Civil and Administrative Tribunal
New South Wales

Case Name:	**The Community Association DP 270427 v Kazagrandi; Kazagrandi v The Community Association DP 270427**
Medium Neutral Citation:	[2024] NSWCATCD
Hearing Date(s):	27 October 2023
Date of Orders:	2 January 2024
Date of Decision:	2 January 2024
Jurisdiction:	Consumer and Commercial Division
Before:	D G Charles, Senior Member

Decision:

1. In the proceeding constituted by file no CL 23/03634, pursuant to sections 190 and 193 of the Community Land Management Act 2021 NSW, the Tribunal orders that the respondents, Igor Kazagrandi and Inna Kazagrandi must:

    a) comply with By-Law 11.4 of the Community Management Statement and remove immediately the boat trailer, which is registered in the name of the first respondent, and

    b) not park a boat trailer in contravention of the Community Management Statement By-Law 11.4.

2. The proceeding constituted by file no CL 23/37840 is dismissed.

3. If a party in either proceeding seeks an order for costs leave is granted to file and serve short written submissions (no more than 5 A4 size pages) on that issue only within 14 days of the date of these orders.

4. Leave is granted to the other party to file and serve short written submissions in reply (no

more than 5 A4 size pages) on that issue only within a further period of 14 days.

5. A costs' applicant may file and serve any written submission, strictly in response to the other parties' written submissions in reply (such response to be no more than 3 A4 size pages) within a further period of 7 days.

6. In any such submissions the parties are to address the matter of whether pursuant to the provisions of the Civil and Administrative Tribunal Act 2013 NSW, s 50(2), the Tribunal should dispense with a hearing on the issue of costs so that the issue is decided on the papers lodged with the Tribunal and with appearances of the parties not required.

Catchwords:	COMMUNITY SCHEME – boat and trailer permanently parked by lot owners on lot property subject to a parking easement – application of Community Management Statement – application of by-law prohibiting parking of heavy vehicles – whether by-law uncertain – whether by-law harsh unconscionable or oppressive – whether there are discretionary reasons why the by-law should not be enforced against the lot owners.
Legislation Cited:	Community Land Management Act 2021 NSW Strata Schemes Management Act 2015 NSW Civil and Administrative Tribunal Act 2013 NSW
Cases Cited:	Upper Hunter District Council v Australian Chilling and Freezing Co Ltd [1968] HCA 8; (1968) 118 CLR 429 The Owners of Strata Plan No 3397 v Tate [2007] NSWCA 207 Minister for Aboriginal Affairs v Peko-Wallsend Limited [1986] HCA 40; (1986) 162 CLR 24 Cooper v The Owners – Strata Plan No 58068 [2020] NSWCA 250; 103 NSWLR 160
Texts Cited:	Heydon, Leeming and Turner, Meagher, Gummow & Lehane's Equity – Doctrines & Remedies (5th ed, Lexis Nexis, 2015)
Category:	Principal judgment
Parties:	The Community Association DP 270427 (Applicant in CL 23/03634, Respondent in CL 23/37840)

	Igor Kazagrandi & Inna Kazagrandi (Applicants in CL 23/37840 and Respondents in CL 23/03634)
Representation:	Counsel:
	M Forgacs (The Community Association DP 270427)
	Solicitors:
	Grace Lawyers (The Community Association DP 270427)
	K M Harkness & Co (Igor Kazagrandi and Inna Kazagrandi)
File Number(s):	2023/00413239, 2023/00379746 (Previously CL 23/03634; CL 23/37840)
Publication Restriction:	Unrestricted

REASONS FOR DECISION

The Parties, the Proceedings, Background Facts, and an Overview of the Matters in Dispute

1 The parties are The Community Association DP 270427 (hereinafter referred to as either the **Community Association** or the **Association**), and Mr Igor Kazagrandi and Mrs Inna Kazagrandi (hereinafter referred to as either **Mr and Mrs Kazagrandi**, or the **Lot Owners**).

2 Their disputes arise within an association scheme known as Prince Henry Community Association, which is located at Little Bay in Sydney's eastern suburbs. The Association's land is the Community formed by DP 270427 (**Community**) and the Lot Owners' land is Lot 88 within precinct A of the Community (**Lot 88**).

3 Lot 88 contains a two-storey town house, the Lot Owners' residence, and along its western boundary, there is a lane that provides a through site link between Gubbeteh Road and Millard Drive. The lane is 37 metres long and 6 metres wide and provides access to the garage of the Lot Owners' residence, as well as the garage of Lot 83 to the north of Lot 88.

4 Adjoining the western wall of Lot 88 is a car parking space of sufficient length under the Australian Standard AS2890 for an 85th percentile (B85) single car, although in a practical sense two smaller vehicles could occupy this space and remain clear of the driveway access to Lot 88's garage. There are a further two AS2890 compliant carparking spaces adjoining the western wall of Lot 83 with a clear parking length of 12 metres to the bollards protecting the street light pole and streetlight. At the Gubbeteh Road entry to the lane and at the Millard Drive exit from the lane there are one way signs to control traffic flow.

5 The Community generally is a large densely populated residential community adjoining the Sydney suburb of Little Bay, its beach, parks (including Macartney Oval), and golf course, which are amenities for the broader public as well as for those who are residents of the Community.

6 The association scheme was registered on 30 March 2005, having been previously owned by the NSW State development company, Landcom. The Association is a heritage listed site and registered on the State Heritage Listing. As part of its development approval, Randwick City Council (**Council**) has stipulated that the Association is governed by a Development Control Plan and Design Guidelines. Therefore, the Association has an important role in the management of a large residential community with its physical and cultural heritage.

7 The Community is arranged into several precincts. As indicated, Lot 88 is within precinct A, in fact, on the boundary and adjoining precinct B. The vicinity of Lot 88 is characterised by narrow roads, many subject to 'No Stopping' restrictions and with extensive off street parking. The relatively narrow lot widths and the high number of driveway crossings, contribute to limited on-street parking.

8 On 24 January 2023, the Association brought to the Tribunal an application, the proceeding constituted by file no CL 23/03634 (the **Association's Proceeding**) seeking orders against the Lot Owners under section s 190 and 193 of the *Community Land Management* Act 2021 NSW (**CLM Act**) in respect of the Lot Owners' parking their boat and trailer in the lane adjacent to their Lot 88 residence. In support of its application for orders under the CLM Act, the Association relied upon, among other matters, a by-law (**By-Law 11.4**) of the Community Management Statement (**CMS**) of the association scheme. The text of By-Law 11.4 is stated below under 'Agreed Facts'.

9 Beyond the by-laws and the CMS, which apply to the Community generally, Lot 88 is also affected by several easements that burden the Lot Owners' lot property and benefit the Community Association, as well as members of the public. In fact, the lane which runs between Gubbeteh Road to the north and Millard Drive to the south with Lots 88 and 83 on DP 270427, is subject to a series of easements imposed by the Council as part of the original approval of the association scheme. Those easements are recorded on the title of Lot 88 and include easement numbered 33 – easement for access (parking) 6 wide,

in favour of each other lot (**Parking Easement**). The Parking Easement is relevantly in the following terms:

> Full, free, and unimpeded right for the Grantee and every person authorised by the Grantee (including, without limitation, members of the public from time to time as determined by Grantee) upon completion of construction of the road to go, pass, and repass over the Easement Site at all times on foot, with bicycles (wheeled or ridden) or using wheelchairs or other disabled access aids but otherwise without any other vehicles, skateboards, razors, or roller-blades and without animals (other than guide dogs assisting visually or hearing impaired persons) and to park motor vehicles on the Easement Site (but so as not to impede the rights to pass and repass described above) subject to the following conditions:
>
> (a) The Grantor may upon giving prior written notice to the Grantees (except in emergency situations) temporarily suspend the use of that part of the Lot Burdened, for the time and to the extent necessary, but only on reasonable grounds including, without limitation, reasons of security, safety, and maintenance.
>
> (b) ...
>
> (c) ...
>
> (d) ...
>
> (e) For the purposes of section 88BA of the Conveyancing Act, the Community Association must maintain and repair the Easement Site, and neither the Grantor or the Grantees of the other Lots Benefited shall have any responsibility for care and maintenance of the Easement Site (subject to the community management statement). When doing so, the Community Association has the rights and powers granted under the "right of access" set out in Part 14 of Schedule 8 of the Conveyancing Act.

As indicated, within the lane there are 3 parking spaces. These are required by the terms of the Parking Easement to be accessible for use by other lot owners of the Community Association and by the public, despite signs erected upon the wall of the dwelling at Lot 83 to the effect that the land is private property. Improvements in the land include an electrical junction box, a streetlight pole and two bollards that protect the streetlight pole, a concrete road pavement, kerb, and guttering, and a double grated drainage pit.

10 The fact that the Community Association must maintain and repair the lane and its improvements, reflects that use of the lane and use of the three parking

spaces as provided by the Parking Easement must benefit each member of the Community and the public as so provided.

11 Relevantly also the lane provides a through link between Gubbeteh Road and Millard Drive, which is a critical pedestrian link to Macartney Oval and the shop and restaurant precincts C and E of the Community to the south for the primary benefit of the 84 dwellings north and west of the lane in precinct A.

12 Within the context of those background facts, the Community Association sought orders of the Tribunal for the removal of the Lot Owners' boat and trailer (permanently parked in the lane), and for continuing compliance by the Lot Owners with By-Law 11.4 and the CMA. While the Association had also sought a civil penalty order (as order 3 of the application, lodged on 24 January 2023), such order was not pressed at the hearing of the Association's Proceeding on 27 October 2023.

13 On 23 August 2023, the Lot Owners lodged a cross-application with the Tribunal, the proceeding constituted by file no CL 23/37840 (the **Lot Owners' Proceeding**) seeking orders against the Association including declarations that By-Law 11.4 and that part of the CMS relating to the By-Law are void for uncertainty; alternatively, that By-Law 11.4 and that part of the CMS relating to the By-Law, must be revoked, because they are harsh, unconscionable, or oppressive (see the CLM Act, s 130(1), s 140(2)); further and alternatively, that there are discretionary reasons why the Tribunal should not permit the Association to enforce By-Law 11.4 and that part of the CMS relating to the By-Law, against the Lot Owners. In the latter respect, the Lot Owners argued that the conduct of the Community Association was material (i.e., that the current By-Law 11.4 and its predecessor, was not generally enforced) and that this had led Mr Kazagrandi to act to his prejudice. Mr Kazagrandi stated at paragraphs 19, 20, and 21 of his Statutory Declaration of 7 June 2023:

> [19] On 2019 I purchased my current boat and trailer for about $85,000 and, had I been aware that that the community association might take objection to the continued parking of a boat and trailer on that site, it is unlikely that I would have made that investment.

> [20] I deliberately selected a boat and trailer which was narrow enough not to impede ordinary traffic in the laneway. I had been considering a wider vessel at the time.
>
> [21] The first notification of any concern regarding trailers or boats in the lane which I received was in February 2020 when a letter dated 27 February 2020 was circulated to lot owners …

14 For the hearing of the Proceedings on 27 October 2023, the parties agreed upon facts and issues in contention.

The Agreed Facts (as recorded in the signed Statement of the Parties' legal representatives, with minor amendments)

15 The Community Association comprises a plot of land located on Anzac Parade, Little Bay in the State of New South Wales, comprising 127 residential, commercial, and recreational lots. The Community Association is bordered by Anzac Parade to the west and Little Bay and the ocean to the east.

16 There are various roads within the Community Association including Gubbuteh Road, Millard Drive, and Newton Street; the most northerly road being Gubbeteh Road and the most southerly being Harvey Street.

17 All the streets and laneways in the Community Association can be accessed and are used by the public.

18 The area comprising the Community Association is located close to Little Bay Beach and the Coast Golf and Recreation Club. Macartney Oval is also located inside the Association.

19 The Community Association is a heritage site registered on the State Heritage Inventory.

20 Randwick City Council has stipulated that the Community Association is governed by a Development Control Plan and Design Guidelines.

21 From 2015 to date Mr and Mrs Kazagrandi have been the registered owners and occupants of Lot 88 located at Gubbuteh Road Little Bay in the State of New South Wales.

22 At the time Mr and Mrs Kazagrandi purchased Lot 88, a Community Management Statement dated 10 March 2005 was in effect.

23 The Lot Owners' lot was subdivided from the original lot 22 to create Lot 88 in the Community Association.

24 Next to the building contained within Lot 88 is a laneway which connects Millard Drive and Gubbeteh Road (**Laneway**). Part of the Laneway is lot property within Lot 88. Another part of the Laneway is contained within a neighbouring lot, Lot 83.

25 In October 2019 Mr Kazagrandi purchased a boat, which is registered with NSW Roads and Maritime Services (**Boat**).

26 Following a by-law consolidation, and a resolution passed at a general meeting of the Community Association on 14 June 2023, by-law 11.3 of the community scheme was revised to become By-Law 11.4 of the CMS, as follows:

> In order to protect the common property from being damaged, a proprietor or occupier of a Lot, must not without the prior written approval of the Community Association, drive or park a heavy vehicle (including but not limited to boats, jet skis, mobile homes, caravans, trailers, campers, buses, and trucks or similar vehicles,), or use or store any construction equipment such as cranes or cherry pickers on any part of the community scheme that can be visible from a public space. A proprietor or occupier may keep a boat, jet ski, mobile home, caravan, trailer, camper, or similar vehicle or equipment not exceeding 3 metres in width, 6 metres in length and 2.4 metres in height stored within their Lot in an enclosure located behind the Lot residence or garage provided that it is fully contained within the Lot and is not visible from outside the Lot. The colours, materials, and design of the enclosure must be consistent with the Lot and must be approved by the Community Association under By-Law 1 (Landscaping and Building Guidelines for the Scheme).
>
> Delivery trucks and tradepersons' vehicles are exempted from this By-Law if their vehicles are parked for periods of not more than 12 hours at a time, and for the purpose of delivery and for carrying out of a service for an owner or resident.

27 From at least February 2020 the Boat has been parked on a trailer in the Laneway.

28 The Boat is permanently parked in the Laneway.

29 In its parked location in the Laneway, the Boat and trailer can be seen from Millard Drive, the Laneway, and Gubbeteh Road.

30 The Boat is not covered by any structure or enclosure other than a protective fabric cover.

31 Prior to 2022, the Lot Owners had not sought the permission of the Community Association to park the Boat in the Laneway or in the community scheme.

32 On 29 November 2022, the Lot Owners lodged an application to build a screen over the Boat to allow the Lot Owners to park the Boat in the Laneway.

33 On 16 January 2023, the Community Association resolved at a committee meeting to engage an architect to provide advice on the Lot Owners' application.

34 On 23 January 2023, the Community Association sent an email to the Lot Owners forwarding an email from the architect to the Lot Owners, which:

(a) advised the information within the application was insufficient to be assessed by the architect, and

(b) requested that further information and documents be provided.

35 The information and documents requested in the email of 23 January 2023 were not provided.

36 The Community Association has not given the Lot Owners permission to park the Boat in the Laneway or in the Community Association.

37 From February 2020 to October 2021 the Community Association has issued the following notices to the Lot Owners, which stated that the parking of the Boat is in breach of By-Law 11.4:

(a) Notice dated 27 February 2020,

(b) Notice dated 3 March 2020,

(c) Notice dated 3 May 2020,

(d) Notice dated 19 August 2020,

(e) Notice dated 7 December 2020,

(f) Notice dated 3 February 2021,

(Notices).

38 The Lot Owners received the Notices.

39 The Boat is and was, at all material times, owned by Mr Kazagrandi.

Issues in Contention

40 The parties agreed that the following issues arise for the Tribunal's consideration and determination:

1) Have the Lot Owners breached By-Law 11.4?

2) Should the Tribunal make an order for compliance with By-Law 11.4, or should it decline to do so?

3) Should By-law 11.4 be revoked, pursuant to the Tribunal's power in s 140(2) of the CLM Act?

4) In relation to the issue in (3) above:

(a) Is By-Law 11.4 void for uncertainty?

(b) Is By-Law 11.4 harsh, unconscionable, and/or oppressive within the meaning of s 130(1) of the CLM Act?

41 Pertinently, the Lot Owners admit that Mr Kazagrandi keeps the Boat and trailer on Lot 88 in the Laneway, and they further admit that the Boat and Trailer can be visible from a public space; but they submit, as the Issues in Contention reflect, that for various reasons, they should not be ordered to remove the Boat and trailer.

Consideration

Is By-Law 11.4 void for uncertainty?

42 The Lot Owners contend that By-Law 11.4 is uncertain, and hence void, because it refers to a "heavy vehicle", an expression which the Lot Owners describe as *"inappropriately vague for a by-law that is supposed to assist the management of the community scheme, and which has punitive consequences for non-compliance"*: see Final Submissions of Lot Owners dated 20 November 2023 (**Lot Owners' Final Submissions**) at [10a]. They argue that unlike its immediate predecessor, which included a specific weight limit for "trucks exceeding two tonnes", the By-Law does not provide any specific weight or mass that makes a vehicle "heavy": Lot Owners' Final Submissions at [8].

43 In further support of their argument for uncertainty, the Lot Owners say that some of the instances of vehicle which are provided for in the language of the By-Law (i.e., boats, jet skis, trailers, campers), need not be in any sense a "heavy vehicle", and that *"all taken together do not form any meaningful class"*: see Lot Owners' Final Submissions at [10b].

44 In essence, the Lot Owners' submission is that the By-Law must be declared void for uncertainty because the term in the By-Law, "heavy vehicle", is a *"vague descriptor"*; because there is no *"identifiable class"* for the term; and because the amplification of the term provided for in the language of the By-

Law is *"incapable of being given any practical meaning"*: Lot Owners' Final Submissions at [10c].

45 I am not persuaded by the Lot Owners' submission as to the alleged uncertainty of the By-Law. Contrary to the Lot Owners' submission that there is no meaningful or identifiable class, I am satisfied that for the purposes of the By-Law, the term "heavy vehicle" is elucidated by the examples given: "boats, jet skis, mobile homes, caravans, trailers, campers, buses, and trucks or similar vehicles". They are clearly examples given as a non-exclusive (i.e., "including but not limited to") list of vehicles, which are vehicles other than ordinary passenger vehicles. Some of the examples in the By-Law, such as buses and trucks, are "heavy" in any context, but, in my view, all could be "heavy" in a particular context. Certainly, none of the types of vehicles which are given as examples of a "heavy vehicle", could be said to be very light vehicles in any context, such as might be the case with (say) scooters and bicycles, which, of course, are not given as examples in the By-Law.

46 Accordingly, while I accept that the term "heavy vehicle" in the By-Law, is capable of a narrower meaning, and that there might be difficulties of interpretation in some contexts, this does not render the By-Law uncertain in a legal sense. Pertinently, in *Upper Hunter District Council v Australian Chilling and Freezing Co Ltd* [1968] HCA 8; (1968) 118 CLR 429 (**Upper Hunter**), Barwick CJ said at [9], pp. 436- 437:

> [A] contract of which there can be more than one possible meaning or which when construed can produce in its application more than one result is not therefore void for uncertainty. As long as it is capable of a meaning, it will ultimately bear that meaning which the courts, or in an appropriate case, an arbitrator, decides is its proper construction: and the court of arbitrator will decide its application. The question becomes one of construction, of ascertaining the intention of the parties, and of applying it ... In the search for that intention, no narrow or pedantic approach is warranted, particularly in the case of contractual arrangements. Thus, will uncertainty of meaning, as distinct from absence of meaning or of intention, be resolved.

47 That statement of the relevant principles of the law of uncertainty of contracts is very apposite in this instance because by-laws are characterised as statutory

contracts (or delegated legislation): see, for example, *The Owners of Strata Plan No 3397 v Tate* [2007] NSWCA 207 at [71].

48 I find that By-Law 11.4 does not suffer from an "absence of meaning", as Barwick CJ put it in Upper Hunter. In my opinion, the By-Law is quite capable of being understood as it relates to vehicles of the types specified in the non-exclusive list, to vehicles "similar" to those types in the non-exclusive list, as well as to vehicles that fall within the ordinary meaning of "heavy vehicle", such as tractors.

49 Materially, in the context of this case, there is no uncertainty as to whether By-Law 11.4 applies. Clearly, the Boat and trailer parked by the Lot Owners in the Laneway are within the types of vehicles specified in By-Law 11.4.

50 Other than general assertions about difficulties in interpretation (see the Lot Owners' Final Submissions at [10a] – [10c]), the Lot Owners have not identified any example or circumstance in respect of which there would be doubt as to whether By-Law 11.4 applied.

51 As the issue is one of interpretation, no question of severance, or of rewriting or editing the By-Law, arises: see the Lot Owners' Final Submissions at [11] – [18]. I find that there is no absence of meaning in By-Law 11.4.

52 For those reasons, the By-Law is not void for uncertainty.

Exercise of the Tribunal's Discretion

53 The Community Association's application for orders of the Tribunal is made under s 193 of the CLM Act, which provides that the Tribunal *"may … make an order to settle a complaint or dispute about … the operation, administration, or management of a scheme under this Act … "*

54 There is no doubt that s 193 of the CLM Act confers a discretion upon the Tribunal, as to whether (or not) it makes an order under that section and under its general order-making power in s 190 of the CLM Act.

55 The Lot Owners submit (Lot Owners' Final Submissions [25] – [39]) for various reasons that the Tribunal, in the exercise its discretion, should not make any order under the CLM Act for the enforcement of By-Law 11.4 against them.

56 A principal reason why the Lot Owners say that the Tribunal should decline relief under s 190 and s 193 of the CLM Act, is an alleged failure on the part of the Community Association to enforce By-Law 11.4 and its predecessors against the Lot Owners in relation to a boat and trailer previously parked by the Lot Owners in the Laneway: see the Statutory Declaration of Mr Kazagrandi dated 7 June 2023, [16] – [19], [21] - [22].

57 I do not accept the Lot Owners' submission that the Tribunal should decline relief in the exercise of its discretion under s 193 of the CLM Act. The reasons for my conclusion in that regard are as set out in the following paragraphs.

58 Firstly, the vehicles which Mr Kazagrandi previously owned are described as "an ex-army trailer" (from 2016 to 2018) and a "much smaller boat and trailer" (from 2018 to 2019). Even if the Community Association had not enforced By-Law 11.4 or its predecessors in relation to those other vehicles, that does not preclude it from enforcing the By-Law in relation to the Boat and trailer currently owned by Mr Kazagrandi. The first respondent purchased the Boat in October 2019, and it is an agreed fact that a breach notice in respect of By-Law 11.4 was issued to the Lot Owners on 27 February 2020.

59 Secondly, to the extent there is an argument based on estoppel (see Lot Owners' Outline Submissions dated 14 July 2023 at [6]) which underpins the Lot Owners' general submissions that there are discretionary reasons why the Tribunal should decline relief to the Community Association, I find that there is no evidentiary basis for Mr Kazagrandi to have any *"expectation that the by-law is a 'dead letter'"* (see the Lot Owners' Final Submissions at [39i]). Indeed, on his own evidence, Mr Kazagrandi was not aware of the contents of By-Law 11.4 prior to receiving the breach notice on or about 27 February 2020: see the statutory declaration of Mr Kazagrandi dated 6 June 2023 at [21] – [22]. This is even though by-laws in and to the effect of By-Law 11.4 were in place at all

relevant times from when the Lot Owners purchased Lot 88. In the circumstances, I find that the Lot Owners were aware, or ought to have been aware, of the contents of the by-laws. If they failed to familiarise themselves with the contents of the by-laws, then I further find that there is no proper basis on which it can be put that the Community Association induced a belief in the Lot Owners that By-Law 11.4 would not be enforced.

60 Thirdly, the contention that the Community Association did not seek to enforce By-Law 11.4 and/or its predecessors prior to issuing the breach notice on 27 February 2020 is not made out on the evidence. On the contrary, Ms Lesley Wood (**Ms Wood**) gave written evidence on behalf of the Community Association, which I accept, that the Community Association took numerous steps to enforce the by-laws, and that it was doing so as early as 2017: see the second statement of Ms Wood dated 4 July 2023, [11] – [13], and the third statement of Ms Wood dated 27 September 2023, [7] – [9]. Ms Wood was not cross examined by the Lot Owners' legal representative.

61 Fourthly, while the Lot Owners may contend that Mr Kazagrandi has *"acted to his substantial prejudice"* (see the Lot Owners' Final Submissions, [32]), I am not persuaded that any real prejudice has, in fact, been demonstrated. The alleged *"substantial prejudice"* consists only in Mr Kazagrandi having purchased the Boat in October 2019; he has, for 4 years, had the use of the Boat and parked it on a trailer in the Laneway. The orders now sought by the Community Association do not require him to dispose of the Boat, rather that he be required to relocate the Boat and trailer.

62 As to the specific submissions at [33] of the Lot Owners' Final Submissions, I make the following findings, adopting the subparagraph lettering in [33]. (I note that some of my findings are also relevant to the consideration under the next heading 'Whether By-Law 11.4 is harsh, unconscionable, or oppressive'):

(a) The relief sought by the Community Association is not equitable relief; it is relief under the CLM Act, in s 190 and s 193. It is a claim at law, and the equitable doctrine of laches is no answer to

it. Even if laches were applicable, the Lot Owners for the reasons given, have not established on the available evidence either reasonable reliance on any conduct of the Community Association, or that they have suffered any real prejudice.

(b) There was no delay in issuing a notification to the Lot Owners. Mr Kazagrandi purchased the Boat in October 2019, and a breach notice was issued in February 2020, which I find was a reasonable time thereafter. As was addressed in Ms Wood's written evidence (see the second statement of Ms Wood dated 4 July 2023, [13]), which I accept, the Community Association is unable to advise whether any notice was left on the Lot Owners' previous vehicles as the Lot Owners have not provided the registration numbers of them to be checked against the Community Association's Register.

(c) As referred to, Ms Wood gave written evidence in her second and third statements of the extensive efforts of the Community Association to enforce By-Law 11.4 and its predecessors. Her evidence was unchallenged by the Lot Owners.

(d) I do not accept that it would be impossible for any lot to comply with the conditions of By-Law 11.4. The Lot Owners' submission to that effect overlooks the provision in By-Law 11.4 to request permission from the Community Association to keep a vehicle on lot property.

(e) Nor do I accept Mr Kazagrandi's written and oral evidence, which was subject to cross-examination, as to the practicality of accessing areas behind garages on other lots. Furthermore, even if it were the case that no lot owner could locate a boat behind her or his residence or garage, that does, in my view, render By-Law 11.4 harsh, unconscionable, or oppressive. The By-Law does not prohibit or prevent the ownership of boats or similar vehicles; it

merely limits where an owner can park them. By-Law 11.4 would not prohibit a Lot owner from keeping a boat or other vehicle in her or his garage (where it would be out of view). Plainly, Mr Kazagrandi's difficulty is that he cannot fit the Boat in his garage because of its size, but I find that this is not a difficulty which should be visited upon the Community Association by making an order under s 140(2) of the CLM Act as the Lot Owners have requested in the cross-application.

(f) The validity of By-Law 11.4 does not depend on the aesthetic impact of a single boat in a particular location, as the Lot Owners contend at sub-paragraphs (i) – (iv). In my determination, By-Law 11.4 creates a policy for the entire Community, such that the visual impact of permitting or prohibiting boats and other vehicles must be considered in relation to the Community as a whole. In this regard, I accept the expert opinion evidence of Town Planner, Brett Daintry (**Mr Daintry**) in his expert witness report dated 30 September 2023. This report was given in accordance with the Tribunal's Procedural Direction 3. Mr Daintry acknowledged that he had read the Experts' Code of Conduct and agreed to be bound by it. Mr Daintry's evidence was not challenged by the Lot Owners.

(g) The Lot Owners' submission that the Boat could not cause damage, given its weight, is of no moment. The submission was unsupported by evidence, and in any event, as was the case in respect of visual amenity, the effect of permitting or prohibiting boats and other vehicles on lot property is to be considered in relation to the Community as a whole, and not in relation to whether (or not) the Boat and trailer on Lot 88 has a combined gross weight of less than 2 tonnes.

(h) In this sub-paragraph of the Lot Owners' Final Submissions, they acknowledge that the Boat and trailer are *"parked in apparent*

breach of the terms of an easement". This is a correct statement save that qualifying breach with the word *"apparent"* is not required, as I find that there is no doubt of the breach of the Parking Easement by the Lot Owners.

(i) The Lot Owners also acknowledge that it would be *"to consent to a breach of the easement"* for the Community Association to consent to the Boat and trailer remaining where they are parked. Such acknowledgment is a significant concession by the Lot Owners because in my determination, the breach of the terms of the Parking Easement caused by the Lot Owners parking the Boat and trailer in the Laneway, is a very good reason for granting the relief sought by the Community Association in the Association's Proceeding, even if I had found that there were other discretionary factors which pointed to the opposite conclusion.

(j) A claim in relation to the Parking Easement is a claim at law and a defence of laches is not available. An injunction in aid of a legal right is not refused by a court of equity until the legal right is itself statute barred: see Heydon, Leeming and Turner, *Meagher, Gummow & Lehane's Equity – Doctrines & Remedies* (5th ed, Lexis Nexis, 2015), at p.1090.

(k) Any suggestion that a defence of laches is available to the Lot Owners is simply not to the point because it does not overcome the fact that the Lot Owners are clearly in breach of the terms of the Parking Easement, as well as By-Law 11.4, such that relief to enforce the By-Law is warranted on two bases.

(l) Even if the Boat and trailer do not obstruct ordinary traffic through the Laneway, this is immaterial to the exercise of the Tribunal's discretion for the reasons already given.

(m) Mr Kazagrandi's evidence was that due to the height of the vehicles and despite extensive searches, the nearest place where he could securely store the Boat and trailer is Penrith. This evidence was challenged, in my view, successfully, under cross-examination by the Community Association's counsel. I found Mr Kazagrandi's evidence as regards there being no convenient alternative, implausible, and I do not accept it.

(n) The Lot Owners have not identified any factors *"unique"* to this case, and which would warrant the Tribunal declining to enforce a valid by-law without *"set(ting) a precedent"* for the rest of the Community. On the contrary, the discretionary factors specific to this case (in particular, the existence of the Parking Easement) weigh heavily in favour of the enforcement of By-Law 11.4.

(o) The two photographs of the Laneway, referred to in subparagraph (iii), the first showing other parked vehicles, and the second showing no other vehicles, prove nothing as to the demand for parking spaces in the Laneway. Far more probative as to that issue than the matters put in subparagraphs (i) – (iv) of [33o], is the existence of the Parking Easement, as well as the (unchallenged) expert evidence of Mr Daintry.

63 The only limitations on the matters which can be considered by the Tribunal in the exercise of its discretion under s 190 and s 193 of the CLM Act arise from the scope and purpose of the statute: *Minister for Aboriginal Affairs v Peko-Wallsend Limited* [1986] HCA 40; (1986) 162 CLR 24 at [15b], p.40 per Mason J. Relevantly, the CLM Act provides that:

(i) A management statement is binding and has effect as if it included mutual covenants by each person (including a Lot owner) on whom it is binding to observe and perform its provisions, and as if those persons had signed and sealed the management statement (s 127),

(ii) Notices may be given for failure to comply with by-laws, and restrictions on the use of property and voting rights may follow from such breaches (s 137).

(iii) The Tribunal may order a person to pay a monetary penalty for a contravention of a by-law (s 138).

64 Those sections of the CLM Act make clear that the by-laws of an association scheme are to be observed. I am satisfied that it would be contrary to the scope and purpose of the CLM Act to grant no relief in relation to a clear and ongoing breach of a valid by-law.

65 Accordingly, I find that there are no discretionary reasons to decline relief under s 190 and s 193 of the CLM Act.

Whether By-Law 11.4 is "harsh, unconscionable, or oppressive".

66 A by-law will not be "harsh, unconscionable, or oppressive" within the meaning of s 130(1) of the CLM Act, unless the by-law restricts the enjoyment of a lot owner's rights in a way which *"could not on any rational view enhance or be needed to preserve the other lot owners' enjoyment of their lots and the scheme common property"*: *Cooper v The Owners – Strata Plan No 58068* [2020] NSWCA 250; 103 NSWLR 160 (**Cooper**) at [78] per Macfarlan JA. The Court of Appeal in Cooper stated that there are purposive limits to the *Strata Schemes Management* Act 2015 NSW, in s 136(1), which is the provision of that Act applying to the by-laws of strata schemes, and which is equivalent to s 130(1) of the CLM Act, applying to the by-laws of association schemes, such as By-Law 11.4. Relevantly, Basten JA observed (Cooper, [56]) that a criterion for concluding that a by-law may be harsh, unconscionable, or oppressive, is that it interferes with the property rights of a Lot owner by controlling or prohibiting a particular use in circumstances where that use does not materially and adversely affect the enjoyment of any other Lot.

67 While the Lot Owners rely upon Cooper, in its application to the facts of this case, Cooper does not assist them. This is because I do not find that By-Law

11.4 restricts the enjoyment of the Lot Owners' rights in the manner referred to by the Court of Appeal in Cooper. I am satisfied that By-Law 11.4 enhances the amenity of other lot owners in the Community, in that the intent of the By-Law is to prevent limited parking space from being permanently occupied by boats and trailers, and other vehicles.

68 I am further satisfied that By-Law 11.4 protects the visual amenity of other owners in the association scheme. The available evidence establishes that the Community Association, which was architecturally designed according to a masterplan, is subject to extensive restrictions that are intended to preserve the architectural intent of the said masterplan. The importance of protecting the overall design and amenity is enshrined in the Design Principles contained in the CMS governing the development of the association scheme. Those Principles include that owners and occupiers are not to keep large vehicles, such as boats, in areas of the association scheme which are visible. In my determination, the By-Law is entirely consistent with other measures taken by the Community Association to protect visual amenity, including enforcing by-laws in relation to the appearance of lots and prohibiting visible antennas and satellite dishes. I observe that in his statutory declaration dated 18 October 2023, Mr Kazagrandi accepts that the appearance of the area is a relevant consideration for the Community Association.

69 Moreover, the unchallenged expert evidence of Mr Daintry establishes that By-Law 11.4 protects important interests of other owners in the visual amenity of the Community and the use of the common property within the association scheme. I accept the conclusions and opinions of Mr Daintry that the By-Law is necessary, having regard to these matters:

(a) The Masterplan Design Guidelines provide for the Community Association to have limited on-street parking, due to there being many no stopping signs, many no parking signs, narrow streets, and extensive use of driveways.

(b) Limited parking is further exacerbated in the summer months by high public demand for street parking as the Community is a means of public access to the nearby beach.

(c) In Mr Daintry's opinion, without By-Law 11.4 in the CMS, it is likely that the limited available parking spaces will be taken up by owners and occupiers storing their boats and other vehicles or articles.

(d) Mr Daintry concludes that an absence of the vehicles (including boats) described in the By-Law being permanently parked (or stored) in the Community *"makes a positive contribution to the amenity and pleasant character of the Community"*.

(e) Further, Mr Daintry opines that in the absence of By-Law 11.4, the storage of large numbers of vehicles on the streets of the Community would result in *"a very poor and visually intrusive outcome, degrading the amenity of all residents of the Community"*.

(f) Mr Daintry also says that the CMS is an appropriate plan of management for the Community, and that it is consistent with the development consent.

70 As against the legitimate interests of the Community Association, the Lot Owners submit that By-Law 11.4 is harsh, unconscionable, or oppressive because Mr Kazagrandi cannot permanently park the Boat and trailer in the Laneway and that this unreasonably interferes with an ordinary incident of modern home ownership. I do not accept that submission.

71 Moreover, irrespective of the By-Law, the Lot Owners are not entitled to permanently park a boat and trailer in the Laneway, because of the Parking Easement.

72 For those reasons, I find that By-Law 11.4 is not harsh, unconscionable, or oppressive, within the meaning of s 130(1) of the CLM Act, and that the Lot Owners are not entitled, in their cross-application, to an order under s 140(2) of the CLM Act.

Conclusion and Orders (including directions as to costs, if required)

73 The Community Association, therefore, has made out its case for orders of the Tribunal under s 190 and s 193 of the CLM Act.

74 The Lot Owners' Proceeding (i.e., the cross-application) must be dismissed.

75 If any party wishes to press an application for costs of the proceedings, I have made other directions. Prima facie s 60(1) of the *Civil and Administrative Tribunal* Act 2013 NSW (**NCAT Act**) applies, as no monetary amount was claimed or in dispute in either proceeding. Accordingly, any costs' applicant should address in written submissions whether there are "special circumstances" warranting an order for costs of the proceedings: NCAT Act, s 60(2).

76 For the foregoing reasons, the orders of the Tribunal are:

1) In the proceeding constituted by file no CL 23/03634, pursuant to sections 190 and 193 of the Community Land Management Act 2021 NSW, the Tribunal orders that the respondents, Igor Kazagrandi and Inna Kazagrandi must:

    (a) comply with By-Law 11.4 of the Community Management Statement and remove immediately the boat trailer, which is registered in the name of the first respondent, and

    (b) not park a boat trailer in contravention of the Community Management Statement By-Law 11.4.

2) The proceeding constituted by file no CL 23/37840 is dismissed.

3) If a party in either proceeding seeks an order for costs leave is granted to file and serve short written submissions (no more than 5 A4 size pages) on that issue only within 14 days of the date of these orders.

4) Leave is granted to the other party to file and serve short written submissions in reply (no more than 5 A4 size pages) on that issue only within a further period of 14 days.

5) A costs' applicant may file and serve any written submission, strictly in response to the other parties' written submissions in reply (such response to be no more than 3 A4 size pages) within a further period of 7 days.

6) In any such submissions the parties are to address the matter of whether pursuant to the provisions of the Civil and Administrative Tribunal Act 2013 NSW, s 50(2), the Tribunal should dispense with a hearing on the issue of costs so that the issue is decided on the papers lodged with the Tribunal and with appearances of the parties not required.

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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