Civil and Administrative Tribunal
New South Wales

Case Name:	**OWNERS SP 47383 v McCULLUM**
Medium Neutral Citation:	[2022] NSWCATCD
Hearing Date(s):	23 December 2021
Date of Orders:	10 January 2022
Date of Decision:	9 January 2022
Jurisdiction:	Consumer and Commercial Division
Before:	G K Burton SC, Senior Member
Decision:	1. Dismiss the application. 2. Make no order as to the costs of the proceedings.
Catchwords:	STRATA MANAGEMENT – 1973 model by-laws – approval of car space lot property enclosure – nature of any approval required – estoppel as a defence
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) Conveyancing (Strata Titles) Act 1961 (NSW) Strata Titles (Freehold Development) Act 1973 (NSW) formerly Strata Titles Act 1973 (NSW) Strata Schemes Management Act 1996 (NSW) Strata Schemes Management Act 2015 (NSW)
Cases Cited:	Davenport v/ats Owners SP 536 [2018] NSWCATAP 301 Draybi Brothers PL v Diab [2014] NSWCATCD 67 Jones v Dunkel (1959) 101 CLR 298, [1959] HCA 8 Owners Strata Plan 63341 v Malachite Holdings PL [2018] NSWCATAP 256 Pongrass v Small [2021] NSWCATAP 314
Texts Cited:	None cited
Category:	Principal judgment
Parties:	Owners SP 47383 (applicant) Hugh James McCullum (respondent)

Representation:	Counsel: Mr J Bannerman, Solicitor (applicant) Mr R Khan, Solicitor (respondent) Solicitors: Bannermans Lawyers (applicant) PBL Law Group (Alex Ilkin Strata Lawyers) (respondent)
File Number(s):	SC 21/32051
Publication Restriction:	Nil

JUDGMENT

Background and procedural history

1 The originating application for these proceedings was SC 20/50101 filed 26 November 2020 in respect of a 109-lot strata scheme in inner Sydney, NSW registered on 25 July 1994 under the *Strata Schemes (Freehold Development) Act 1973* (NSW) formerly the *Strata Titles Act 1973* (NSW) (the 1973 Act). The applicant owners corporation (OC) sought the removal of what it said was an unauthorised enclosure since 1995 of a car space owned by the respondent lot owner. The enclosure structure comprised two metal sheeting side walls and a roller door front wall within lot property, each bolted into the common property floor and rear wall. The rear enclosure was the common property wall of the building. I shall call the enclosure the "lot structure". Also originally enclosed, but removed in circumstances described below, was enclosure of adjacent common property.

2 The OC referred to orders made in earlier proceedings SC 20/07686 on 29 May 2020 which it said were made by consent. Those orders read as follows:

> "1. The applicant is to file and serve draft by-law to enclose Lot 109 on or before 26 June 2020.
>
> 2. The respondent is to arrange an EGM to consider for approval the proposed by-law on or before 24 July 2020.
>
> 3. The Tribunal notes the respondent's contention (for which there was no evidence proferred today) that he had an approval by the executive committee (EC) in 1995 for enclosing the open car parking space into a secure garage."

3 The OC said that there was a clear inadvertent error in identifying who was to prepare the proposed by-law, being the respondent lot owner, and who was to call the EGM. Even if uncorrected, nothing had been timely prepared by way of proposed by-law and the OC was entitled to seek the removal of an unauthorised structure.

4 A Senior Member heard the application on 10 March 2021 in the absence of the lot owners and granted the relief sought by the OC. It appears that the lot owner's prior written adjournment application was misplaced and therefore not before the Tribunal.

5 The lot owner successfully appealed that decision on the basis of a constructive failure to exercise jurisdiction in inadvertently not considering the adjournment application. On 6 July 2021 an Appeal Panel quashed the original decision and remitted the matter for hearing on the original evidence before the Tribunal and on the evidence before the Appeal Panel that the lot owner said that he would have put on if given the opportunity with appropriate notice of the application. These are the remitted proceedings.

6 On 13 August 2021 directions were made for the filing of material in respect of varying the orders made on 29 May 2020 and filing further material arising from any determination by the Member who made those orders.

7 On 13 August 2021 leave was granted for legal representation with the parties on notice that special circumstances were required for a costs order.

8 The evidentiary material before me on the remission comprised, for the lot owner, two comprehensive witness statements by the lot owner with exhibited documents and witness statements by two others being a lot owner and member of the EC in 1995 and a former strata manager at the time. Only the lot owner was cross-examined. The OC relied upon the strata scheme by-laws, some further photographs of the enclosed car space, the orders set out above and a brief witness statement by the current strata manager, who was cross-examined.

Owners corporation's case

9 The OC's case was that the enclosure works in 1995 were and remained unauthorised, either prospectively or retrospectively. There was no available evidence of any OC resolution approving a by-law as required by s 58(7) of the 1973 Act, the relevant legislation in 1995, for works affecting common

property. There was also no available evidence of any approval for works on lot owner's property.

10 The OC said that there was power to order removal of the structure under ss 132 and 241 of the *Strata Schemes Management Act 2015* (NSW) (SSMA). To those provisions could be added SSMA s 232.

11 The OC relied upon the statement of the current strata manager that there were no other enclosed car spaces within the scheme and "We have canvassed all past records" and could not see an approval in a by-law or other resolution.

Lot owner's case

12 The lot owner said that in 1995 the then executive committee (EC) unanimously verbally authorised the enclosure and that it, not the OC (then called the body corporate), was the appropriate scheme governance body to authorise the works to the extent that authorisation was required, which the lot owner said was not required and was asked for as a matter of courtesy.

13 The lot owner said in cross-examination that he had originally sought approval, even if it was not formally required, because his car space was very close to the ramp and exterior and what was within his car space was subject to vandalism or theft by intruders, with his motor scooter in the space being stolen prompting the lot enclosure; it was also subject to rat infestation unless bird droppings were precluded by the screening. To the extent that the enclosure involved affixation into common property, or passive use of common property as the rear wall of the protective enclosure, that was within the by-laws as they stood in 1995.

14 In his witness statement the lot owner said that as secretary of the EC he had recorded the unanimous approval in the minutes of the EC and his family company (then the nominated purchaser) was provided with the written approval. These company records were stored in his secured car space and became seriously water damaged by water ingress from the common property

courtyard immediately above. The company was deregistered in 2001 so he discarded the records. At the time he believed that the OC records would be intact. It was not until 2014 when he inquired at the time of the then proceedings described below that he was told by the then strata manager that the records prior to 2001 could not be found as having been received from the previous strata manager.

15 The lot owner said that there was no contravention of more recent by-laws, to the extent that they could apply to an existing approved structure.

16 Thus, by-law 3 was not contravened because it was trespass into the lot space if it was said that the structure inhibited, in a tight parking lot, manoeuvring by intrusion of part of a vehicle into the edge of a lot. Photographs showed that the lot structure did not unreasonably interfere with line of site or intrude beyond the lot. By-law 17 was not contravened because there was an existing approved use before it was approved on 13 December 1997.

17 There was cross-examination of the representative of the current strata manager over the researches into the scheme's records. There was contention as to whether the strata manager had sighted records back to 1995 or before when his company took over the management in 2015 or 2016 and whether there was any record of a verbal approval. There was in evidence no record such as a minute book from 1995 to show the absence of a record of the topic of the lot structure.

18 There was also challenge to the strata manager's contention that since its appointment it had issued breach notices and taken other action before the first 2020 proceedings were instituted. Breach notices were not in evidence.

19 There was no contradiction of the lot owner's evidence that there were no other complaints about the lot enclosure and that the EC in 2014 had acknowledged that fact.

20 The 1995 member of the EC recalled, without cross-examination, that the EC did discuss the lot structure and that she did not recall any complaints or issues with the lot owner securing his lot or breach notices being issued to him; if there had been an issue it would have been dealt with. She did not recall any inquiry of her about records other than by the lot owner. She had shredded many of the old records including her meeting notes and did not have copies of the 1995 minutes. She thought that in 1995 owners did not get permission to carry out works within their lots.

21 The 1995 strata manager said, without cross-examination, that he did not recall discussion of the lot structure but that, if asked whether body corporate approval or a by-law was required to build such a structure in 1995, he would have answered that no approval or by-law was required by reason of by-law 16 (set out below): "The lot owner was permitted to secure their lot in any way they liked providing no other by-laws were being breached at the time".

22 On 3 December 2014 in Tribunal proceedings SC 14/35673 the lot owner was ordered to remove his enclosure of the common property adjacent to his car space, but no order was sought or made to remove the lot structure. He reduced the enclosure to the lot structure without further objection. He otherwise had undertaken no changes to the 1995 enclosure since it was built. An EC email of 29 May 2014 said that the lot owner claimed that the enclosure in both its parts was done with the acceptance of the EC of the day "which given the dodgy nature of previous committees, is believable".

23 Given the lack of challenge since 1995 until 2020 by ECs of varying composition and the absence of evidence that any (if any) required authorisation had not been passed in 1995, the lot owner submitted that the balance of probabilities was that consent in accord with the by-laws as they existed in 1995 was given for the lot enclosure.

24 The lot owner further relied upon the applicability of the principles in *Davenport v/ats Owners SP 536* [2018] NSWCATAP 301.

25 Alternatively and for the same reasons, the lot owner relied upon conventional and other forms of equitable estoppel as a defence within the Tribunal's jurisdiction: *Draybi Brothers PL v Diab* [2014] NSWCATCD 67; *Pongrass v Small* [2021] NSWCATAP 314 at [61]-[81].

26 The lot owner said, uncontradicted, that he had not lodged a proposed by-law in accord with the orders in the previous proceedings because of the wording of the orders.

27 The lot owner on 26 May 2021 served a proposed by-law on the OC. A meeting of the OC to consider the by-law has yet to be called.

Relevant legislative provisions in 1995

28 As they stood in 1995, the relevant legislative provisions were extracted by the parties as follows.

29 Section 57 of the 1973 Act required, within one month after the end of the initial period, a convening of a meeting of the body corporate to, among other matters, decide what matters should be restricted matters for the purposes of s 75 and to amend, add to or repeal the existing by-laws.

30 Section 58(7) of the 1973 Act authorised an exclusive use by-law ("conferring on that proprietor the exclusive use and enjoyment of, or special privileges in respect of, the common property or any part thereof") with a unanimous resolution of the body corporate and the consent of the lot owner.

31 Section 75(2) of the 1973 Act defined "restricted matters" in relation to the council of the scheme as those required to have decisions made by resolution (unanimous, special or ordinary) of the body corporate or any matter referred to in s 77 that was the subject of a specified resolution. Section 75(2) made, subject to the Act, a decision of the council (as the EC was then called) the decision of the body corporate on any other matter. Section 75(3) recognised the body corporate's power to continue to exercise or perform its powers under the Act or the by-laws.

32 Section 77 of the 1973 Act was not reproduced in the parties' submissions, presumably because there was no record of a meeting of the body corporate or of any additional restricted matters being resolved at the required meeting.

33 By-law 16 as it existed in 1995 (under the 1973 Act before new by-laws under the *Strata Schemes Management Act 1996* (NSW) were adopted in 1997) relevantly provided, amongst other matters, that a lot owner should not drive nails, screws or the like into or otherwise damage or deface any structure that formed part of the common property without the written approval of the body corporate, but this did not prevent a lot owner or person authorised by that lot owner from installing "any locking or other safety device for protection of his lot against intruders; or any screen or other device to prevent entry of animals or insects upon his lot".

By-laws adopted in 1997

34 By-laws 3 and 17 were adopted on 13 December 1997 and have been referred to above.

35 By-law 3 required that a lot owner or occupier not obstruct *lawful* use of common property. Emphasis has been added given the argument on trespass referred to above and below.

36 By-law 5 repeated by-law 16 but added to its exclusions structures or devices to prevent harm to children and relevantly required structures or devices to have an appearance after installation "in keeping with the appearance of the rest of the building".

37 By-law 17 relevantly required lot owners, absent approval of the OC, not to maintain within a lot anything visible from the outside of the lot that, viewed from the outside of the lot, was not in keeping with the rest of the building.

38 The OC said that SSMA s 135 bound compliance with such subsequent by-laws, and s 106 required action to keep in maintenance and repair common

property, in the absence of evidence of existing use rights in by-laws or resolutions in respect of the lot structure.

Consideration and conclusion

39 The lot owner has uncontradicted evidence that he had at least the informal approval and, on his evidence the formal approval that was minuted, of the then EC to enclose his car space. There are in evidence no records to assist, one way or the other, in relation to formal approval in 1995. There is evidence that the lot owner has made reasonable inquiries to produce such records.

40 The lot owner has uncontradicted evidence that nothing formal was done to attempt to remove the lot structure until 2020. There is uncontradicted evidence that there were good security and pest control reasons for enclosure in 1995 and no evidence that such position has changed. The reasons for enclosure in 1995 gave permission to the lot owner to erect the lot structure by affixation to common property without body corporate approval under the only express source of reference to empowerment stated by the parties, being by-law 16 as it then existed.

41 There is presently no evidence of a sustainable reason to seek such removal beyond the fact that no other car space in the scheme is enclosed. That the structure impedes the facilitation of cars turning in a tight space because they cannot intrude into the lot space relies upon a trespass and would in any event not be available if, for example, the lot owner chose to place his vehicle at the edge of the car space. Photographic evidence supports the inference that lines of sight are not unreasonably interfered with. It therefore does not qualify as a breach of by-law 3. If there was appropriate approval for the lot structure in 1995 then the OC has no basis to rely upon breach of more recent by-laws such as by-laws 5 and 17.

42 On the evidence put forward by the parties and the statutory provisions of the 1973 Act referred to by the parties, I am not convinced that the lot owner required any approval of the body corporate via its general meeting or its EC

to erect the lot structure in 1995 to provide security and protection against animals for the contents of his car space. It is however possible that without approval of a relevant decision-making organ of the scheme in 1995 or the establishment of his estoppel defence to a claim of contravention, the lot owner would be at risk of contravening by-laws 5 and 17 of the 1997 by-laws. I therefore consider such matter.

43 In my view, for the reasons below, the lot owner has sufficiently established approval of the relevant decision-making organ of the scheme in 1995 so as to avoid contravention of those later by-laws, or has established an estoppel defence to a claim of contravention.

44 Neither party pointed to a provision of the 1973 Act which came within the definition of "restricted matter" in the provisions outlined above. The provisions for an exclusive use by-law in s 58(7) do not appear apposite for enclosure within a lot space that incidentally included affixing at limited points to common property and using without intrusion (except for affixations) the common property rear wall as part of the enclosure. To say to the contrary would be inconsistent with the regime established for such affixations in then by-law 16, which did not specify written approval of the body corporate as requiring a unanimous or special resolution or a general meeting of the body corporate. There was no record of other restricted matters being resolved.

45 Accordingly, absent being a restricted matter and on the legislative provisions relied upon by the parties, the EC had power to approve the lot enclosure in 1995.

46 I accept the lot owner's submission that the balance of probabilities was that consent in accord with the legislative provisions including model by-laws as they existed in 1995 was given for the lot enclosure, given the lack of challenge since 1995 until 2020 by ECs and SCs of varying composition and the absence of evidence that authorisation had not been granted in 1995.

47 Alternatively, the same matters give rise to a defence, to the OC's claim for removal of the lot structure as unauthorised, of authorisation by operation of conventional estoppel, estoppel by conduct (including silence when one could reasonably expect something to be said or done) and estoppel by standing by as the improvement of lot property was made at cost to the lot owner that was the subject of evidence.

48 Turning to the lot owner's reliance upon *Davenport*, there the Appeal Panel at [74]-[77] and [84] set out authority concerning the presumption of regularity in its contribution to what was required for a court to be affirmatively satisfied of a matter required to be proved, and the content of the requirement of affirmative satisfaction. Affirmative satisfaction was said by the high authority cited to be circumstances established by evidence or admission which raised a more probable inference in favour of what was alleged according to the course of common experience if left unexplained. More probable meant "no more than that upon a balance of probabilities such an inference might reasonably be considered to have some greater degree of likelihood": cited and discussed by Dixon J in *Jones v Dunkel* (1959) 101 CLR 298, [1959] HCA 8 at [2].

49 I consider that the foregoing authority supports the conclusion I have reached in two ways, each of which is distinctive support but each of which supports the other.

50 First, even without taking into account the effect of the presumption of regularity, there was no explanation to rebut, by an appropriate record or other evidence, the more probable inference according to the course of common experience from the contemporary evidence of at least informal approval in 1995 by the EC as the appropriate approving body and a continuous absence of attempt to challenge the validity of the lot structure erected until recent times, including when there was a challenge in 2014 to an adjacent structure directly on common property.

51 Secondly, the presumption of regularity operating on the evidence of at least informal approval in 1995 by the EC, followed by erection of the lot structure which *may* not have been lawful without such approval, led to a conclusion of regularity of that approval by the appropriate procedures absent any record to the contrary (including absence of a body of records that was comprehensive for the period and which did not contain such a record of formal approval).

52 I do not however accept that the doctrine of unanimous assent as applied in *Davenport* at [101]-[129] provides a further and distinct basis for resisting removal of the lot structure. The decision in *Davenport* was based on distinctive provisions in the *Conveyancing (Strata Titles) Act 1961* (NSW) and applied to a clear context where unanimous assent could be readily inferred because all four lots in the small scheme were co-owned by all owners at the relevant time. In the present case there is evidence of unanimous assent by members of the EC in 1995, but no basis for inferring unanimous assent of all lot owners. Without the unanimous assent of all proprietors it would not be safe to rely upon other than consent achieved within the approval structures specified by the relevant provisions of the then-current statute including by-laws.

53 For the reasons given I consider that the OC's application for relief should be dismissed.

54 If I am subsequently found to be wrong on that conclusion, I should state what my alternative conclusion would have been.

55 The lot owner has an application for a by-law that the OC has yet to deal with. If the OC rejects the proposed by-law, then the lot owner may wish to challenge that rejection and has means under the SSMA to do so. It would be appropriate for such to be heard as part of and prior to any grant of final relief in the current proceedings, given the history of the proceedings described earlier in these reasons.

56 Accordingly, I would have adjourned the current proceedings to enable the proposed by-law to be considered in a meeting of the OC and, if rejected, for the lot owner to have the opportunity to bring a cross-application to be heard with the current proceedings to challenge the rejection of the proposed by-law, with evidence in one proceeding to be evidence in the other. If the proposed by-law is passed then the current proceedings would be dismissed without the need for further proceedings. I consider that there is power to adopt this course under SSMA ss 229 and 232 with s 240.

57 The form of those alternative orders would be as follows:

> "1. Adjourn the current proceedings to enable the respondent lot owner's proposed by-law concerning enclosure of his car space to be considered in a meeting of the OC and, if rejected, for the lot owner to have the opportunity to bring a cross-application to be heard with the current proceedings to challenge the rejection of the proposed by-law, with evidence in one proceeding being evidence in the other.
>
> 2. If the proposed by-law is passed then the current proceedings will be dismissed."

Costs

58 As the parties were warned, there is no automatic right to costs despite a grant of leave for legal representation in proceedings that seek the current form of relief and special circumstances would be required under s 60 of the *Civil and Administrative Tribunal Act 2013* (NSW): *Owners Strata Plan 63341 v Malachite Holdings PL* [2018] NSWCATAP 256.

59 I consider there are no special circumstances justifying an award of costs and make no order as to the costs of the proceedings.

Orders

60 I make the following orders:

(1) Dismiss the application.

(2) Make no order as to the costs of the proceedings.

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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