

## ACT CIVIL & ADMINISTRATIVE TRIBUNAL

**JOHNSON & ANOR v THE OWNERS - UNITS PLAN 4373 (Unit Titles) [2020] ACAT 114**

**UT 32/2019**

**Catchwords:**

**UNIT TITLES** – use of common property – approval from executive committee required – whether proposed use of common property is inconsistent with use permitted under Crown lease for units plan – whether refusal to permit use of common property interferes with owners right to use and enjoyment of common property – decision making process used by executive committee – allegations of unconscionable conduct – scope of tribunal's powers

**Legislation cited:**

*Building Units and Group Titles Act 1980* (Qld) s 51  
*Unit Titles (Management) Act 2011* ss 2, 3, 7, 8, 16, 19, 35, 127, 129

**Cases cited:**

*Piazza & Anor v Strata Corporation 10147 Inc & Anor* [2020] SASCFC 27  
*Platt v Ciriello* [1997] QCA 33

**Tribunal:**

Senior Member K Katavic

**Date of Orders:**

18 December 2020

**Date of Reasons for Decision:**

18 December 2020

**AUSTRALIAN CAPITAL TERRITORY )  
CIVIL & ADMINISTRATIVE TRIBUNAL )**

**UT 32/2019**

**BETWEEN:**

**MARK JOHNSON**  
First Applicant

**JANET JOHNSON**  
Second Applicant

**AND:**

**THE OWNERS - UNITS PLAN 4373**  
Respondent

**TRIBUNAL:** Senior Member K Katavic

**DATE:** 18 December 2020

**ORDER**

The Tribunal orders that:

1. The application is dismissed.

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Senior Member K Katavic

## REASONS FOR DECISION

### Introduction

1. At the heart of this dispute is the use of a 'Dining Room', being common property within the Greenwich complex in Campbell in the ACT. The applicants considered it was an appropriate venue in which they could conduct drawing classes as part of their home business and sought approval from the executive committee to do so. The executive committee refused the request on the basis that it was not a use consistent with the permitted purposes of the units. The executive committee regarded the applicants' proposed use to be for a commercial purpose and therefore not a permitted use. The applicants disagreed. They also took issue with the way the executive committee arrived at its decision, which included conducting an anonymous survey of unit owners on whether the 'Dining Room' should be used for commercial purposes. The applicants characterised the executive committee's handling of their request as unconscionable.
2. The applicants applied to the Tribunal for relief under the *Unit Titles (Management) Act 2011* (the **UTM Act**). Both parties filed extensive submissions and relevant material.
3. The parties jointly proposed that the Tribunal decide the application on the papers without conducting a hearing. The Tribunal agreed to that course. The decision was reserved on 14 July 2020 after the final direction was complied with and no further documents were to be lodged. As there were no objections to any of the material relied upon by either party, the Tribunal has had regard to all the documents lodged by the parties.<sup>1</sup>

### Background

4. The applicants own and reside in a unit within the Greenwich Park complex (UP 4373) which comprises 205 residential units and 15 commercial units.

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<sup>1</sup> Application dated 15 November 2019 including submissions and attachment M&J 002, Appendices A-D; Respondent's Response dated 13 February 2020 including attachments; Respondent's Supplementary Response dated 22 April 2020; Respondent's Timeline; Witness Statement of Brian Hall dated 22 April 2020; Witness Statement of Jenny Campbell dated 22 April 2020; Applicants' additional submissions dated 19 May 2019 [sic]; Respondent's Supplementary Reply dated 22 May 2020; Applicants' Final Response dated 22 June 2020

5. The second applicant, Mrs Johnson, operates a home business from the unit known as 'Tesstangles'. Tesstangles teaches the mindfulness drawing method of Zentangle. The business offers classes comprising up to 10 people of two hours duration. Participants are charged a fee and it is open to any member of the public.
6. On 20 September 2018, Mrs Johnson sent an email to the executive committee seeking permission to use the dining room to teach Zentangle classes.<sup>2</sup> A member of the executive committee responded to Mrs Johnson's request advising it was under consideration and enquired as to whether Mrs Johnson would be charging for the classes and offering the classes to members of the public,<sup>3</sup> to which Mrs Johnson answered yes to both questions.<sup>4</sup>
7. The 'Dining Room' Mrs Johnson was referring to forms part of the common property of the units plan (**the Dining Room**). It is a space which can hold approximately 20 people and has tables, chairs, and a small kitchenette.<sup>5</sup> It is usually used by residents for social activities which cannot be accommodated within a dwelling, such as meeting people or holding personal functions such as a dinner party or birthday function.<sup>6</sup> It is used for hosting committee meetings for charities or not-for-profit organisations and the executive committee also holds its meetings in the Dining Room.<sup>7</sup> The use of the Dining Room is regulated by an online booking system.
8. What followed Mrs Johnson's request might be described as a protracted dialogue which involved the executive committee exercising its responsibility for common property and two owners (the applicants) who believed they had an entitlement to use the common property. The applicants also believed they were subjected to a targeted effort by the executive committee to resist the proposed use. They were particularly aggrieved by a survey conducted by the executive committee in relation to the applicants' proposed use.

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<sup>2</sup> Application Appendix A attachment 1, email dated 20 September 2018 page 11

<sup>3</sup> Application Appendix A attachments 2 and 3, emails dated 20 September 2018 page 12

<sup>4</sup> Application Appendix A attachment 4 and 5, emails dated 21 September 2018 page 13

<sup>5</sup> Witness statement of Brian Hall dated 22 April 2020 at paragraph 12

<sup>6</sup> Witness statement of Brian Hall dated 22 April 2020 at paragraph 13

<sup>7</sup> Witness statement of Brian Hall dated 22 April 2020 at paragraph 13

9. The executive committee considered the Units Plan 4373 Greenwich Park Owners Corporation Rules (**the Rules**) and the Dining Room Policy made under those Rules. In considering the applicants' request they conducted a survey of the unit owners regarding the scope of uses for the Dining Room. Ultimately, the applicants' request to use it for Zentangle classes was refused.

**The application and scope of the Tribunal's powers**

10. The applicants sought the following relief in their application:<sup>8</sup>

- (a) An order under section 19 of the UTM Act that the executive committee's decision denying the applicants' request to occasionally use the Dining Room for their home business is void.
- (b) An order under section 19 of the UTM Act repealing the "rule" established by the executive committee prohibiting the use of the Dining Room by owners or occupiers for their home business.
- (c) A finding that the executive committee has failed to comply with the Code of Conduct for Executive Members under part 1.1, sections 2 and 3 of the UTM Act in relation to fairness, care and diligence in dealing with the applicants' request to use the Dining Room.
- (d) A finding that the executive committee engaged in unconscionable conduct under part 1.1 section 7 of the UTM Act by undertaking the "commercial use" survey of owners and an order that the results of the survey are void.
- (e) An order for "redress" for the unconscionable behaviour of the executive committee, requiring the executive committee to correct the record for all owners by:
  - (i) distributing a communication, approved by the applicants or the Tribunal, to all owners via Buildinglink and to be read into the record at the next General Meeting or Annual General Meeting;

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<sup>8</sup> These are set out generally as stated in the Application dated 15 November 2019, attachment M&J 001



(ii) including in the communication the following:

- (1) that the current and previous executive committee have unfairly dealt with the applicants' request to use the Dining Room;
- (2) that the applicants use of the Dining Room has been approved based on its merits;
- (3) the survey of owners on "commercial use" of common property was ill considered and unfair;
- (4) that the current and previous executive committee and each executive member apologise to the applicants for their conduct and offence caused by the survey;
- (5) that the executive committee will consider any requests for the use of the Dining Room based on the merits of each request; and
- (6) a summary of the Tribunal's findings.

11. The Tribunal's powers in respect of a dispute such as this are set out in section 129 of the UTM Act. It provides, relevantly, as follows:

***Kinds of ACAT orders***

- (1) *The ACAT may make the following orders:*
  - (a) *an order requiring a party to do, or refrain from doing, a stated thing;*
  - (b) *an order requiring a party to exercise a function under this Act;*
  - (c) *an order requiring an owners corporation to do a stated thing that is ancillary to a function of the corporation under this Act;*
  - (d) *an order requiring a person to pay to the Territory or someone else an amount of not more than \$1 000;*
  - (e) *a declaration—*
    - (i) *that a general meeting or executive committee meeting is void for irregularity; or*

- (ii) *that a resolution of a general meeting or executive committee meeting is void for irregularity; or*
  - (iii) *that a rule of the owners corporation is invalid—*
    - (A) *because the owners corporation does not have the power to make the rule; or*
    - (B) *under section 108 (3); or*
    - (C) *for irregularity; or*
  - (iv) *for an application made under section 127 (1) (d)—that the rule is invalid on the ground that the method in the resolution used to work out the proportion of fund contributions to be paid by each unit owner is not fair;*
  - (f) *an order repealing or amending a resolution of a general meeting or executive committee based on a merits review of the resolution by the ACAT;*
  - (g) *an order giving effect to an unsuccessful motion for a resolution of a general meeting (either as originally proposed or as amended by the ACAT) if the ACAT is satisfied after a merits review of the motion that opposition to the motion was unreasonable;*
  - ...
  - (j) *an order requiring an owners corporation to make or repeal a rule and register a copy of the resolution making or repealing the rule;*
  - ...
  - (2) *The ACAT may make any other order it considers reasonably necessary or convenient to resolve a dispute under this part.*
  - ...
  - (5) *This section does not limit the orders the ACAT may make in relation to a dispute under this part.*
12. The relief sought by the applicants is not easily reconciled with the kinds of orders the Tribunal can make under section 129 of the UTM Act. The Tribunal does not have a general regulatory role under the UTM Act. Its jurisdiction is determined by the kinds of disputes that may be brought before the Tribunal for determination and the kinds of orders it may make in accordance with section 129. The Tribunal is not vested with a general power to simply inquire into the conduct of an owners corporation or executive committee.
13. Disputes involving the executive committee are confined to the executive committee and an executive member not between owners or occupiers and the

executive committee.<sup>9</sup> The executive committee is not a party to this application. On 22 January 2020, orders were made changing the name of the respondent to The Owners – Units Plan 4373 rather than the executive committee for Units Plan 4373. In their submission dated 5 May 2020, the applicants maintained they were asking the Tribunal to make ‘all the orders’ requested. I have taken that to mean the orders as stated in the application and summarised above at [10] against the executive committee.

14. The applicants particularised their complaint regarding the conduct of the executive committee in relation to their request to use the Dining Room and the survey as being unconscionable. In their application, they stated, in relation to the survey.<sup>10</sup>

*[It] was unfairly run, poisoned the well of owner sentiment, prejudiced our request, and is not supported in legislation or rules as a mechanism to gain owner approval. This survey has been relied upon to support the ECs decision. Further, the EC has continued to rely upon the survey after being apprised of the issues with the survey and have engaged in cyber bullying by using digital means to take the ECs position to all owners, unfairly paint our request as detrimental to owners, and thus providing us with no ability to put a position to the same audience.*

15. Even if the Tribunal were to find the executive committee acted unconscionably in its handling of the applicants request to use the Dining Room, what order could the Tribunal make?
16. The Tribunal has a general power under section 129(2) to make any other order it considers reasonably necessary and convenient to resolve a dispute under Part 8 of the UTM Act. The same can be said for section 129(5) which does not limit the orders the Tribunal may make. This still requires the Tribunal to make ‘an order’. Simply making findings about conduct or circumstances at large are of no consequence unless an order can be made. Findings are the basis upon which any orders are made. To make findings and commentary as sought by the applicants, may stray into giving an inappropriate advisory opinion. At best, the applicants have sought orders for ‘redress’ in the manner set out above at [10]. This might be interpreted as an order requiring the executive committee, on

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<sup>9</sup> Section 127 of the UTM Act

<sup>10</sup> Application Attachment M&J 001 page 1



behalf of the respondent, to do a stated thing in accordance with section 129(1)(a).

17. However, assuming the Tribunal could make orders pursuant to sections 129(1)(a), 129(2) or 129(5) against the executive committee on the basis that it had failed to comply with the UTM Act and otherwise engaged in unconscionable conduct, I am not satisfied the applicants as owners can bring such a dispute before the Tribunal. The applicants are not entitled by reason of section 127 of the UTM Act to bring an action against the executive committee. The Tribunal cannot make any orders against it.
18. Having regard to the powers available to the Tribunal in section 129 of the UTM Act, I am not satisfied the Tribunal has the power to make the orders sought regarding the conduct of the executive committee in the manner proposed by the applicants. The applicants were no doubt unhappy about the process the executive committee adopted in order to determine and ratify use of the common property known as the Dining Room. Inevitably a difference in opinion may arise in how such considerations should be processed and considered. I am not satisfied the Tribunal can make orders regarding the conduct of the executive committee and do not propose to do so.
19. I am satisfied that the order sought by the applicant's asking the Tribunal to 'void' the executive committee's decision to deny their request to use the Dining Room may be within the scope of section 129(1)(a).
20. The applicants have asked the Tribunal to repeal the "rule" prohibiting the use of the Dining Room for commercial purposes. I cannot find such a rule. I have regarded the applicants request to refer to the reason underpinning the executive committee's decision, not that a resolution making such a rule had been passed. As best it can be ascertained, the applicants seek an order that the executive committee refrain from applying such a reason to any requests to use common property. For reasons that become apparent below, to do so would unreasonably interfere with the exercise of the executive committee's discretion regarding such requests.

21. The issue before the Tribunal can be distilled to the following:
  - (a) Whether the applicants' use of the Dining Room to conduct Zentangle classes is a permissible use under the Crown Lease;
  - (b) If so, should the request have been approved such that the executive committee, on behalf of the respondent, should be ordered to do so?
22. The applicants submit, in general terms, that the refusal to allow them to use the Dining Room denies them the opportunity for reasonable use and enjoyment of common property. They submit the decision was erroneously premised on their request being for a "commercial use". They submit that "commercial use" is not relevant to deciding whether to permit an owner to use common property, in this case for a home business which they say is consistent with a residential use.
23. The respondent submitted that the applicants' proposed use of the Dining Room was impermissible as it was inconsistent with the Crown Lease and applicable planning laws and therefore it could not be approved.

**Is the applicants' proposed use of the 'Dining Room' permissible and should the request be approved?**

24. The owners corporation is responsible for the control, management, and administration of the common property.<sup>11</sup>
25. Section 19(1) of the UTM Act vests the common property in the owners corporation as agent for the unit owners as tenants in common in shares proportionate to their unit entitlement.
26. Section 19(2) of the UTM Act requires the owners corporation to give all members of the corporation the opportunity for the reasonable use and enjoyment of the common property.
27. Special privileges may be granted for the enjoyment of the common property if authorised by an unopposed resolution.

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<sup>11</sup> Section 16(1)(b) of the UTM Act

28. The applicants submit that the refusal unreasonably interferes with their right to use the common property. That of course must first be measured against whether the use is permissible in the first place and secondly balanced against the entire unit body's ability to use the common property.

**Permissible uses of common property**

29. As part of its responsibility to control, manage and administer common property, the owners corporation is obliged to ensure it is used consistently with the terms of the Crown Lease. To do otherwise would undermine the terms of the Crown Lease. Common property is specifically dealt with in the Crown Lease.

30. The Crown Lease purpose clause states:<sup>12</sup>

*To use Units 1 to 220 only for one or more of the following purposes:*

- (i) bar;*
- (ii) café;*
- (iii) office;*
- (iv) personal service establishment;*
- (v) residential for not more than two hundred and five (205) dwellings;*
- (vi) restaurant;*

*AND ANCILLARY THERETO retail.*

31. 'Retail' appears to be an ancillary use to the predominant uses. 'Ancillary' is defined to mean: "associated with and directly related to, but incidental and subordinate to the predominant purposes."
32. The Crown Lease does not refer specifically to the Dining Room as common property. It is simply an identifiable area which falls within the scope of common property and subject to the UTM Act provisions governing common property. The Crown Lease does not confine the use of the space described as the Dining Room to that function. That is achieved through rules to manage the use of the space. The Crown Lease only requires that the common property be used for the following:
- (a) Carparking.

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<sup>12</sup> Crown lease clause 3(c)

- (b) Landscaping.
  - (c) Paving.
  - (d) Lighting.
  - (e) Storage areas.
  - (f) Service areas.
  - (g) Vehicular and pedestrian access.
  - (h) Any other purposes approved by the owners corporation provided that these uses are consistent with the permitted purposes of the units.
33. Given the way in which it has been characterised, the Dining Room could only be used for a purpose approved by the owners corporation provided the use is consistent with the purposes of the units under the Crown Lease. Those permitted purposes are not confined to residential use. It is the uses of all units. Therefore, any approval by the owners corporation may be consistent with any of the permitted uses, including office, restaurant et al. I regard this approach to be consistent with the owners corporation holding common property as agent for the unit owners as tenants in common proportionate to their unit entitlement. The common property is for the use and enjoyment of all unit owners not just the residential units. It is not a matter of designating the area as a dining room and requiring any use by a unit owner to be consistent with that activity (unless there are rules to that effect ratified by the owners corporation). It is about whether the use of the space, if approved by the owners corporation, is consistent with any of the uses under the Crown Lease, including the ancillary use of retail.
34. Having regard to the purposes under the Crown Lease, what might be approved by the owners corporation could be using it as a dining room because hosting a function or party would be residential use. Holding a meeting or conducting appointments or holding a class, might fall within office use.
35. 'Office' is defined to be any premises used for the purpose of administration (including commercial and public administration), and clerical, technical, professional, or like business activities.



36. 'Retail' means the selling of goods and providing personal services in any quantity and by any means other than by wholesale and includes retail shops, restaurants, drink establishments, drive-in facilities, bulky retailing, bulk landscape supplies, vehicle sales, service stations,, retail plant nurseries and produce markets. This is however an ancillary use.
37. By definition, 'retail use', even as ancillary, contemplates commercial transactions, as does office. If office is to be regarded as including commercial administration and retail contemplates transactional activities, then a unit owner using the Dining Room, which is just common property, to host Zentangle classes for fee paying members of the public is not inconsistent with those uses.
38. A different question arises in respect of whether such a use should be approved by reference to the reasonableness of such a use and whether it interferes with the use and enjoyment of that area of common property by other unit owners. Expressed differently, just because it can be approved, should it?

#### **The applicants' use and enjoyment of common property**

39. In *Platt v Ciriello*,<sup>13</sup> the Court of Appeal in Queensland considered similar provisions under the *Building Units and Group Titles Act 1980* (Qld). Section 51 of the Queensland Act stated that a unit owner shall not use or enjoy the common property in such a way or for such a purposes as to interfere unreasonably with the use or enjoyment of the common property by the occupier of another unit.<sup>14</sup> The majority held that section 51, impliedly conferred on unit owners a positive right to use the common property as they wished, subject only to the limitation that their use did not unreasonably interfere with its use by other unit owners.<sup>15</sup> It further held that the uses complained of in that case were not necessarily exclusive uses requiring authorisation. Ambrose J observed that most uses of common property by one unit owner, at least temporarily, in an operational sense, excluded the contemporaneous use of the same property by another.

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<sup>13</sup> [1997] QCA 33

<sup>14</sup> This is in similar terms to section 19(2) and Schedule 2, section 2.4 of the UTM Act

<sup>15</sup> *Platt v Ciriello* [1997] QCA 33 pages 21-22, 34

40. The applicants in this case are proposing exclusive use only on certain days at certain times. In *Piazza & Anor v Strata Corporation 10147 Inc & Anor (Piazza)*,<sup>16</sup> the Full Court of the South Australian Supreme Court held, per Kourakis CJ:<sup>17</sup>

*Unit holders in strata corporations are generally characterised as having a right to share common property in a way which is reasonable and, for that purpose, may make arrangements as between themselves as to the sharing of that space. Plainly enough, multiple unit holders cannot occupy the same space at the same time unless acting jointly. Occupation at any one point in time by one unit holder is not necessarily exclusive or unreasonable.*

41. The use of the common area for a particular purpose is at the discretion of the owners corporation.
42. In accordance with section 35 of the UTM Act, the executive committee exercises the functions of the owners corporation, including but not limited to developing matters in relation to the common property and submitting any matters developed to the owners corporation for consideration.
43. Under Schedule 2, section 2.4 of the UTM Act, the executive committee may approve an application by a member of the corporation to use the common property if:
- (a) *the use applied for is minor; and*
  - (b) *the use will not unreasonably interfere with the reasonable use and enjoyment of the common property by other members of the corporation.*
44. On 12 June 2019, the executive committee refused the applicants requested use of the Dining Room.<sup>18</sup> The executive committee explained its reasoning as follows:

*While the Executive Committee would like to support in principle the conduct of your art classes in the Dining Room, the fact that this is a commercial undertaking and will set a precedent and may have unintended consequences in relation to the use of the owners' common*

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<sup>16</sup> [2020] SASCF 27

<sup>17</sup> *Piazza & Anor v Strata Corporation 10147 Inc & Anor* [2020] SASCF 27 at [43]

<sup>18</sup> Application Appendix A attachment 16, email dated 13 June 2019

*space for commercial purposes. For example, we need to consider issues such as home businesses that may compete with commercial tenants, conduct of businesses the land lease is not zoned for and implications of wear and tear and fair usage of common property.*

45. The executive committee advised that it would seek further advice and consider drafting parameters to assess future requests for the use of common property for commercial purposes.
46. The minutes of the executive committee meeting held on 12 June 2019 do not reflect any decision to the effect described above or at all in relation to the applicants request.<sup>19</sup> The minutes record endorsement of a survey for installation of a parcel locker, but not use of common property for commercial purposes. I am not persuaded this is critical.
47. On 19 July 2019, the executive committee conducted a survey of owners using Buildinglink in the following terms:

*Background:*

*The Executive Committee has had an application from an owner to use the dining room for commercial purposes. The Executive Committee's concern is that if this application is approved it sets a precedent and opens up a range of issues, some foreseen and others not yet foreseen in relation to the use of common property here at Greenwich being used for commercial purposes. The Executive Committee is therefore seeking clear direction from owners on this issue.*

*QUESTION:*

*Does the Owners Corporation wish to permit individual owners to use common property for commercial (profit-making) purposes? Note: if the answer is in the affirmative, the Executive Committee will develop and implement a policy to regulate such use, for the overall benefit and in the interests of the Owners Corporation.*<sup>20</sup>

48. The survey closed on 7 August 2019 and of the 108 responses received, 92 answered "no".

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<sup>19</sup> Application Appendix B attachment 5 Minutes of executive committee meeting 12 June 2019 pages 64-65

<sup>20</sup> Application Appendix C attachments 1-3, survey and results summary pages 79-83

49. On 3 September 2019, the applicants renewed their request to use the Dining Room with a newly elected executive committee and raised their concerns regarding the survey.<sup>21</sup>
50. On 12 September 2019, the executive committee responded to the applicants, again refusing to approve the request.<sup>22</sup> The executive committee stated that it had considered the following factors:
- (a) The Dining Room facility is part of the common property.
  - (b) Greenwich Owners Corporation Rules V2.0, section 5(a).
  - (c) The applicants booking the Dining Room on every Wednesday evening 5:00pm to 10:00pm (except the first Wednesday of each month when the EC meets, up to and including 1 January 2020).
  - (d) The attitudes of owners as expressed in the recent survey.

51. The executive committee stated its reasoning as follows:

*Your extensive block booking of the Dining Room through to January 1<sup>st</sup> is considered demonstrably unreasonable by nature of the frequency and length of the bookings. Your block booking means that the Dining Room is not available for other residents on any Wednesday evening for the remainder of the year. If your proposal were approved this situation would be ongoing for the foreseeable future.*

*The EC cannot, and will not ignore the documented preferences of a large number of owners. The owners do not want their common property used for commercial purposes.*

*Accordingly, the outcome of the EC consideration is that your proposal to use the Dining Room for a commercial purpose is inconsistent with the letter and intent of Section 5(a) of the Rules and is therefore not approved.*

52. A series of email exchanges between the applicants and the executive committee followed resulting in the applicants being invited to attend a special meeting of the executive committee on 21 October 2019 to present their proposal to the executive committee.<sup>23</sup>

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<sup>21</sup> Application Appendix A attachment 20, email dated 3 September 2019 pages 25-32

<sup>22</sup> Application Appendix A attachment 20, email dated 12 September 2019 pages 32-33

<sup>23</sup> Application Appendix A attachments 22-30: emails between 13 September 2019 and 16 October 2019 pages 34-43



53. There are three versions of the minutes of the executive committee meeting held on 21 October 2019, at which the applicants presented their proposal.<sup>24</sup> The result is the same regardless of how the versions were developed or drafted. The applicants request was still not approved.
54. Section 5(a) of the Rules states:<sup>25</sup>
- A unit owner, occupier or user must not use the common property, or permit it to be used, to interfere unreasonably with the use and enjoyment of the common property by an owner, occupier or user of another unit.*
55. This is the provision referred to by the executive committee in its email of 12 September 2019 above.
56. Section 34 of the Rules specifically deals with the Dining Room. It does not specify what activities may and may not occur in the Dining Room other than to state that it is common property and subject to other rules, including section 5 and other approved policies. The approved policy for the Dining Room does little more than repeat section 34 of the Rules. There is no further guidance as to specific or excluded uses.
57. Regardless of whether the Rules and the Dining Room Policy specifically state the activities that can and cannot occur in the Dining Room, the executive committee on behalf of the owners corporation still has the discretion to refuse an application for the use of the common property in accordance with Schedule 2, section 2.4 of the UTM Act.
58. The Rules and the Dining Room Policy guide that decision-making process, but do not preclude the exercise of the discretion in any particular way.
59. The Rules and the Dining Room Policy could state specific activities, but the discretion to approve or refuse any requests remains. To refuse to approve the use as requested by the applicants does not deny or contradict the relevant opportunity required under section 19(2) of the UTM Act. Section 19(2) does

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<sup>24</sup> Application Appendix B attachments 8-10, Minutes of executive committee Meeting held on 21 October 2019 pages 74-77

<sup>25</sup> Application Appendix D attachment 5, Units Plan 4373 Greenwich Park Owners Corporation Rules pages 89-109

not contemplate every conceivable use to which a unit owner would like to put the common property to and any use is not unfettered. The opportunity is limited to what the executive committee may or may not approve on behalf of the owners corporation. In this case for the reasons expressed particularly in its email dated 12 September 2019, it has decided not to approve the applicants' use. The proposed use is not minor, having regard to the frequency and length of time the applicants wish to use the Dining Room. The applicants denied booking the Dining Room as extensively as described in the email of 12 September 2019. Nonetheless some regular and frequent booking would likely be required. It also unreasonably interferes with the use of the Dining Room by other owners for the same reason and because it is regarded by owners as being for a commercial purpose.

60. The concept of reasonable use and enjoyment must be considered in light of the process by which executive committee ascertained what was regarded by owners as reasonable use and enjoyment. The survey results were compelling in informing the executive committee as to how its function should be exercised. This indicated to the executive committee the extent of what might be regarded as reasonable use of the Dining Room. Reasonable use and enjoyment is not unfettered. It is informed by section 19(2) and Schedule 2, section 2.4 of the UTM Act. If it does not align with the applicants expected use it is not unreasonable.

61. As Kourakis CJ said in *Piazza*:

*...the limits on the rights of a tenant in common to act unilaterally against the use of another, and the delineation between ordinary uses and the taking of exclusive possession, or other such acts of ouster, are fact sensitive.*

62. It is for the executive committee on behalf of the Owners Corporation to approve use of common property and in doing so consider the request subjectively. In this case the request has been refused for the reasons set out in the emails dated 13 June 2019, 12 September 2019 and the Minutes of 21 October 2019. Simply because this is inconsistent with the applicants' expectations does not mean they have been denied use and enjoyment of the common property. It could be revisited by the owners corporation by way of a

motion put to a general meeting by the applicants seeking amendment of the Rules and the Dining Room Policy by way of resolution or seeking a special privilege. That is beyond the scope of this application. A right of review in the tribunal exists in respect of resolutions and unsuccessful motions,<sup>26</sup> but that is not the case here.

63. To the extent the applicants have sought orders in respect of their use of the Dining Room, I find that the use would not be inconsistent with the Crown Lease purpose clause. The use is however not approved, and it was therefore not an unreasonable interference with the applicants use and enjoyment of the common property known as the Dining Room. Their reasonable use must be balanced against what is reasonable for all unit owners. Considering requests subjectively is the heart of striking that balance and the executive committee's assessment and consideration was reasonable in the circumstances. The extent of the applicants' reasonable use and enjoyment of that space is determined by the uses approved by the owners corporation. That is the measure of what is regarded by this owners corporation as reasonable use and enjoyment of the common property.
64. I decline to make an order requiring the owners corporation to approve the applicants' use of the Dining Room.

### **Conclusion**

65. I am not persuaded that the respondent has unreasonably interfered with the applicants use and enjoyment of the common property referred to as the Dining Room by defining and confining the Dining Room's use and refusing the applicants' request to use the Dining Room for Zentangle classes.
66. It is the responsibility of the respondent to manage and administer common property. Those responsibilities necessarily involve setting boundaries as to use of common property to ensure reasonable use and enjoyment of all unit owners can be achieved. There is no unfettered right to use and enjoy common property or to use and enjoy common property in a particular way. That is determined by

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<sup>26</sup> Section 129(1)(f) and (g) of the UTM Act

what is reasonable and what the owners corporation may determine from time to time.

67. I am not satisfied the Tribunal can make orders regarding the conduct of the executive committee and do not do so.
68. The application is dismissed.

.....  
Senior Member Kristy Katavic

<b>Dates of hearing:</b>	Heard on the papers
<b>First and Second Applicants:</b>	In person
<b>Solicitor for the Respondent:</b>	Clyde & Co Lawyers