the concerns raised by the owners at the various meetings were addressed:

(1) An enlarged version of the plans was provided for ease of review;

(2) heritage concerns were addressed pursuant to report by Mr Danies of “Urbis” dated 12 May 2020.

(3) The report found that the by-law seeks to introduce floating floor boards and floor structure over existing mosaic tiled floors within an enclosed verandah of lot 3. This is an acceptable low-impact and fully reversible change which would protect the existing mosaic tiles which are noted to be less elaborate than the tiles of the main entrance to the building and from a later period than the original construction of the dwellings.

(4) The drawings clearly indicate the proposed location of new air-conditioning conduits and ducting which would be located out of prominent view and on a section of wall which has already been altered as a result of previous fixings;

(5) the sliding windows would be located on an area of the building out of public view;

(6) reversible floating timber floors will allow for full retention and protection of existing timber floor boards;

(7) the proposed works shown in the architectural drawings indicate a respect for the heritage significance of the building.

16 It is submitted that the objections were unreasonable and despite the plans being left in the foyer for a further period of 5 weeks to allow for independent investigations to be made the respondents did not seek such advice and did not review the plans.

17 It is submitted that the by-law was not loosely worded and it was clearly evident from the terms of the by-law that the impact it would have on other lots' common property and proprietary interest on lots was either nil or would impact in a beneficial sense via protection or improvement of the property. It is submitted that the unreasonableness of the refusal must be assessed by consideration of the effect that by-law may have on the interests of all owners in the use and enjoyment of their lots and common property and the rights and reasonable expectations of the applicants. It was submitted that the application for their internal works to the applicants' lot does not and could not affect the respondent's use and enjoyment of their lots.

18 To the extent that the by-law affects common property, such proposal is of benefit to the respondents as it has the effect of relieving the respondents from their responsibility to repair and maintain such property, shifting that responsibility to the applicants.

19 In light of the negligible impact the by-law has on the respondents use and enjoyment of their lots and common property especially when weighed against the applicants' reasonable expectations to be able to undertake an internal update and refresh in what is an ageing property, the Tribunal should find that upon an objective assessments the respondent's refusal was unreasonable and in the sense it was "not endowed with reason nor guided by

reasonable good sense, not based on or in accordance with reason or sound judgement, immoderate capricious or exorbitant".

The respondent's submissions

20 It is submitted that lots 1 and 2 do not oppose lot 3 renovating the unit and having an appropriate by-law to regulate that work. It is submitted that the owners of lots 1 and 2 oppose the grant of exclusive use rights over areas of common property without clearly describing the common property in the by-law or to owners at meetings and without making any offer of compensation; the grant of authority to remove heritage tiles when that is contrary to advice from lots 3's own heritage expert; the inadequate way in which the works to the kitchen are dealt with and the ambiguity and confusion that this will likely create; the failure to properly and sympathetically address the way in which some elements of the work may detrimentally affect the amenity of their lots; the failure to require reports and certification to cover structural elements of the building, waterproofing works and acoustic issues; the failure to prescribe the specific works and materials handling plan that will govern works that will take place over four months in an occupied building; the fact that the wording of the by-law makes it uncertain what areas of common property will be subject to exclusive use and how the works can be expanded or changed. It is submitted, for example, that lot 3 could assert that it has exclusive use over the whole of the light atrium.

21 The applicants would not have reasonable expectation that they would be entitled to have exclusive use of areas of common property comprised in the light atrium; the courtyard area outside the living room; the utilities area outside the proposed or leading from the main bedroom; the area extending from the kitchen; and other areas that may be affected by the works, without having proper regard to the interests of other owners and that use of that common property and without offering any compensation.

22 It is submitted that the rights affected by common property rights by-law are proprietary. The owners corporation holds the common property on behalf of

all lot owners. The grant of exclusive use of common property to a particular lot owner must adversely affect the property rights of the owners corporation and therefore all lot owners see *Ainsworth v Albrecht [2016] HCA 40; (2016) 261 CLR 167 at 186-187 [60] – [64].*

23 It is submitted that the applicants acquired lot 3 without the benefit of the exclusive use now proposed in the by-law. The other owners acquired their lots with the benefit of all rights in relation to the common property. The grant of exclusive use will significantly increase the floor area of lot 3 and therefore improve its value. Without compensation that would be a windfall to the applicants at the expense of the owners corporation.

24 The common property that is proposed to be the subject to exclusive use is not merely common property within lot 3. It also is outside the boundary of the lot. It is submitted that “common sense and general knowledge of the world says that the land must have some value”. There is no reason to suppose that the exclusive use of the light atrium is required in order to enable the applicants to carry out renovations to their lot

25 It is not irrational or lacking in sound judgement for the owners corporation or lot owners to decline to give exclusive use rights over common property to a lot owner without compensation. The text of the by-law expressly states that tiles will be removed from the verandah. Even if the applicants do not intend to remove the mosaic tiles, the by-law would permit any subsequent owner to do so.

26 It is not irrational for the owners corporation or lot owners to be concerned to preserve heritage elements of the common property in a heritage significant building.

27 It is not irrational or lacking in sound judgement for the owners corporation to require that the applicants properly measure and identify the areas of common property that are sought to be appropriated by the by-law.

Legislation

Section 149 of the SSMA

28 Section 149 of the SSMA provides:

> 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—
>
> ...
>
> (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
>
> ...
>
> (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.
>
> ...
>
> (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.

29 It is common ground that the by-law in question is a common property rights by-law, within the definition of that term in s 142 of the SSMA.

30 Section 149(1)(b) provides the Tribunal with a discretion to make an order prescribing a change to a common property rights by-law if the Tribunal first

makes a particular finding. In the present case, the requisite finding is a finding that the owners corporation has unreasonably refused to consent to the terms of a common property rights by-law.

31 If such a finding were to be made, the Tribunal's discretion to make an order would be enlivened. In exercising that discretion, the Tribunal must have regard to the matters set out in s 149(2), namely (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.

32 It is common ground that the applicant bears the onus of proving that the respondent's refusal of consent was unreasonable.It is also common ground that "unreasonable" should be regarded as meaning "not endowed with reason, not guided by reasonable good sense, not based on or in accordance with reason or sound judgment, immodest, capricious or exorbitant": see Olive Grove Investment Holdings Pty Ltd v The Owners-Strata Plan No 5942 [2015] NSWCATAD 120 at [67]; Capcelea v The Owners-Strata Plan No 48887 [2019] NSWCATAD 27 at [31]. In The Owners-Strata Plan No 69140 v Drewe [2017] NSWSC 845, Latham J said at [43]: "The onus lay upon the first defendant to establish that these grounds had no rational basis in that they were not guided by sound judgment or good sense".

33 The determination of whether there has been unreasonableness is to be made by reference to the circumstances at the time of the refusal to give consent: The Owners – Strata Plan No 69140 v Drewe [2017] NSWSC 845 at [27],[41]; The Owners-Strata Plan No. 12289 v Donaldson [2019] NSWCATAP 213 at [88],[101] and these reasons were discussed in the recent decision of Gelder v The Owners – Strata Plan No 38308 [2020] NSWCATAP 227.

Consideration

34 For the reasons that follow I am of the view the owners corporation unreasonably refused the making of an exclusive rights by law. The applicant

bears the onus of proof in establishing that the refusal was unreasonable. It is not incumbent upon the respondent to establish that it acted reasonably and with good judgment. I interpret s149(1)(a) as requiring a determination as to whether the owners corporation's refusal of consent to the making of a common property rights by-law was unreasonable under s 149(1). The starting point of my enquiry must be the owners corporation's reasons for the refusal of the making of the by law at the time of refusal, and not, the reasons for the refusal that the owners corporation articulated at the time of the hearing and after careful preparation of legal submissions.

35 The review must be based on the material available to the owners at the time of their refusal and not on the material available to the Tribunal at the time of hearing. The authorities have approached the review as one of what was before, or reasonably available to the owners corporation at the time they refused consent to the by-law or the common property alteration.

36 The reasons for the owners' refusal was helpfully outlined in the minutes of meetings taken at the three general meetings. The reason for refusal was summarised in paragraph 13 above and as set out in a table of the applicants' written submissions on pages [9] to [12]:

(1) the plans were too small;

(2) there are heritage concerns including in relation to the mosaics in the enclosed verandah,

(3) the affixation of air-conditioning pipes and ducting to the common property,

(4) the sliding windows to replace existing windows,

(5) details about the replacement floor boards;

(6) a misunderstanding regarding the role of a draughtsman and the role of an architect and the differences between those plans;

(7) the lot owners' wish to seek architectural advice in relation to 'new' plans and a five week timeframe for the owners to seek independent investigations and architectural advice to allow them to read and understand the plans submitted in March 2020.

37 The owners did not refuse approval because of the appropriation of common property referred to in these reasons as parts or part of "the atrium". It appears that the reasons for refusal relied upon at the hearing were very different and distinct to those reasons for refusal offered by the respondent at the three meetings as outlined in the respective minutes of meeting. The reasons for refusal of the making of the exclusive rights by-law relied upon at the hearing of the application were as follows:

(1) The applicants failed to describe the common property in the by-law or to owners at meetings and failed to make an offer of compensation;

(2) the inadequate way in which the works to the kitchen are dealt with and the ambiguity and confusion that this will likely create;

(3) the failure to properly and sympathetically address the way in which some elements of the work may detrimentally affect the amenity of their lots;

(4) the failure to require reports and certification to cover structural elements of the building, waterproofing works and acoustic issues;

(5) the failure to prescribe the specific works and materials handling plan that will govern works that will take place over four months in an occupied building; the fact that the wording of the by-law makes it uncertain what areas of common property will be subject to exclusive use and how the works can be expanded or changed.

(6) The possibility that lot 3 could assert that it has exclusive use over the whole of the light atrium.

38 The reasons for refusal advanced at the hearing divert significantly from those provided and as minuted at the three general meetings. I agree with the submissions of the applicants that the applicants addressed each of the concerns as posed during the meetings and that each of the concerns were adequately and completely addressed.

39 The alterations and additions proposed by lot 3 will result in minor covering of the common property atrium or light well, which is approximately 6 square meters in size, but this was not raised as a concern of the owners corporation until shortly before the hearing.

40 There is no evidence as to the present value of the atrium which is situated entirely within the confines of lot 3. No other lot owner has access to it. The submission made on behalf of the respondent was to the effect that because half of the atrium would be enclosed as part of the alterations, that common property would be appropriated and that the appropriation should attract compensation. The general proposition that common property has a value can be accepted as a matter of common sense and general knowledge of the world. However, I note that the atrium is entirely within the confines of the applicant's lot and in the absence of any evidence provided on behalf of the respondent, the mere submission that the atrium should have a value has no weight and is in my view not sufficient to arrive at a finding that there is some value which should be attached to the atrium. I also note that the atrium is currently in a state of disrepair (see affidavit of Alexander Knight 4 November 2020 page 22) as it leaks and there is some force in the applicant's submission that the light atrium which is not a significant part of common property and requires significant and expensive maintenance which the applicants are proposing to be responsible for and therefore compensation is not required. In any event, none of these issues are of any relevance to the application before me as they were not raised as matters of concern during any of the general meetings.

41 During cross examination the respondent Mr Nash conceded that there were no objection raised in respect of the atrium and that objections in respect of

works to the kitchen played no part in the owners refusal to the making of the by-law. The objections that were raised at the general meetings were addressed and resolved to the best of the applicant's ability. I am satisfied that the alterations and additions imposed by the by-law have a negligible impact on the respondent's use and enjoyment of their lots and common property and I find on the objective assessment of the matter, the respondent's refusal was unreasonable.

42 I note in particular the affidavit of Mr Knight in reply dated 4 November 2020, addressing "properly and sympathetically … the way in which some elements of the work may detrimentally affect the amenity of [the other owners'] lots". Mr Knight deposes, inter alia:

(1) in respect of the alleged encroachment of the kitchen work, there are no cupboards being excavated into a [common property] wall and the kitchen renovation may be classified as minor renovations;

(2) the door which opens onto a patio has been in existence for nearly 50 years and there is no evidence before the Tribunal that the door is "unauthorised", the applicants merely propose to install steps so that the door may be used;

(3) the new sliding windows do not protrude onto common property as they slide;

(4) the French doors in the main bedroom which are said by Mr Nash to "give the owners of lot 3 a right of exclusive use and and enjoyment of the common property outside that door…" do not give right of exclusive use of the outside area and the respondents are merely accusing the applicants of appropriating common property;

(5) noise concerns arising from opening and closing doors are trivial in nature and to demand the applicants obtain "a noise impact study" to

ascertain the noise created by opening doors is an unreasonable demand designed to thwart the renovations of lot 3.

43 Finally I note the respondent submitted that the applicants should seek approval of alterations and additions which were performed by previous owners that were not covered by by-laws. I note the submissions in reply by the applicants at paragraph 1. I am satisfied that there is no merit in the respondent's submission that a subsequent owner is required to regularise unauthorised works of prior owners and I note that there is no application by the owners corporation citing unauthorised works. I note, by way of example, that the enclosure of the verandah may predate the registration of the strata plan in 1962 and as such there was no legal requirement for the making of a by-law covering the verandah enclosure, and nor is there a legal requirement for the current applicants to have those works "retrospectively approved". Insofar necessary I find that the applicants are not required to differentiate between works for which approval is now required, and potential works performed historically by prior owners particularly as any prior renovations are likely to be subsumed by the currently proposed alterations.

44 Accordingly, and for the reasons as set out above, I make the orders in paragraphs one and two above.

Costs

45 Any application for costs by the applicants is to be made by written application containing written submissions (no more than 4 pages) to be filed with the Tribunal and served on the other party on or before 14 days from the date of this decision.

46 Any response to the application for costs is to be made by written submissions (no more than 4 pages) to be filed with the Tribunal and served on the other party on or before 14 days thereafter.

47 Costs submissions are to include reference as to whether the parties consent to the issue being determined on the papers. Subject to the submissions of

the parties, the issue of costs will be determined on the papers pursuant to s 50(2) of the Civil and Administrative Tribunal Act 2013 (NSW).

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

Registrar