NCAT overturning an unreasonable refusal of renovation works

In our previous article on "*Reasonable Grounds to be Unreasonable*", we considered the question on when can an owners corporation refuse requests by owners wanting to perform works or have exclusive use of common property. The position in the case of *Ainsworth v Albrecht [2016] HCA 40* (**Ainsworth**) provides an extensive list of factors that it could consider in determining whether opposition to a motion was unreasonable.

Given the passage of time, does the principle in Ainsworth still apply today?

No, the rationale from Ainsworth still stands. A recent decision in *Knight v The Owners – Strata Plan No. 208 [2022] NSWCATCD 170* (**Knight**) confirms the position in *Ainsworth*, and shed light on the requirements of an exclusive use area definition and what the Tribunal can take into account when determining whether an owners corporation has been unreasonable in refusing a common property rights by-law.

In *Knight*, 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.

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.

Interestingly, the Tribunal strengthened the persuasiveness of plans attached to a by-law. The respondents argued that the by-law was in violation of section 142(a) of the *Strata Schemes Management Act 2015* in conferring upon an owner "*a right of exclusive use and enjoyment of the whole or any specified part of the common property.*"

In coming to the decision that the owners corporation unreasonably refused the proposed by-law, the Tribunal considered each of the reasons suggested by the owners corporation for refusing the making of the by-law (Tribunal's response in **bold**)

1. That the words used to describe exclusive use were too broad.

   In the text of the by-law, the definition of "Exclusive Use Area" was linked to the payment of compensation of $14,500 and the accompanying valuation clearly indicated that amount

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related to an area which was the area on the plan on which there appear the words "Glass roof over", and not to the area on which there appear the words "Existing light well".

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.

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.

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.

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.

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.

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 the owners corporation's opposition.

5. Lack of specification in relation to a pipe outside a door near the clothes line.

That work is covered by the wording of the proposed by-law ….which summarised the proposed work to "permit the existing door to be functional and replacement of the external door as necessary".

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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.

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.

9. People using the French doors being able to look into Lot 1.

   This aspect is irrelevant.

10. Exclusive use of the light atrium would impact on Lot 1.

    Apart from the fact that there is no such impact, this objection is based on the incorrect view that the area for which exclusive use sought is included the area referred to on the plan as "existing light well".

Further, the Tribunal also confirmed that noise during construction is not a reasonable ground for refusing a by-law noting that construction noise "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".

It is clear from *Knight* that the refusal was not based on *reasonable good sense* nor *reason or sound judgment*. This case can be viewed as a benchmark to determine reasonableness moving forward. However, it is also important to determine the factors that constitutes unreasonableness on a case by case basis. As such, we would recommend that you obtain specialist legal advice before making a move in legal proceedings.

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