Civil and Administrative Tribunal
New South Wales

Case Name:	Fontainas v Gennacker Pty Ltd t/as Homestead Holiday Parks
Medium Neutral Citation:	[2019] NSWCAT
Hearing Date(s):	4 December 2018
Date of Orders:	28 June 2019
Date of Decision:	28 June 2019
Jurisdiction:	Consumer and Commercial Division
Before:	G.J. Sarginson, Senior Member
Decision:	1. By 14 days from the date of this decision, Gennacker Pty Ltd t/as Homestead Holiday Park is to provide to Jacques Fontainas a signed standard form site agreement in respect of site 33 at 200/25 Chinderah Bay Drive, CHINDERAH NSW 2487 ('the park'). The site agreement is to comply with Schedule 1 of the Residential (Land Lease) Communities Regulation 2015 (NSW). The fees, charges, and site fee increases stipulated in the site agreement are to be consistent with equivalent sites at the park which are the subject of current site agreements. 2. By 14 days after order 1 above, Jacques Fontainas is to return to Gennacker Pty Ltd t/as Homestead Holiday Park a signed copy of the site agreement. 3. If there is any application for costs by the applicant, it is to be made in writing with all submissions and documents filed with the Tribunal and served on the other party by 14 days from the date of this decision. Any submission is to include reference to whether there is consent to the issue of costs being determined without further a further oral hearing in accordance with s 50 (2) of the Civil and Administrative Tribunal Act 2013 (NSW). 4. Any costs submissions in response by the respondent are to be filed and served on or before 14

	days thereafter.
Catchwords:	RESIDENTIAL COMMUNITIES---Site agreement---Whether reasonable grounds for refusal---Whether compliance with previous Tribunal orders.
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) Holiday Parks (Long-term Casual Occupation) Act 2002 (NSW) Local Government Act 1993 (NSW) Local Government (Caravan Parks, Camping Grounds, and Moveable Dwellings) Regulation 1995 (NSW) Residential (Land Lease) Communities Act 2013 (NSW) Residential (Land Lease) Communities Regulation 2015 (NSW)
Cases Cited:	Blair v Curran (1939) 62 CLR 464 Bondarek v NSW Land and Housing Corporation [2018] NSWCATAP 299 Gleeson v The Owners-Strata Plan No 48226 [2018] NSWCATAP 204 Port of Melbourne Authority v Anshun Pty Ltd (1981) 147 CLR 589 Roseby v The Owners-Strata Plan No 2400 [2018] NSWCATCD 72
Category:	Principal judgment
Parties:	Jacques Fontainas (Applicant) Gennacker Pty Ltd t/as Homestead Holiday Parks (Respondent)
Representation:	Counsel: Ms M. McMahon (Applicant) Mr S. Malcomson (Respondent) Solicitors: Legal Aid NSW (Applicant) Worcester & Co Solicitors (Respondent)
File Number(s):	RC 18/31014

Publication Restriction: Nil

REASONS FOR DECISION

1 The dispute arises from the refusal of the respondent ('the operator') to prepare and enter into a long term site agreement under the *Residential (Land Lease) Communities Act 2013* (NSW) ('the RC Act').

2 The dispute has a protracted history. In August 2015 the applicant purchased a caravan with an annex that included a deck and a carport on a site located at a park of the operator at Chinderah NSW. The site was adjacent to the Tweed River. Prior to completing the sale, the applicant spoke to an officer from Tweed Shire Council (Mr LeGrand) who gave him documents and told him the site was listed with the Council as a "residential site".

3 The relevant site at the park is site 33. Under a Tweed Shire Council Caravan Park Approval to Operate to the operator dated 23 August 2014, site 33 is one of the approved "long term sites" at the park.

4 According to the applicant, the person from whom he purchased the caravan (Ms Pease) informed him prior to sale that she had a "permanent site agreement" and she had been in occupation of the site for approximately 11 years.

5 On 27 August 2015 the applicant submitted an application to the operator for a site agreement.

6 In September 2015 there was correspondence between the Applicant and the operator regarding the issue of a site agreement. On 4 September 2015 the operator wrote to the applicant offering an occupation agreement under the *Holiday Parks (Long-term Casual Occupation) Act 2002* (NSW) ('the HP Act'). Relevantly, a site agreement under the HP Act for casual occupation only allows occupation of the site for a limited number of days each year.

7 The applicant responded by letter on 14 September 2015 stating that he sought a "residential site agreement" rather than a "long term casual occupation agreement" as he intended the site to be his "permanent and sole residence".

8 On 24 September 2015, the operator wrote back to the applicant stating that they would "further consider" the request for a long term site agreement if the applicant provided the following:

> "(1) Survey drawing by a licensed and qualified surveyor showing the dimensions, description, size and location of all structures on the site, the distances of the structures on the site, the distances of the structures on the site from those structures on adjoining sites.
>
> (2) A report from a licensed and qualified building certifier stating that all the structures on site comply with the Local Government Act 1993 and the Local Government (Manufactured Home Estates, Caravan Parks, Camping Grounds and Moveable Dwellings) Regulation 2005, including but not limited to the following clauses:
>
> Clause 91 Separation Distances
> Clause 161 Setbacks
> Clause 162 Site Coverage
> Clause 165 Running Gear
> Clause 166 Structural Soundness
> Clause 167 Design gust wind speed
> Clause 169 Floor area
> Clause 172 Compliance plates"

9 On 25 September 2015, the operator wrote to the applicant stating that his written application on 27 August 2015 was for occupancy of the site under the HP Act, and the document included an undertaking that the site not be occupied until a site agreement was signed between the parties. The letter stated that "under no circumstances" was the applicant to occupy the premises" and if he did so, he would be required to leave immediately on the request of the operator. Further, the operator could remove any goods or chattels of the applicant and also charge storage fees.

10 The applicant informed the operator that he believed he had a right to occupy the site, and would be moving in. On 28 September 2015, the operator wrote the applicant stating that he was not entitled to move in without a signed

occupation agreement, and that as he had “refused” to enter into a casual occupation agreement under the HP Act, he must remove all “chattels” and “structures” on the site prior to 12 October 2015.

11 The applicant spoke to NSW Fair Trading and wrote to the operator on 29 September 2015. The operator responded by letter on 2 October 2015, stating the operator’s “requirements have not changed” from its previous correspondence.

12 The applicant, after obtaining advice and representation from ARPRA (a body who represents persons living in manufactured homes and caravans) took proceedings in the Tribunal.

13 On 11 December 2015, the following consent orders were made:

(1) On or before 18 December 2015, the respondent is to give the applicant a disclosure notice in accordance with s 21 of the *Residential (Land Lease) Communities Act 2013*.

(2) The applicant is to provide the respondent the information requested in the respondent’s letter addressed to the applicant dated 24 September 2015 as soon as practicable.

(3) Within 3 working days of the applicant providing to the respondent the information described in order 2, the respondent is to provide the applicant a residential site agreement under the *Residential (Land Lease) Communities Act 2013*.

(4) The parties have leave to re-list the matter before the Tribunal at short notice, to determine any disputes that may arise in carrying out these orders”.

14 In January 2016, the applicant applied to the Tribunal to re-list the proceedings. On 22 January 2016, a Member of the Tribunal extended the time for provision of documents to the respondent to 29 February 2016.

15 In early February 2016, the applicant provided documents to the operator in support of the issue of a long term site agreement under the RC Act and in response to the issues raised by the operator in its letter of 24 September 2015.

16 Relevantly, the applicant provided a letter from Mr LeGrand, Environmental Health Compliance Officer at Tweed Shire Council dated 15 January 2016 which stated:

> "The structure has been inspected and was found to be satisfactorily completed. No further matters were noted".

17 Further, the applicant provided a letter from Mr Peter Lucena of Lucena & Associates (engineer) dated 5 February 2016. The letter stated that the caravan, annex, deck and carport had been inspected on 3 February 2015. The letter states that the caravan and annex had been previously certified by Moir & Associates on 21 October 2013; the carport had been certified by Rymark Engineers Pty Ltd on 22 December 2015, and the engineer did not belief further certification was required. However, the engineer relevantly stated:

> "Notwithstanding the two previous certifications, we are prepared to provide a further certification of the existing caravan, annex and carport as structurally adequate in accordance with AS 1170.1, AS 1170.2, AS1164 and AS1288. The design gust wind speed is 50m/s (N3) in accordance with AS4055. This letter can be taken as proof of certification. We will supply compliance plates for the annex and carport accordingly.
>
> In regards to Running Gear, we inspected the running gear of the caravan and found it to be in place and in good working order in accordance with Local Government (Manufactured Home Estates, Caravan Parks, Camping Grounds and Moveable Dwellings) Regulation 2005.
>
> In regards to all remaining items on the request letter, these are covered by the survey drawings by Robert Harries (Registered Surveyor) showing areas, separation distances, and setbacks. These items are all compliant and have been previously approved by Council, and have not changed."

18 The documents provided by the applicant to the operator also included the Engineers Compliance Certificate of Rymark Engineers Pty Ltd; and the report of Moir & Associates referred to in the letter of Lucena & Associates

dated 5 February 2016, together with a compliance plate issued by Lucena & Associates. A survey of Robert Harries, Registered Surveyor, dated 17 December 2015, was also provided to the operator.

19 On 11 February 2016, the operator wrote to the applicant refusing to issue a long term site agreement. The letter relevantly states:

> "We refer to the documents provided and advise that we (are) not in a position to offer you a site agreement under the Residential (Land Lease) Communities Act 2013. The documents submitted by you identify several issues including, but not limited to:
>
> (1) the structures on the site substantially exceeds the 66.66% site coverage allowed under the Local Government Act and regulations.
>
> (2) the structures exceed the rear boundary of the site.
>
> (3) the aluminium plate provided is inadequate in terms of the requirements of the Local Government Act and regulations for compliance plates.
>
> (4) the engineer's letter refers to a Moir & Harding letter dated 21 October 1993, a copy of which was enclosed. At the last hearing, it was raised by your advocate and it was pointed out that the letter pre-dated by 11 years the installation of the annexe on the above site and referred to a caravan and annex at Cudgen which is several kilometres away from the site and this letter is therefore irrelevant.
>
> It will be necessary for the structures to be substantially modified to enable them to comply with the requirements under the Local Government Act and regulations. You have until Friday 18 March 2016 to bring the structures into compliance with the Local Government Act and regulations. Failure to do so will leave us on alternative but to require that you remove the structures from the site immediately.
> …"

20 On 24 February 2016 the applicant wrote to the operator stating that he was going to have a further meeting with the engineer, and that he not received the boundary of site 33, but had received the "Homestead Holiday Park Plan" from the Council, and enquired whether the issue the operator had was the "total length side" set out on the survey was "20 cm too long and need to be shortening?"

21 It does not appear that the operator responded to the applicant's letter of 24 February 2016. In any event, on 14 April 2016, the applicant again wrote to the operator to request the operator inform him of what type of site agreement

the operator was prepared to provide without any reduction in the size of the current dwelling. The operator responded to that letter with its own correspondence of 19 April 2016 stating that its previous position was unchanged.

22 In May 2016 the operator issued a letter of demand to the applicant regarding payment of storage fees. The operator subsequently took proceedings in the Local Court of NSW seeking payment of monies, which was settled by way of consent orders.

23 On 19 December 2016, the applicant filed fresh proceedings in the Tribunal (Matter RC 16/54883). The proceedings were not filed as a renewal application under Cl. 8 Sch.4 of the *Civil and Administrative Tribunal Act 2013* (NSW) ('the NCAT Act'), using the form of the Tribunal dealing with renewal proceedings. Rather, they were filed as a fresh application for orders under the RC Act. The sole order sought in the application was:

> "A residential site agreement to be given".

24 On 10 April 2017, there was a hearing in the Tribunal before a Member. At the hearing, Mr LeGrand of Tweed Shire Council attended and gave evidence. The Member dismissed the application, and gave written reasons. In essence, the Member noted that the applicant had not applied for an order under the RC Act that the operator had unreasonably refused the assignment of the previous long-term site agreement of Ms Pease to the applicant, but rather sought an order that a new long-term site agreement. The Member was not satisfied that the certificates, reports and surveys the applicant had provided the operator showed that the structures on site complied with both the *Local Government Act 1993* and the *Local Government (Manufactured Home Estates, Caravan Parks, Camping Grounds and Movable Dwellings) Regulation 2005* ('the 2005 Regulations') and accordingly the applicant had not complied with the consent orders of the Tribunal dated 11 December 2015.

25 Regarding the evidence given by Mr LeGrand, the Member stated that he accepted Mr LeGrand's evidence, including that the local Council did not intend to take any action against the applicant or the operator to remove or modify the caravan, annex or carport. The Member also accepted on the evidence that the only failure to demonstrate compliance with the 2005 Regulations was in respect of the site coverage and set back (i.e. Cl. 161 and 162 of the 2005 Regulations).

26 The applicant appealed the decision of the Member dated 10 April 2017 in Matter RC 16/54883. In the course of the appeal, the applicant obtained further documents and served them on the respondent. Such documents included a letter of Mr LeGrand of Tweed Shire Council dated 19 May 2017 that the caravan, annex and carport had been in place for "many years" and: "No action against the owner of this home and structures to remove or modify these structures will be forthcoming". Further, another letter was obtained from Mr Lucena of Lucena Civil and Structural Engineers dated 6 March 2018 that all of the "structures" on the site appeared to have been built at the same time, and had not been subject to renovations or alternations.

27 In 2017, the applicant also took further proceedings in the Tribunal in Matter RC 17/42953, but they were withdrawn pursuant to s 55 (1) of the NCAT Act on 27 April 2018.

28 The appeal from the decision of the Tribunal on 10 April 2017 was determined by the Appeal Panel on 20 June 2018. Relevantly, the appeal was upheld and the Appeal Panel relevantly made the following orders:

> 3. The application is remitted for rehearing by a differently constituted Tribunal and is to be treated as an application under order 4 made 15 December 2016.
>
> 4. The issues to be resolved are:
>
> a. Whether order 2 made 15 December 2015;
>
> i. Reflected the agreement of the parties to settle the dispute;
>
> ii. Is ambiguous;

iii. Required the carrying out of work to bring the structures on site into compliance with the Local Government Act 1993 and the Local Government (Manufactured Home Estates, Caravan Parks, Camping Grounds and Moveable Dwellings) Regulation 2005 in respect of setback and site coverage as applied to structures built after the date the Regulation came into effect;

iv. Or, in the alternative to 4 (a) (iii), whether the savings and transitional provisions of the Regulation meant that the structures on site comply with the Regulation,

b. If order 2 did not require the appellant to carry out work to bring the structures into conformance with the Regulation, did the parties agree:

i. That it was a condition precedent to the entry of a new site agreement for such work in 4 (a) (iii) above to be carried out; and/or

ii. That the respondent could otherwise refuse to enter a site agreement on reasonable grounds (as may be permitted pursuant to s 109 (2) of the Residential (Land Lease) Communities Act 2013), or did the agreement and the orders made on 15 December 2015 limit the matters to which the appellant was required to comply before order 3 made 15 December 2015 took effect".

29 The matter was then remitted back to the Tribunal. On 15 October 2018 at a directions hearing before a Principal Member of the Tribunal, directions were made regarding the respondent filing and serving documents and the applicant filing and serving documents in reply.

30 At the hearing on 4 December 2018, both parties relied upon the documents and written submissions they had relied upon in the Appeal Panel proceedings, which also included the documents relied upon in the earlier proceedings before the Tribunal.

31 Neither party called witnesses at the hearing on 4 December 2018. Each party relied upon documentary evidence only. Oral submissions were then made by Counsel for the applicant and Counsel for the operator. Further, prior to the hearing on 4 December 2018, the applicant filed and served an outline of written submissions dated 30 August 2018; and the respondent filed and served a written outline of submissions dated 30 October 2018.

32 At the conclusion of the oral submissions, the Tribunal gave both parties the opportunity to file and serve any further written submissions. Neither party

believed such a course of action was necessary, in circumstances were there had been written submissions filed and served in the Appeal Panel proceedings; and the parties had made extensive oral submissions at the hearing. No directions were made regarding the filing and serving of written submissions on 4 December 2018.

33 However, at the hearing on 4 December 2018, there was argument as to whether or not the proceedings by the applicant filed on 19 December 2016 in Matter RC 16/54883 were, in substance, renewal proceedings of Matter RP 15/54738, in which the consent orders of the Tribunal were made on 11 December 2015.

34 Renewal proceedings arise under Sch 4 Cl 8 of the NCAT Act, which allow a party to renew proceedings in the Tribunal if another party has not complied with an order to perform work or provide a service, with the party being able to renew proceedings within 12 months from the date of compliance with the order.

35 As the Appeal Panel of the Tribunal further considered the jurisdiction and the powers of the Tribunal in renewal proceedings in *Bondarek v NSW Land and Housing Corporation* [2018] NSWCATAP 299 ('*Bondarek*'), which was published on 14 December 2018.

36 As the parties had not had an opportunity to make submissions as to whether or not the decision in *Bondarek* had any effect on the issues for determination in these proceedings, the Tribunal issued directions to the parties regarding the filing and serving of written submissions. The written submissions were to focus exclusively on whether or not the decision in *Bondarek* affected these proceedings.

37 Regrettably, the applicant's legal representatives not only filed and served an outline of written submissions that slightly exceeded the stipulated page limit (which is not a major concern) but then, without applying for leave from the Tribunal to vary or extend the timetable, filed and served submissions in reply.

The submissions in reply then amplified a claim raised in the written submissions that the Tribunal should grant the applicant leave to re-open his case for the applicant to make a claim in respect of damages for the cost of storage fees the respondent has "required him to pay".

38 Unsurprisingly, the respondent objected to the Tribunal considering the applicant's submissions in reply.

39 Under s 38 (4) of the NCAT Act, the Tribunal is to act with as little formality as the circumstances of the case permit and focus on the substantial merits of the case rather than legal technicalities. Under s 38 (5) (c) of the NCAT Act, the Tribunal must give parties a reasonable opportunity to be heard and their submissions considered.

40 However, under s 36 (1) of the NCAT Act, the Tribunal must focus on the just, quick and efficient resolution of the real issues in dispute in the proceedings, and under s 36 (3) (b) of the NCAT Act, the legal representatives of a party have a duty to co-operate with the Tribunal to achieve the just, quick, cheap resolution of the real issues in dispute.

41 It is deeply disappointing that the applicant's legal representatives have thought it appropriate to (i) file and serve written submissions in reply when there has been no orders of the Tribunal regarding submissions in reply; and (ii) seeking to raise a completely new cause of action after the close of the evidence in the case, particularly in light of the long history of proceedings in the Tribunal.

42 Arguably, the conduct of the applicant's legal representatives in this regard does not comply with their obligations under s 36 (3) (b) of the NCAT Act. However, it is unnecessary for the Tribunal to make any findings on that issue.

43 For reasons that will be further elaborated upon later in this decision, the Tribunal refuses the late application for leave to make a claim for

compensation in these proceedings. The Tribunal has also not considered the submissions in reply. Frankly, that does not cause the applicant any disadvantage because the submissions in reply in substance merely regurgitate submissions that have been made previously.

CONSIDERATION

Jurisdiction of the Tribunal Under the RC Act

44 Section 27 of the RC Act states that the Regulations to the RC Act may prescribe standard form site agreements.

45 Section 109 of the RC Act states:

> **109 Operator to enter new site agreement**
>
> (1) This section applies if a purchaser or prospective home owner under a contract, or proposed contract, for the sale of the home (the ***sale contract***) requests the operator of the community to enter into a new site agreement (the ***new site agreement***) for the residential site with the purchaser or prospective home owner.
>
> Note.
> This section is not relevant if the purchaser or prospective home owner intends to remove the home from the community.
>
> (2) The operator must enter into the new site agreement after the request is made, unless:
>
> (a) the operator declines to enter into the agreement and does so on reasonable grounds (including, for example, the ground that it appears reasonably unlikely that the sale contract will be entered into), or
>
> (b) without limiting paragraph (a), the operator and the purchaser or prospective home owner do not agree on the terms of the proposed agreement.
>
> (3) If the sale contract is entered into before the new site agreement is entered into:
>
> (a) the contract may include a term to the effect that the contract is subject to the new site agreement being entered into within a specified period after the contract is entered into, and
>
> (b) the contract is unenforceable if it includes that term and the new site agreement is not entered into within that period.

(4) If the new site agreement is entered into before the sale contract is entered into:

(a) the agreement may include a term to the effect that the agreement is subject to the sale contract being entered into within a specified period after the agreement is entered into, and

(b) the agreement is unenforceable if it includes that term and the sale contract is not entered into within that period.

(5) The site fees under the new site agreement must not exceed fair market value.

(6) Fair market value is the higher of the following:

(a) the site fees currently payable by the home owner who is selling the home,

(b) the site fees currently payable for residential sites of a similar size and location within the community.

(7) The operator must not unreasonably delay or refuse to enter into a new site agreement referred to in subsection (2).

46 Section 156 of the RC Act states:

156 Applications to Tribunal relating to disputes

(1) A home owner, former home owner or operator of a community may apply to the Tribunal for determination of any of the following:

(a) a dispute relating to a right or obligation under this Act,

(b) a dispute arising from, or relating to, a site agreement or collateral agreement,

(c) any other matter that may be determined by the Tribunal under this Act.

(2) An application to the Tribunal must be made within the period (if any) specified in this Act or prescribed by the regulations.

47 Section 157 of the RC Act states:

157 Orders that may be made by Tribunal

(1) The Tribunal may, on application by a party to a dispute or other matter before the Tribunal, or in any proceedings under this Act, make one or more of the following orders:

(a) an order that restrains an action in breach of this Act or a site agreement or collateral agreement,

(b) an order that requires a person to comply with an obligation under this Act or a site agreement or collateral agreement,

(c) an order that relieves a party to a site agreement or collateral agreement from the obligation to comply with a provision of the agreement,

(d) an order for the payment of an amount of money,

(e) an order for the payment of compensation,

(f) an order that a party to a site agreement perform such work or take such other steps as the order specifies to remedy a breach of the agreement,

(g) an order that requires payment of part or all of the site fees payable under a site agreement to the Tribunal until the whole or part of the agreement has been performed or any application for compensation has been determined,

(h) an order that requires site fees paid to the Tribunal to be paid towards the cost of remedying a breach of the site agreement or towards the amount of any compensation,

(i) an order directing an operator to give a former home owner or person authorised by a former home owner access to a residential site or home on the site for the purpose of recovering goods of the former home owner,

(j) an order for anything else necessary or desirable to resolve a dispute.

(2) An order under subsection (1) (a) or (b) may be made even though it provides a remedy in the nature of an injunction or order for specific performance in circumstances in which such a remedy would not otherwise be available.

(3) The Tribunal must not make an order for:

(a) the payment of an amount that exceeds the amount (if any) prescribed by the regulations for the purposes of this section, or

(b) the performance of work or the taking of steps the cost of which is likely to or will exceed the amount (if any) prescribed by the regulations for the purposes of this section.

(4) An order for the payment of compensation to a party is not to be made for loss or damage to the extent the loss or damage could have been avoided or limited by taking reasonable steps to mitigate the loss or damage.

(5) A provision of this Act that enables a resident to apply for a determination by the Tribunal and the Tribunal to determine a matter or make an order also applies, where appropriate, to a former resident.

(6) The Tribunal does not have jurisdiction to award compensation for damages arising from personal injury.

(7) Except as provided by subsection (6), nothing in this section limits the orders that the Tribunal may make under this Act.

Note.

This Act also confers other order-making powers on the Tribunal, including other specific powers to make termination orders and to declare that a residential site has been abandoned.

48 As the order sought by the applicant in the proceedings that have been remitted by the Appeal Panel sought an order that the Tribunal directing that a long-term site agreement be entered into under s 109 (1) of the RC Act, no relevant limitation period applies under Sch 3 of the *Residential (Land Lease) Communities Regulation 2015* (NSW) ('the RC Regulations') to the proceedings.

49 Sch 1 of the RC Regulations sets out a standard form site agreement, although it does not make reference to the amount of site fees; when site fees are payable; and the method of site fee increases. The standard form site fee agreement does not have to be for any fixed period of time.

50 Accordingly, the Tribunal has jurisdiction under the RC Act in the matter remitted by the Appeal Panel to make orders that the operator provide to the applicant a site agreement in the standard form set out in Sch 1 of the RC Regulations and that the parties enter into such an agreement. By reason of the scope of s 159 (7) of the RC Act, the Tribunal has the power to stipulate terms of the agreement to the extent it is appropriate to do so.

Were The Proceedings In Matter RC 18/31014 A Renewal Of Proceedings in Matter RP 15/54738?

51 The dispute in these proceedings arises in circumstances where the applicant asserts that he has provided the operator with the information requested under order 2 of the Tribunal dated 11 December 2015 (i.e. the information sought in the operator's letter of 24 September 2015); and consequently the operator must provide a site agreement in accordance with order 3. The respondent asserts that the information provided is deficient, so the applicant had not complied with order 2, and accordingly the operator does not have to provide a site agreement in accordance with order 3.

52 As discussed previously, Cl 8 Sch 4 of the NCAT Act states:

> **Renewal of proceedings in respect of certain Division decisions**
>
> (1) If the Tribunal makes an order in exercise of a Division function in proceedings, the Tribunal may, when the order is made or later, give leave to the person in whose favour the order is made to renew the proceedings if the order is not complied with within the period specified by the Tribunal.
>
> (2) If an order has not been complied with within the period specified by the Tribunal, the person in whose favour the order was made may renew the proceedings to which the order relates by lodging a notice with the Tribunal, within 12 months after the end of the period, stating that the order has not been complied with.
>
> (3) The provisions of this Act apply to a notice lodged in accordance with subclause (2) as if the notice were a new application made in accordance with this Act.
>
> (4) When proceedings have been renewed in accordance with this clause, the Tribunal:
>
> (a) may make any other appropriate order under this Act or enabling legislation as it could have made when the matter was originally determined, or
> (b) may refuse to make such an order.
>
> (5) This clause does not apply if:
>
> (a) the operation of an order has been suspended, or
> (b) the order is or has been the subject of an internal appeal.

53 Although the submissions of the parties focussed upon whether or not consent orders 2 of the Tribunal had been complied with by the applicant (and consequently whether consent order 3 was enlivened), the Tribunal does not regard the proceedings in Matter RC 16/54883 as renewal proceedings Matter RP 15/54738 for a number of reasons.

54 Firstly, when the applicant filed proceedings in Matter RC 16/54883, he did not file proceedings as a renewal application, but as a fresh application for an order that the operator provide a site agreement. The salient issues in the proceedings were not only whether or not the operator had failed to comply with order 3 of the Tribunal dated 11 December 2015 (which was contingent on the applicant complying with order 2), but whether or not the operator had

unreasonably refused to provide a site agreement in breach of s 109 (2) (a) of the RC Act.

55 Obviously, if the applicant had provided sufficient documents and information to comply with order 2 of the Tribunal dated 11 December 2015, there would be no reasonable grounds for the operator refusing to provide a site agreement, because that is what it agreed to do pursuant to order 3 of the Tribunal dated 11 December 2015. However, even if there was some failure of compliance with order 2 by the applicant, the Tribunal still has power to consider whether or not the operator had reasonable grounds for refusing to issue a site agreement under s 109 of the RC Act and if the operator did not have reasonable grounds, make an order that a site agreement be provided.

56 In this regard, the consent orders of the Tribunal dated 11 December 2015 do not create an issue estoppel or res judicata that prevents the applicant from bringing fresh proceedings in the Tribunal to seek an order that a site agreement be provided other than in respect of a renewal application. Issue estoppel:

> "…covers only those matters which the prior judgement, decree or order necessarily established as the legal foundation or justification of its conclusion. … Nothing but what is legally indispensable to the conclusion is thus finally closed or precluded. In matters of fact the issue- estoppel is confined to those ultimate facts which form the ingredients in the cause of action, that is, the title to the right established." (per Dixon J in Blair v Curran (1939) 62 CLR 464 at 531-532)

57 There cannot be an issue estoppel arising from the consent orders of 11 December 2015, because no site agreement had been issued and the orders cannot be legally indispensable to the conclusion of whether or not a site agreement had been unreasonably refused, and the consent orders do not determine the ultimate facts that form the ingredients of the applicant's cause of action under ss 109 and 157 of the RC Act.

58 Further, as the Appeal Panel stated in *Gleeson v The Owners-Strata Plan No 48226* [2018] NSWCATAP 204 at [19], for the doctrine of issue estoppel to arise in a second set of proceedings:

(a) the same question must have been decided;

(b) the judicial decision which is said to create the estoppel was final; and

(c) the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

59 The consent orders of the Tribunal did not finally determine the issue of whether or not the operator had unreasonably refused to provide a site agreement to the applicant. Rather, the provided a mechanism by which the parties agreed that if the applicant provided certain information to the operator, the operator would provide a site agreement and if there were further disputes regarding the consent orders, the parties may apply to re-list the matter. Assessed objectively, those orders do not restrict the applicant to only being able to bring renewal proceedings under Sch 4 Cl 8 of the NCAT Act, rather than fresh proceedings.

60 The consent orders of 11 December 2015 also do not create res judicata, on the principles set out by the High Court in *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589, because there is no cause of action in these proceedings that conflicts with the consent orders of 11 December 2015. Rather, the applicant has consistently after the consent orders of 11 December 2015 requested that the operator provide a site agreement. The obligation of the operator under s 109 (1) of the RC Act does not end simply because the parties entered into consent orders that if the applicant provided certain documents and information, the operator would issue a site agreement.

61 Secondly, the consent orders dated 11 December 2015 provide that: “the parties have leave to relist the matter before the Tribunal at short noticed, to determine any disputes that may arise in carrying out these orders”. That order makes no reference to the proceedings being renewed under Sch 4 Cl 8

of the NCAT Act. The jurisdictional power to grant a "re-list" arises from the wide ambit of s 157 (1) (j) of the RC Act. The use of the words "any disputes that may arise in carrying out these orders" are of broad scope. Assessed objectively, a dispute that "arises" from the carrying out of the orders not only includes whether or not the applicant has provided the information referred to in order 2, but whether or not, even if there is a deficiency in the information provided, whether or not it is unreasonable for the operator to continue to refuse to provide a site agreement.

62 Thirdly, the remittal of the proceedings from the Appeal Panel states that the matter is to be "treated as an application under order 4 made on 15 December 2015". The reference to "15 December 2015" in the orders of the Appeal Panel rather than 11 December 2015 is clearly a typographical error. The Appeal Panel did not remit the matter under s 81 (1) (e) of the NCAT Act on the basis that the proceedings were to be regarded as a renewal of Matter RP 15/54738, but rather that they were a re-listing of proceedings to determine "any disputes that may arise" in the carrying out of the agreement of the parties regarding the provision of a site agreement under s 109 of the RC Act.

The Issues Identified by the Appeal Panel For Consideration

Does Order 2 Reflect the Agreement of the Parties to Settle the Dispute?

63 The orders were made by consent, and no issue has been raised that the consent was not genuine or that the orders were not within the jurisdiction of the Tribunal.

64 However, for reasons set out previously, the Tribunal is satisfied that when the orders are objectively interpreted, they do not prevent the applicant from bringing further proceedings in the Tribunal to seek the issue of a site agreement under s 109 of the RC Act. There was no reference to the orders being "in full and final settlement of the dispute".

65 Rather, the Tribunal is satisfied that the agreement of the parties was that if the applicant provided the operator with the information set out in the

operator's letter of 24 September 2015, the operator would, within 3 working days, provide the applicant with a site agreement under the RC Act. However, the agreement allowed either party to re-list the matter and did not prevent the applicant from filing fresh proceedings to seek that a site agreement be issued under s 109 of the RC Act, on the basis that the operator did not have reasonable grounds for refusing to provide the site agreement.

Was Order 2 Ambiguous?

66 Order 2 is not ambiguous, as the letter of the operator dated 24 September 2015 states the information sought by the operator.

Does Order 2 Require the Applicant to Bring the Structures On Site Into Compliance with the Local Government Act 1993 and the Local Government (Manufactured Home Estates, Caravan Parks, Camping Grounds and Moveable Dwellings) Regulation 2005 in respect of Set-Back and Site-Coverage As Applied to Structures After the Date of the Regulation Came Into Effect?

67 The letter of the operator dated 24 September 2015 which forms the basis of order 2 of the Tribunal dated 11 December 2015 does not state that the applicant must bring structures on site into compliance with the *Local Government Act 1993* or the 2005 Regulations regarding set-back and site coverage.

68 Rather, the letter states that the operator required the following information: (i) a survey drawing; and (ii) a report from a licensed and qualified building certifier that "all the structures on site" comply with the *Local Government Act 1993* and the 2005 Regulations.

69 The applicant clearly provided to the operator a survey. He also provided a number of letters from Mr Lucena (engineer), including the letter of 5 February 2016 that the structures on site complied with the *2005 Regulations* in respect of running gear; structural soundness and design gust wind speed and relevant Australian Standards. Further, Mr Lucena addressed the other "remaining issues" as follows:

> "In regards to all remaining items on the request letter, these are covered by the survey drawing by Robert Harries (Registered Surveyor) showing areas, separation distances and setbacks. These items are all compliant and have been previously approved by Council and have not changed".

70 In its submissions to the Tribunal, the respondent submitted that (i) the consent orders meant that the applicant had "agreed to bring his site into conformity with the 2005 Regulations prior to being provided with a site agreement". However, the letter of the operator dated 24 September 2015 which forms the basis of order 2 does not state this at all, nor when an objective assessment is made of the words of the letter can such a stipulation be implied.

71 In submissions, the respondent asserted that Mr Lucena was not properly qualified in accordance with the information sought in the letter of 24 September 2015 by the operator. However, no lack of qualifications was raised by the operator in its letter of 11 February 2016, not has the operator provided its own expert evidence assessing (including an assessment of the survey and how the site failed to comply with any relevant statutory provisions or regulations); nor did the operator request that Mr Lucena be available for cross examination and seek to cross examine him on his qualifications.

72 Mr Lucena has, in his letter of 5 February 2016, addressed all of the items raised by the operator in its letter of 24 September 2015. The operator simply disagrees with the opinion, based on its own interpretation of the survey report regarding the set back and site coverage, and that the set back and site coverage exceeds the 2005 Regulations.

73 Further, the key issue raised in the operator's letter of 24 September 2015 is that the structures on site complies with the *Local Government Act 1993* and the 2005 Regulations. The applicant has provided evidence to the operator on a number of occasions that Tweed Shire Council has inspected the site and does not intend to take any action regarding the structures on site. If Tweed Shire Council regarded the structures on site and their location as non-compliant with any relevant statutory provisions, it can reasonably be expected that they would either (i) notify the operator; the applicant; or the

previous site owner that the structures were non-compliant and must be removed or modified; or (ii) state that no action would be taken in this regard. The correspondence from Tweed Shire Council (and Mr LeGrand's oral evidence to the previous hearing on 10 April 2017) makes clear that Tweed Shire Council does not intend to take any action.

74 There is further dispute between the parties regarding whether or not the 2005 Regulations apply. It is unclear from the documentary evidence as to when precisely the annex, deck and carport were installed. The documentary evidence includes an application by Ms Pease to install the annex. The application was filed on 30 September 2004, and contains plans. The application sates that the "percentage of site coverage" is "55.1%". The proposed annex was approved by Tweed Shire Council on 13 September 2004, subject to various conditions. The applicant understood from his conversations with Ms Pease that the annex, deck and carport were all installed in late 2004, and although there was a brief statutory declaration from Ms Pease, it does not clearly state when the structures were installed, and Ms Pease was not called to give evidence.

75 On the available evidence, the Tribunal infers that the structures would have been installed within a few months of the local Council approval, and accordingly the structures were installed in late 2005 or early 2005.

76 The 2005 Regulations relevantly came into force on 2 September 2005 (cl. 2 of the 2005 Regulations). Under cl 175 of the 2005 Regulations which were the savings and transitional provisions, any "act, matter or thing" that had effect under the predecessor legislation is taken to have effect under the 2005 Regulations.

77 The predecessor Regulations were the *Local Government (Caravan Parks, Camping Grounds, and Moveable Dwellings) Regulation 1995* ('the 1995 Regulations'). The 1995 Regulations also contain provisions under Part 5 of the 1995 Regulations regarding set-back; site coverage; running gear; structural soundness and wind resistance. There does not appear to be any

relevant difference between the requirements under Division 5 of the 2005 Regulations (which deals with set-back; site coverage; running gear, structural soundness and wind resistance) and the requirements under Part 5 of the 1995 Regulations.

78 Frankly, the debate about whether or not the 2005 Regulations apply or the 1995 Regulations apply is a red herring. The Tribunal is satisfied that the information provided by the applicant in respect of the survey; the letters of Mr Lucena and attached documents; and the correspondence from Tweed Shire Council satisfies the relevant statutory requirements and the local Council takes no issue with the structures.

Do The Savings and Transitional Provisions of the 2005 Regulation Mean That the Structures On Site Comply With The Regulation?

79 This has been addressed previously. The Tribunal is satisfied the structures are compliant.

If Order 2 Did Not Require The Applicant To Carry Out Work To Bring The Structures In Conformance With The Regulation, Did The Parties Agree (i) That It Was the A Condition Precedent To the Entry Of A New Site Agreement For Such Work To Be Carried Out?

80 The Tribunal is satisfied on the evidence provided by the applicant that the structures are compliant. In any event, if the Tribunal is wrong about that issue and the structures are non-compliant, it was not a condition precedent of order 2 that the applicant perform work to make them compliant.

Did The Parties Agree That the Respondent Could Otherwise Refuse to Enter A Site Agreement on Reasonable Grounds Or Did the Agreement and the Orders Made on 11 December 2015 Limit The Matters To Which The Applicant Was Required To Comply?

81 As discussed previously, s 109 (2) of the RC Act states that the operator must enter into a new site agreement with a prospective purchaser unless (a) it declines to do so on reasonable grounds; or (b) the parties do not agree on the terms of the proposed agreement.

82 Under s 12 of the RC Act, persons are prohibited from contracting out of their obligations under the RC Act.

83 For reasons discussed previously, just as the consent orders of the Tribunal do not prevent the applicant from filing a fresh application to seek an order that the operator provide a site agreement, the consent order do not prevent the operator from raising other reasonable grounds for refusing to provide a site agreement. In this regard, no argument has been put forward that the operator is estopped from refusing to provide a site agreement on other grounds, or has waived any legal rights by reason of the consent orders.

84 However, the orders are of evidentiary significance regarding the reasonableness of the grounds being raised by the operator to refuse to issue the site agreement. The operator has not raised any other grounds upon which to refuse to issue a site agreement other than the applicant has not provided sufficient or adequate information to satisfy order 2 of the Tribunal dated 11 December 2015. As discussed previously, the Tribunal is satisfied that the applicant has provided adequate and sufficient information.

85 However, even if the Tribunal is wrong in its finding that the information provided by the applicant is insufficient to show that the site and its structures comply with any relevant provisions of the 2005 Regulations or the predecessor 1995 Regulations, the Tribunal is satisfied that the operator does not have reasonable grounds for refusing to issue a site agreement.

86 Whether there are reasonable grounds for a refusal has been considered in the context of s 149 of the *Strata Schemes Management Act 2015* (NSW), and in that statutory context "unreasonable" carries its ordinary meaning of "*not reasonable, not endowed with reason, not guided by reason or good sense, not based on or in accordance with reasonable sound judgement" (Roseby v The Owners-Strata Plan No 2400* [2018] NSWCATCD 72 at [21]-[24]). The test is objective, not subjective.

87 Even if the information provided by the applicant to the operator does not strictly comply with the information sought in the letter of the operator dated 24 September 2015 (which forms the substance of order 2 dated 11 December 2015), the Tribunal is satisfied the applicant has established that the operator does not have reasonable grounds to refuse to enter into a site agreement because:

(a) The applicant has provided evidence from an engineer that the structures on site are sound; comply with relevant Australian Standards; and comply with local Council requirements;

(b) The structures have been in place since late 2004 or early 2005, and the local Council is aware of the structures, and has been aware for a considerable period of time.

(c) The local Council has not taken action previously regarding the structures, and has stated that it does not intend to take any action in the future to require the structures be removed or modified.

(d) The operator did not take any action to request the previous site owner remove or modify the structures, and has first raised the issue of whether or not the structures comply with the *Local Government Act 1993* and 2005 Regulations after sale of the home to the applicant.

(e) No evidence has been provided by the operator to support any other grounds for refusal, such as the structures are unsafe, or deleteriously affect the use and enjoyment of the park by other occupants.

Conclusion

88 The Tribunal is satisfied that an order should be made that the operator provide a site agreement to the applicant.

The Applicant's Purported Claim for Compensation

89 As discussed previously, the late application by the applicant to amend the application, or that the proceedings be re-listed so that the applicant can seek leave to amend, is refused. It has been raised after the close of evidence and it would be a fundamental denial of procedural fairness to the operator for the Tribunal to attempt to deal with such a cause of action in these proceedings.

90 If the Applicant seeks to take proceedings seeking compensation or damages under s 157 of the RC Act regarding the issue of the occupation fees he has paid to the operator, that must be dealt with in a fresh application. The Tribunal expresses no views as to whether or not it has jurisdiction to consider such a cause of action, or the merits. Those issues will be dealt with if and when the applicant brings a fresh application in the Tribunal.

Costs

91 As both parties are legally represented and the matter has a protracted history, the Tribunal anticipates that a costs application will be made. If such an application is made, the Tribunal has made directions in its orders to deal with the disposal of any costs application.

Orders

92 The Tribunal makes the following orders:

(1) By 14 days from the date of this decision, Gennacker Pty Ltd t/as Homestead Holiday Park is to provide to Jacques Fontainas a signed standard form site agreement in respect of site 33 at 200/25 Chinderah Bay Drive, CHINDERAH NSW 2487 ('the park'). The site agreement is to comply with Schedule 1 of the Residential (Land Lease) Communities Regulation 2015 (NSW). The fees, charges, and site fee increases stipulated in the site agreement are to be consistent with equivalent sites at the park which are the subject of current site agreements.

(2) By 14 days after order 1 above, Jacques Fontainas is to return to Gennacker Pty Ltd t/as Homestead Holiday Park a signed copy of the site agreement.

(3) If there is any application for costs by the applicant, it is to be made in writing with all submissions and documents filed with the Tribunal and served on the other party by 14 days from the date of this decision. Any submission is to include reference to whether there is consent to the issue of costs being determined without further a further oral hearing in accordance with s 50 (2) of the Civil and Administrative Tribunal Act 2013 (NSW).

(4) Any costs submissions in response by the respondent are to be filed and served on or before 14 days thereafter.

****

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