Civil and Administrative Tribunal
New South Wales

Medium Neutral Citation:	**Olive Grove Investment Holdings Pty Ltd v The Owners-Strata Plan No 5942 [2015] NSWCATCD 120**
Hearing dates:	9 September 2015
Decision date:	14 October 2015
Jurisdiction:	Consumer and Commercial Division
Before:	J A Ringrose, General Member
Decision:	1. The appeal is dismissed pursuant to s. 181 of the Strata Schemes Management Act 1996 and the Order of the Adjudicator is affirmed.
Catchwords:	Exclusive use By-law
Legislation Cited:	Strata Schemes Management Act 1996, s 158
Category:	Principal judgment
Parties:	Olive Grove Investment Holdings Pty Ltd (applicant) The Owners-Strata Plan No 5942 (respondent)
Representation:	Mr McMahon of Counsel appeared for the applicant Solicitors Kevin Benson Lawyers Ms Crittenden, solicitor appeared on behalf of the respondent.
File Number(s):	SCS 15/44239
Publication restriction:	Nil

REASONS FOR DECISION

BACKGROUND

1 Strata Plan 5942 is located at [****] Maroubra. It initially comprised 8 lots being 2 three bedroom lots, 5 one bedroom lots and 1 two bedroom lot with a ground floor store room which was lot 3 now owned by the applicant. Each lot had one garage and there were three common property parking spaces for visitor parking. These were not marked on the strata plan.

2 The original owner of lot 3 was the developer of the strata plan and on 15 September

1988 a duly convened general meeting of the Owners Corporation resolved to lodge a development application with the Randwick City Council in the following terms;

> "The body corporate consents to the lifting of a Randwick Council restriction as to habitation on parts of lot 3 being a unit on the ground floor of 269-271 Maroubra Road, Maroubra."

3 On 28 September 1989 P & D Investments Pty Ltd (a predecessor in title of lot 3) lodged a development application with the Council and that application was affixed with the common seal of the Owners Corporation. The application sought the Council's consent to convert to ground floor storeroom of lot 3 into a separate two bedroom unit.

4 The development application was reviewed by Council initially and a revised application was submitted with proposals that parking spaces be marked, sealed and drained in accordance with Council's development control plan.

5 By a letter dated 20 April 1990 the amended development application lodged by P & D Investments was approved and shortly thereafter works were undertaken, which included the conversion of the ground floor storeroom of lot 3 into a separate two bedroom building which since been known as unit 9, certain landscaping works and the building of a garage door on part of a common property which was then designated as being for the use of unit 9 within the application itself. Three common parking spaces were constructed and designated as visitor spaces.

6 No exclusive use by-law was ever obtained by any predecessor in title of lot 3 to formalise the exclusive use for the occupier of unit 9 of the parking space within the carport area which had a garage door added.

7 On 24 February 2000 a predecessor in title to lot 3 put forward a motion seeking a grant of exclusive use of the unit 9 parking space to be added to lot 3. This proposal was rejected.

8 The applicant purchased lot 3 in November 2010 and it is claimed that between November 2010 and October 2014 the garage door of the parking space which had been available for unit 9 became increasingly rusty and fell into a state of disrepair. It is claimed that the parking space was not used by a tenant who occupied the property from 2006 to 2014 until late 2013 when he began to drive a smaller vehicle.

9 In about October 2014 Mrs Richards, on behalf of the applicant, ascertained that the owner of unit 9 (being part of lot 3) was entitled to carry out repairs to the garage door but that no formal arrangement or exclusive use of the space had ever been approved. She engaged a solicitor to prepare a draft motion and an exclusive use by-law which was then submitted to an extraordinary general meeting of the Owners Corporation on 12 December 2014. The motion was not approved and an application was filed for mediation and adjudication on 16 February 2015. In that application an order was sought pursuant to s. 158(1) of the Act that a by-law in relation to exclusive use of a car space was unreasonably refused by the Owners Corporation at a meeting held on 12 December 2014.

10 The adjudication application was ultimately dealt with by Strata Schemes Adjudicator

Eftimiou and on 29 June 2015 she dismissed that application.

APPLICATION FOR APPEAL

11 The present application was lodged by Olive Grove Investment Holdings Pty Ltd on 20 July 2015. Directions were made for the provision of evidence and submissions and both parties and their solicitors complied with the directions.

APPLICANT'S SUBMISSIONS

12 In the reasons for requesting an appeal the applicants submitted that the Adjudicator had erred when she inferred that the development approval gave the applicant a right to exclusive use of the car space. It was argued that the appropriate interpretation of the material should have been one whereby the approval for development application gave the applicant a reasonable expectation that it would be granted exclusive use of the car space.

13 It was further submitted that the Adjudicator had erred in determining that the applicant was unaware it was entitled to use the car space until November 2014. It was submitted that such a finding was contradicted by the evidence of Mr Joseph Cummins who had provided a witness statement.

14 It was argued that the Adjudicator had failed to addressed the principals enunciated by the land and environment court in a decision of the *owners – Strata Plan No. 432 v Seddon [2015]NSWLEC 69* to the affect that a lack of ownership does not preclude an applicant from restraining a respondent from breaching a development consent. It was submitted further that the Adjudicator erred in finding that no exclusive use by-law was ever sought by the applicant's predecessor in title and such a finding was contrary to the material provided by the respondent to the affect that a motion for issue of an exclusive use by-law was considered by the Owners Corporation at a general meeting in February 2000.

15 The applicant produced evidence in support of the background material which has been referred to above and pointed out that the amended drawings provided to the council in support of the development application showed proposed landscaping to be carried out including, in the south west corner of the strata plan, the creation of four parking spaces. In that plan the parking spaces were designated "visitor parking 1", "visitor parking 3" and "parking unit 9 (under car port)".

16 It was submitted further that the statement of environmental effects submitted with that application referred to one parking space per building and with a car port the proposal would comply with clause 74 of the parking controls. The submissions referred to a number of documents either to or from the council in which reference to parking spaces to be allocated were made. Condition 11 of the council's recommendations contained in a letter of 6 April 1990 required parking spaces to be created, marked, sealed and drained in accordance with the development control plan and parking controls.

17 It was conceded that no exclusive use by-law was ever obtained by the predecessor in

title of lot 3 to formalise exclusive use for the occupier of unit 9 to the parking space with the car port and the garage door constructed on it. It was however claimed that when the applicant purchased lot 3 in November 2010 the letters from the Council referred to above, were attached to the contract for sale of lot 3 and, having viewed these letters, the directors of the applicant understood that the unit 9 parking space was not registered on the title of lot 3 but as a condition of the conversion of unit 9 into a habitable unit the parking space was for the use of the occupier of unit 9. It was submitted further that the applicant understood that the Owners Corporation had consented to this situation.

18 It was noted that from a search of records in November 2010 there was no record of the general meeting of 24 February 2000 where a motion for exclusive use of the car port area was considered and rejected. It was stated that the applicants only became aware that the Owners Corporation had rejected a motion for a by-law to grant exclusive use of the unit 9 parking space to lot 3 after reading submissions of the respondent filed for the purposes of the adjudication.

19 The applicant relied upon claims that after the garage door of the unit 9 parking space became increasingly rusty and fell into disrepair, monies were expended by the applicant on carrying out repairs to the door which was then paid for by the applicant. Reference was made to the statement of Mr Cummins and it was alleged that he understood the unit 9 parking space was for his use but that he did not park his vehicle in that space until late 2013 when he began to drive a smaller vehicle.

20 It was pointed out that when a notice of meeting to vote on the exclusive use by-law was prepared, a note prepared by Mrs Richards on behalf of the applicant read;-

> "This car space was originally required by Randwick Council to be attached to units 3 and 9 when they gave approval to convert the storeroom into a unit. The previous owner installed a car port and tilta- door but as we were unaware that we were entitled to this space we did not utilise it until now."

21 It was submitted that the notice did not reflect the understanding of directors of the applicant company at the time when the notice for the exclusive use by-law was given.

22 Ms Crittenden, on behalf of the applicants referred to the provisions of s. 158 of the Act and argued that in dismissing the application the Adjudicator erred in interpreting the applicant's evidence as to its expectation that the by-law granting exclusive use would be granted.

23 On 16 July 2015, after the receipt of the Adjudicators decision, the applicant's solicitor sent to the strata manager a letter enclosing an amended draft motion for an exclusive use by-law which was in similar terms to the previous motion but which also included an agreement from the applicant to pay the Owners Corporation a sum of $7,000.00 in compensation for its proposed right of exclusive use over the unit 9 parking space. It was initially noted that a general meeting was to be held on 25 August 2015 to consider that motion but by the time the matter came for hearing it was clear that the motion had been defeated and it was submitted, on behalf of the applicant, this provided evidence that the issue of a financial contribution was not the issue which apparently determined

that the application initially should have been refused.

24 Reference was made to definitions of reasonable and unreasonable referred to in the Oxford English Dictionary and in decisions such as *Re Curragh Coal Sales Co Pty Ltd v John Maxwell Wilcox [1984]FCA 168*.

25 It was argued that the allocation for unit 9 parking space to the newly created unit 9 was a condition of Council's consent on the Development Application and although the council did not have power to grant a right of exclusive use over the unit 9 parking space, it was unreasonable for the Owners Corporation to have consented to the Development Application and thereafter refused to grant exclusive use.

26 Reference was made to the decision of the Land and Environment Court in The *Owners – Strata Plan 432 v Seddon (supra)* where there was a dispute as to whether a laundry and toilet was part of the common property or a part of a lot. In that case new owners, having become aware that the laundry was part of lot 15, took steps to remove washing machines and toilet and Justice Sheahan declared that the owners of lot 15 were not permitted to remove the laundry and toilet facilities which had been approved by council in 1962, effectively claiming that although the Owners Corporation did not own lot 15 it was still entitled to restrain the owners of lot 15 from breaching the Development Approval conditions granted by the Council in 1962. It was submitted that there was a belief that the owner or occupier of unit 9 had exclusive use of the designated parking area for a number of years and it would therefore be unreasonable for the Owners Corporation to not approve an exclusive use which allowed the owners of unit 9 to use of that parking space.

27 Other parking spaces were available for visitors and there is no suggestion that the additional space was necessary for visitor parking.

28 Reference was made to a decision of the Tribunal in *Rapoda and Greg Harris Constructions v Owners Corporation SP 47451 [2013]NSWCTTT 166* where the Tribunal found that an Adjudicator had incorrectly dismissed an application under s. 158 where a special use resolution was passed but never registered. Reference was also made to a decision of the Strata Schemes Board in *Garth, Patterson v The Owners Strata Plan 49621 [1999]NSWSSB 66*.

29 It was submitted finally that in weighing up the reasonable expectations of the applicant against the interests of all owners in the use and enjoyment of their lots and the common property, the applicant had a reasonable expectation that the conditions of the Council consent to the development application would have given rise to an expectation on the part of the owners that an exclusive use by-law should have been approved. Failure to approve the by-law was unreasonable and accordingly the appeal should be allowed.

RESPONDENT'S SUBMISSIONS

30 Mr McMahon of council on behalf of the respondent noted that lot 3 had four owners from 1988 to date and that the original owner of lot 3 was the developer of the strata

plan. The current owner of lot 3 was the applicant who completed the purchase of it on 8 April 2011.

31 At the extraordinary general meeting held on 12 December 2014 when the applicant sought the exclusive use by-law providing the owner of lot 3 with exclusive use of a common property car port pursuant to s. 52 of the Act the motion was not passed with lots 1, 2, 6 and 7 voting against the motion and lot 8 abstaining from a vote on the basis that not enough information had been provided. The by-law submitted by the applicant to the extraordinary general meeting was the same by-law which was considered by the Adjudicator in proceedings SCS 15/26764.

32 On 16 July 2015 the applicant's solicitor wrote to the Owners Corporation proposing an amended draft motion for exclusive use by-law with an additional clause requiring the owner of lot 3 to pay the Owners Corporation $7,000.00 in compensation for its proposed right of exclusive use of the common property car space.

33 It was noted that the Adjudicator had, and the Tribunal has, power pursuant to s. 158(1)(a) of the Strata Schemes Management Act to make by-laws to confirm exclusive rights or privileges over the common property if the Owners Corporation has unreasonably refused to make such a by-law. In determining the matter the Tribunal must consider whether the Owners Corporation has reasonably refused to make the by-law having regard to the interests of all owners in the use of and enjoyment of their lots and the common property and the "rights and reasonable expectations of any owner deriving or anticipating a benefit under the by-law (ss. 158(2)(a) and (b)."

34 It was submitted that the consent of Randwick Council was limited to the lifting by the council of a restriction as to habitation on part of lot 3 being a unit on the ground floor of [***], Maroubra. When that motion was submitted the minutes record that there was a unanimous vote in favour of the motion and the resolution was simply that the Body Corporate make application to the Randwick Council to lift a restriction as to the use of part of lot 3 being a unit on the ground floor of [***] Maroubra. It was pointed out that the minutes of 15 September 1988 make no mention of the grant to the owner of lot 3 of the exclusive use of a car space.

35 It is claimed that on 28 September 1989 the owner of the lot, P & D Investments Pty Ltd, the original owner and a company associated with the Wakim family lodged a development application with Randwick council simply seeking a lifting of the restrictions as to habitation on parking lot 3 SP 5942 but during the consent process Council required further conditions to the consent which related to the provision of a parking space.

36 It was argued that the Owners Corporation derives its powers from the statute and s. 21 of the Act provides that;-

> "the common property shall not be dealt with except in accordance with the provisions of the Act."

37 It was therefore submitted that the common property area that in 1990 was made into a covered car space was not dealt with in accordance with the provisions of the Strata

Titles Act 1973 as it was not transferred to the owner of lot 3, nor was it made the subject of an exclusive use or special privilege favouring lot 3.

38 Mr McMahon sought to distinguish the decision of the Owners – Strata Plan No. 432 v Seddon (supra) and the decision of *Patterson, Garth, owner of lot 51 and 42 v The Owners Strata Plan 49621 (supra),* noting that there was no evidence that the letter from the Council and the amended development application were brought to the attention of the Owners Corporation to consent and that it was appropriate to assume that the owner of lot 3 had made amendments without obtaining the Owners Corporation further consent.

39 It was argued that if a reasonable expectation placed on the owner of lot 3 was founded upon a misrepresentation made by a previous owner of lot 3, of which the Owners Corporation had no involvement, then that could have been cured by an appropriate search of the books and records of the Owners Corporation as a reasonably prudent purchaser would be required to do.

40 The owner of lot 3 was apparently unaware of the exclusive use by-law which was submitted to a general meeting on 24 February 2000 and it was declined and a copy of the minutes of that meeting were attached to the respondent's material.

41 When the motion was put before the general meeting on 12 December 2014 it was noted that lots 1, 2, 6 and 8 voted against the motion and the owner of lot 4 who abstained from the vote has now indicated that she would vote against the proposal by-law and evidence to that effect is contained in an email attached to the respondent's emails.

42 It was submitted that car spaces in the Maroubra area are highly desirable and sought after and that the car space is an asset to the Owners Corporation and that it is to the benefit of the Owners Corporation that the spaces be available for visitors.

43 It was submitted further by Mr McMahon that the proposed by-law which was initially submitted for the Adjudicator required the lot 3 owner to keep the space clean and tidy and have provision for maintenance in keeping in a state of good repair of the carport structure and the door but it left the Owners Corporation otherwise responsible for maintenance for common property area. It was claimed that the term was both deficient, unclear and unjust to the Owners Corporation as it would impose further obligations from the Owners Corporation. The proposed by-law did not contain standard terms providing for the process to be undertaken if the use of the car space was breached and although there were remedies under the Act for a breach of by-law, it was common for exclusive use by-law to provide additional powers of entry to the Owners Corporation in such circumstances.

44 It was argued that the proposed by-law was unjust as it did not provide for the applicant to take responsibility for renewal and repair in circumstances where the structure of the doors may have become unserviceable to the extent that they require replacement.

45 In conclusion it was submitted that consent to the proposed by-law in the light of the

history of lot 3 could not be reasonably said to have been expected by the applicant and that benefit could reasonably been anticipated in such circumstances particularly where the car space had not been used for a significant period of time. It was argued further that the terms of the proposed by-law were deficient and unjust and that the by-law had now been rejected by four of the eight lot owners at the general meeting and one other lot owner who had indicated that they would not vote in favour of the proposed by-law.

DECISION

46 This is an appeal from an order made from Adjudicator Eftimiou on 29 June 2015 when she dismissed an application seeking an order pursuant to s. 158(1) of the Strata Schemes Management Act that a by-law be made in terms of a motion which was considered by the Owners Corporation at a general meeting on 12 December 2014 giving the applicant exclusive use of a car space.

47 Ms Crittenden, on behalf of the applicant, submitted that, in weighing up the reasonable expectations of the applicant against the interests of all owners in the use of enjoyment of their lots and the common property, the applicant had a reasonable expectation that the conditions of Council's consent to the Development Application which allowed for the conversion of unit 9 to a residential unit and the use by the owner or occupiers of unit 9 in a common property car space would be complied with by the Owners Corporation. She submitted further that no other owners had previously or currently used the common property which is now the unit 9 parking space and that the common property area at the rear of the building would not be affected by the applicant's by-law if it was made a car space and not used by other owners or occupiers or visitors to the building.

48 She argued that it was unreasonable for the Owners Corporation to not approve a by-law granting the owner of lot 3 exclusive use of the unit 9 parking space in circumstances where the applicant had that reasonable expectation. She then sought, on behalf of the applicant, orders that the Adjudicators order be set aside and that a by-law be made in accordance with the terms of a motion which was considered by the Owners Corporation at an extraordinary general meeting of 25 August 2015, such by-law being an annexure to the material provided on the appeal.

49 Strata Plan 5942 was registered on 24 December 1971 and on 1 January 1988 a Development Application number DA437/1988 was lodged with the Randwick City Council to seek conversion of a lot 3 storage area into habitable space. That Development Application was rejected on 19 April 1989 and on 28 September 1989 a further Development Application Number 503/299D-362/89 was lodged with the Randwick Council seeking conversion of the lot 3 storage area into a habitable space.

50 Development consent was finally granted by Randwick Council on 20 April 1990 and in November 2010 Olive Grove Investment Holdings Pty Ltd, the present applicant, purchased lot 3 and around 30 October 2014 that company paid a person to carry out

certain repairs to the parking space at the rear of the building.

51 An extraordinary general meeting was held on 12 December 2014 and at that meeting the Owners Corporation refused to approve a by-law granting the owner of lot 3 exclusive use of the parking space at the rear of the building. A mediation date was appointed in February 2015 and on 2 April 2015 the applicants lodged the application for adjudicated orders (SCS 15/26764).

52 Representatives on behalf of both parties filed comprehensive submissions for the adjudication and further material has been filed in relation to the appeal. The Tribunal has been asked to consider the additional material in the event that it was satisfied initially that the Adjudicator erred on the basis of material which was before her.

53 The evidence discloses that on 15 September 1988 a duly convened general meeting of the Owners Corporation resolved to lodge a Development Application with the Randwick City Council to allow the ground floor storeroom of lot 3 to be converted into a habitable unit. The terms of the resolution were as follows;-

> "The Body Corporate consents to the lifting of a Randwick Council restriction as to habitation on part of lot 3 being a unit on the ground floor of 269-271 Maroubra Road, Maroubra.
>
> **Resolutions**
>
> As a resolution of the unanimous written vote in favour of the above motion it was resolved that the Body Corporate make application to Randwick Council to lift a restriction on user on part of lot 3 being a unit on the ground floor of 269-271 Maroubra Road, Maroubra."

54 Mr McMahon, of counsel, on behalf of the respondent submitted that the minutes of the general meeting held on 15 September 1988 did not indicate consent being granted to the owners of lot 3 for the exclusive use of a car space. The application lodged with the Council by P & D Investments Pty Ltd on 28 September 1989 simply referred to the lifting of a restriction as to the habitation of apartment lot 3 in strata plan 5942. He submitted further that the Owners Corporation was bound by statute that as at 1988, s. 21 of the Strata Titles Act 1973 (NSW) provided that the "common property shall not be dealt with except in accordance with the provisions in this Act". He submitted that the common property area that in 1990 was made into a covered car space was not dealt with in accordance with the provisions of that Act by either being transferred to the owner of lot 3 or made the subject of an exclusive use or special privilege favouring lot 3.

55 Any representation by the then owner of lot 3 that exclusive use had been provided as a result of the meeting held on 15 September 1988, was mistaken and unfounded and that the consent given to the lodgement of the Development Application did not include or even imply a grant of exclusive use of a parking space in favour of lot 3 to the then owners of that lot.

56 The Owners Corporation deny that Randwick Council required lot 3 to have the exclusive use of a car space and submit that even if it was a condition of the development consent, the Strata Titles Act 1973 required the owner of lot 3, if they

wished to bring such an application to place the matter before the Owners Corporation for consent to be granted. There is no evidence that any application for such consent was made and no special use by-laws have been added to the present date.

57 The applicant has claimed that the Owners Corporation is in breach of a condition of the Council's consent and reference has been made to the decision of the Land and Environment Court in the Owners – *Strata Plan No. 432 v Seddon [2015]NSWLEC 69* and a further decision of the New South Wales Strata Schemes Board in *Patterson, Garth, Owner of lots 51 and 42 v the Owners Strata Plan 49621 [1999]NSWSSV 66.*

58 The Tribunal is satisfied that these decisions can be distinguished as there is no evidence that the request of council for the provisions parking space or the amended Development Application was ever brought to the attention of the Owners Corporation for consent. It would appear likely that the owner of lot 3 made amendments without obtaining the Owners Corporation's further consent.

59 Mr McMahon argued that the Owners Corporation was not responsible for a misrepresentation made by the previous owner of lot 3 to the present owner of lot 3 and that the reasonable expectation placed on the owner of lot 3 was founded upon a misrepresentation made by a previous owner of lot 3 in which the Owners Corporation had no involvement.

60 Evidence before the Tribunal includes a statutory declaration of Elizabeth Voysey who was a purchaser of unit 1 in April 1986. Ms Voysey details recollections of a discussion with the Wakim family just before a general meeting of the Owners Corporation was held on 15 September 1988. At the time the father was ill and bedridden and required a wheelchair. This situation was given as a basis upon which an application should be brought to the Council to convert the storeroom into a ground floor living area for the father. The Owners Corporation did not make the application and it was made by P & D Investments Pty Ltd and the consent to the application was simply annexed thereto when it was lodged with the Randwick Council. Ms Voysey declared that at no stage was she aware that the Owners Corporation determined at a general meeting or at all to provide the owner of lot 3 with exclusive use of a car parking space.

61 She notes further that on 24 February 2000 a general meeting of the Owners Corporation was held and at that stage a motion was tabled to subdivide lot 3 into new lots being lots 9 and 10 and the creation of an exclusive use by-law providing the owner of lot 3 with exclusive use of the common property carport which was built pursuant to the Development Application. That motion was defeated and in May 2001 P & D Investments Pty Ltd, who were then the original developer, sold lot 3, and that there had now been three new owners since that time.

62 Ms Voysey deposed further that she was not aware of any owners or tenants exclusively using the car parking space now being claimed by the applicant and she expressed she believed the operating mechanism on the tilt of the door was rusted and required replacement in 2014.

63 In relation to the use of the carport it is noted that Mr Joseph Cummins filed a

statement on behalf of the applicants in which he indicated that he had been living in the property known as unit 9 since February 2006 and through until December 2014. He agreed that he had not used the car parking space although he understood that it was "associated with unit 9" and for the use of occupiers of unit 9 only. Mr Cummins stated that in late 2013 he began to drive a smaller vehicle and used the vehicle thereafter until his lease agreement ended.

64 The statements of Ms Voysey and Mr Cummins were both before the Adjudicator at the time she made her determination.

65 S. 158(1)(a) of the Strata Schemes Management Act enables an Adjudicator or the Tribunal to make a by-law confirming exclusive rights or privileges over the common property in circumstances where the Owners Corporation has unreasonably refused to make such a by-law. In determining whether consent has been unreasonably refused the Tribunal must consider whether the Owners Corporation acted unreasonably in refusing to make a by-law having regard to the interests of all owners in the use and enjoyment of their lots and the common property and the rights and reasonable expectations of any owner deriving or anticipating a benefit under the by-law (s. 158(2)(a) and (b) of the Act.

66 S. 181(2) of the Strata Schemes Management Act enables the Tribunal to admit further evidence but the applicant bears the onus of establishing on the balance of probabilities that the refusal was unreasonable.

67 Unreasonable is given its every day meaning and in *Owners Corporation Strata Plan 69481 v Want [2013]NSW CTTT 440* the Tribunal endorsed the Macquarie Dictionary's definition of 'unreasonable' as being "not reasonable, not endowed with reason, not guided by reasonable good sense, not based on or in accordance with reason or sound judgement." In *George v Rockett [1990]170 CLR 104 at 112* the High Court observed that 'reasonable' must be determined objectively. For a decision to be reasonable requires the existence of facts which are "sufficient to induce the state of mind in a reasonable person".

68 In *Owners SP67631 v Waters and Gardner* [2010]NSWCTTT 343 the Tribunal observed "a decision by the Owners Corporation to withhold consent could be seen as reasonable if there was on the material before the Owners Corporation a sound basis for making that decision. Conversely if there was no such basis it would be unreasonable".

69 In *Bartlett v Owners Corporation SP1429* [2011]NSWCTTT 219 it was noted that;

> "it is immaterial that there was also material which may not provide a sound basis for the decision. The onus is on the appellant to demonstrate that the Owners Corporation decision was unreasonable. The Owners Corporation does not have to prove that it acted reasonably in refusing its consent to the proposed by-law".

70 The respondent points out that at the meeting of 12 December 2014 the only vote in favour of the granting of a by-law from those who had voted was the applicant and the general objection of the proposal was highly probative and should be given significant weight when the application is determined. It was submitted further on behalf of the

respondent that the car space had remained unused for a substantial period and although there is some inconsistency in the evidence of both parties, it is clear that the car space was not used at least until 2013 or possibly 2014 when the door was repaired.

71 Mr McMahon, on behalf of the respondent points out that there was no offer of compensation proposed when the by-law was put up for consideration in December 2014 and it is significant to note that after the determination by the Adjudicator but before the Hearing of the present appeal, the applicant sought to put forward an amended by-law which included an offer to pay compensation in the sum of $7,000.00 for the exclusive use right to the common property car space. Although it is submitted by Ms Crittenden that the submission of an amended by-law was only designed to indicate that an offer of compensation was not the determining factor, it is clear that the present appeal can only be said to relate to the consideration of the Owners Corporation in December 2014.

72 Mr McMahon of counsel submits further that the terms of the by-law which was submitted, were deficient in that they did not clearly define what common property the Owners Corporation was to be responsible for in the obligation imposed upon the Owners Corporation to be otherwise responsible for maintaining the common property. It did not contain the standard item providing for the process to be undertaken if the use of the car space was breached and it made no provision for renewal or replacement of the car port structure if that became necessary.

73 The applicant has maintained that it was always of the understanding that the purchase of lot 3 included exclusive use rights to the car space.

74 Mr McMahon has submitted that the Owners Corporation is not responsible for the misrepresentation made by the previous owner of lot 3 to the present owner of lot 3 and the reasonable expectation placed on the owner of lot 3 was founded upon a misrepresentation in which the Owners Corporation had no involvement. Further, the solicitor/conveyancer of lot 3 or the lot 3 owners themselves could have conducted further enquiries and searched the books and records of the Owners Corporation, as any reasonable prudent purchaser would do and/or reviewed the schemes registered by-laws. Upon such an investigation they would have noted that there was no additional by-law registered on title that gave the rights of exclusive use in favour of lot 3.

75 It is significant to note that the notice of the extraordinary general meeting to be held on 12 December 2014 for consideration of the by-law includes the following note, apparently on behalf of the applicants.

> "Note, this car space was originally required by Randwick Council to be attached to unit 3 and 9 when they gave approval to convert the storeroom to a unit. The previous owner installed a carport and tilt door, but as we were unaware that we were entitled to this space we did not utilise it until now".

76 The notation referred to suggests that a reasonable expectation that the time of purchase of the lot did not arise until December 2014. This is consistent with the

evidence of Mr Cummins that he did not for many years attempt to use the parking space which he believed was available for unit 9.

77 The applicant has attempted to draw parallels between this matter and the situation in *Rapoda and Greg Harris Constructions v Owners SP47451 [2013]NSWCTTT 166* but this decision can be distinguished on the basis that the applicant had a clear and reasonable expectation when purchasing the lot in Rapoda by way of a special condition in the contract for sale and by way of communication with the strata manager concerning the use of the space.

78 It is encumbent upon the appellant to establish that the Adjudicator's determination was incorrect and that the consent of the Owners Corporation to the previous by-law was unreasonably withheld.

79 The Tribunal is not satisfied on the evidence that this has been made out and this position is affirmed by the fact that, after the adjudication and before the determination of this appeal the applicant has seen fit to put up an alternate proposal which offered compensation but did not include any of the other general items expected in the by-law of this nature. There is no evidence to suggest that the offer of compensation proposed was reasonable in the circumstances and in any event the by-law for consideration was the by-law which was originally before the Owners Corporation in December 2014 and which was considered further by the Adjudicator in June 2015. The appeal is dismissed.

J A Ringrose

General Member

Civil and Administrative Tribunal of New South Wales

14 October 2015

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

Decision last updated: 11 November 2015