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20 November 2012

By Hand

The Registrar
Consumer, Trader and Tenancy Tribunal
Level 3, 4-8 Woodville Street
HURSTVILLE NSW 2220

Dear Registrar

RE: UNIVERSAL FINANCE HOLDINGS PTY LTD -v- OWNERS CORPORATION SP 50785
FILE NO.: SCS 12/49745

We act for The Owners – Strata Plan No. 50785 which is the respondent in this matter ("owners corporation").

We have been instructed to make a submission on behalf of the owners corporation in response to the application for an order by an adjudicator made by Universal Finance Holdings Pty Ltd ("applicant").

The submission we have been instructed to make is set out below. The evidence in support of the submission is appended to this letter in Tabs 1-16 and contained in the statement of Carey Beebe (an owner and executive committee member) which accompanies this letter.

Submission

Position Statement

1. The owners corporation opposes the application and says that it should be dismissed. The owners corporation contends that much of the application is confused and misconceived and that there is no basis for making any of the orders sought.

Background

Côte d'Azur

2. This application concerns a mixed use strata scheme known as Côte d'Azur.

3. Côte d'Azur is situated on the corner of McDonald and Gerrale Streets and the Kingsway, Cronulla. It was constructed during about 1995 and completed in March 1996.

Liability limited by a scheme approved under Professional Standards Legislation

4. Côte d'Azur contains a multi-level residential tower with basement car park, swimming pool and other communal facilities, and two separate three storey buildings known as Blocks A & B which comprise restaurants and apartments: see **Tab 1 –** pictorial representation of Côte d'Azur; Strata Plan No. 50785.

5. The applicant owns Lot 21 in Côte d'Azur. The applicant became the owner of Lot 21 on 2 September 2003: see **Tab 2 – s**trata roll for Lot 21.

6. Lot 21 is located on the second floor of Block B. It is directly opposite the intersection of Gerrale Street and the Kingsway. Lot 21 occupies approximately 136 square metres on the second floor of the Block B building.

7. There is a restaurant known as the Opah which at all material times has operated out of Lot 21. The applicant leases Lot 21 to the operator of the restaurant.

8. Immediately adjacent to the restaurant is a large, partly uncovered balcony on which tables and chairs for the restaurant are placed to seat and serve restaurant patrons. The balcony forms part of the common property.

9. Restaurant patrons are able to enter Lot 21 by either climbing a staircase which runs from the street level up to the second floor of the building in which the restaurant is situated or, alternatively, by using an elevator which is housed in an elevator tower and runs between the first and second floors of that building to exclusively service the restaurant: see sheets 5 and 7 of Strata Plan 50785 which show that the elevator (which is marked (A)) only runs between these two floors.

10. There is a gazebo structure comprising metal frames and columns and glazing which sits immediately above, is attached to, covers and surrounds the elevator tower and the staircase surrounding it. The gazebo has been in situ since completion of construction of Côte d'Azur: see **Tab 3** – photographs of staircase, elevator, elevator tower, gazebo and balcony adjacent to Lot 21; see also Tab 1 – pictorial representation of Côte d'Azur showing gazebo.

<u>Relevant By-Laws</u>

11. Strata Plan No. 50785 was registered on 11 September 1995 on completion of construction of part of Côte d'Azur. The strata plan is appended to the applicant's application.

12. The strata plan was registered with a by-law made by the developer of Côte d'Azur known as Special By-Law 1. This by-law gave the owners of seven commercial lots situated in Blocks A & B the exclusive use and enjoyment of various parts of the common property.

13. Relevantly, the by-law gives the applicant (as the owner of Lot 21) the exclusive use of part of the balcony adjacent to Lot 21 (which the by-law describes as an "open area") for the purpose of placing and maintaining on that area tables and chairs to be used by members of the public for the consumption of food or beverages purchased from the restaurant operated out of Lot 21. The by-law also imposes on the applicant the responsibility for the proper maintenance and keeping in good repair and the cleaning of the open area but excluding any maintenance or repair of a structural nature – see **Tab 4** – Special By-Law 1.

14. On 20 April 1996 the owners corporation made a new by-law, Special By-Law No. 21, which was in substantially identical terms to Special By-Law 1 but which conferred solely on the owner of Lot 21 the exclusive use and enjoyment of the same open area adjacent to the Lot referred to in Special By-Law 1 on the same terms and conditions as Special By-Law 1: see **Tab 5** - Special By-Law No. 21.

15. On 1 September 1997 the owners corporation and the previous owner of Lot 21, Clydeworth Pty Ltd, entered into a licence agreement which permitted the previous owner to install an exhaust system and an air conditioning system on the common property adjacent to Lot 21. The licence agreement was for a period of five years and required the previous owner to pay a quarterly licence fee to the owners corporation in the sum of $1,000. The licence agreement made the previous owner responsible for the cost of the lift maintenance contract for the elevator servicing the restaurant and also for the upkeep of the structure above the elevator (namely, the gazebo): see **Tab 6** – licence agreement; clause H in "Attachment to Licence Agreement".

16. On 2 May 2003 (shortly after the licence agreement expired) the owners corporation made a new by-law, Special By-Law No. 2 – Use of Common Property by Lot 21. This by-law gave the owner of Lot 21 the special privilege in respect of the roof above Lot 21 to keep the exhaust system which was the subject of the licence agreement, and also granted the owner of Lot 21 special privileges over the common property to move the shopfront of the restaurant out onto the common property open area adjacent to Lot 21 by carry out "glazing works": see **Tab 7**- Special By-Law 2 – Use of Common Property by Lot 21 and plans of glazing works. This allowed the owner to extend the restaurant quite substantially onto the common property: see **Tab 8** – letter from previous strata manager to previous owner dated 19 November 1999.

17. Importantly, Special By-Law No. 2 imposed on the owner of Lot 21 (which is now the applicant) the responsibility to maintain and keep in good repair the glazing works, the elevator, and the elevator tower and adjacent structures adjacent to Lot 21, and to also indemnify the owners corporation for the costs and charges under the elevator maintenance contracts that the owners corporation has entered.

18. The by-law imposes these obligations on the owner "until Sutherland Shire Council agrees that the terms of the development application in relation to the construction of the bridge over Gerrale Street are complied with and the bridge is constructed and commissioned": see clauses C(iii) and C(iv). The owners corporation granted the owner permission to extend the restaurant quite substantially onto the common property "on the basis that they would maintain the lift and the tower": see **Tab 8** - letter from previous strata manager to previous owner dated 19 November 1999

19. The by-law also requires the owner to comply with the terms of the licence agreement dated 1 September 1997: see clause C(vii).

20. On 23 March 2005 the owners corporation introduced a number of new by-laws one of which was Special By-Law No. 42 – By-Laws Applicable to Commercial Lots. This by-law applies to Lots 1, 2, 3, 4, 5, 12 and 21 (all of which are commercial lots in Blocks A & B). Relevantly, Special By-Law No. 42.5 conferred special privileges on the owners of these commercial lots to allow them to install an exhaust system on the common property and share the common property grease traps for each of their lots. In consideration of those special

privileges, each of the owners was required to pay the owners corporation a licence fee of $1,000 plus GST per quarter; and the executive committee was given the right (but not the obligation) to waive the licence fee if 75% of the committee members determined that the terms of the by-law are not being breached: see **Tab 9** – Special By-Law No. 42; clause 42.5(a) and (b).

21. On 26 March 2008 the owners corporation amended Special By Law 42.5 by increasing the licence fee payable by each of the commercial owners to $2,500 plus GST per quarter. The power for the executive committee to waive the licence fee remained: see **Tab 10** – Special By- Law 42.5.

22. It is with this background in mind that the owners corporation turns to address the contentions advanced by the applicant.

Outline of Argument

23. The applicant applies for eight orders. None of those orders should be made for the following reasons:

(a) Order 1 – Repeal of Special By-Laws 42 and 42.5

(i) Special By-Law 42 confers special privileges on the owners of seven commercial lots (one of whom is the applicant). But six of those commercial owners are not named as respondents to the application meaning it would be procedurally unfair to make an order repealing Special By-Law 42 "in their absence".

(ii) Special By-Law 42.5 is lawful and consistent with the strata legislation (contrary to the applicant's assertions). The by-law does not purport to impose levies on the applicant. Rather, it requires the applicant to pay a licence fee in consideration for being given the right to keep an exhaust system on the common property roof and use the common property grease trap for Lot 21 which is perfectly permissible under section 53 of the *Strata Schemes Management Act 1996* ("Strata Act").

(iii) Special By-Law 42.5 is not ambiguous or uncertain. Its terms are clear and require the seven commercial owners to pay a quarterly licence fee to the owners corporation whilst they continue to keep an exhaust system and grease trap for their lots on the common property. Nor is the by-law discriminatory. It gives the executive committee the right (but not the obligation) to waive the licence fee if the commercial owners do not breach the by-law.

(iv) It is too late for the applicant to challenge the amendment that was made to Special By-Law 42.5 on the grounds that the applicant did not consent to the amendment. This is because more than two years have passed since the amendment was made and it is now conclusively presumed that the applicant did consent to the amendment of the by-law by operation of section 52(3) of the Strata Act; see also *James -v- Owners Strata Plan No. 11478 (No. 4)* [2012] NSWSC 590 at [94].

(b) Orders 2 & 8 – Maintenance and Repair of Gazebo

(i) The applicant is responsible for maintaining and repairing the gazebo roof structure above the elevator tower adjacent to Lot 21 by operation of Special By-Law No. 2.

(ii) Special By-Law No. 2 imposes on the applicant (as the owner of Lot 21) the responsibility for properly maintaining and keeping in good repair the elevator tower adjacent to Lot 21 including the walls, surrounding stairs and roof: see clause C(iv). The gazebo is the roof of the elevator tower because it is positioned immediately above and forms the only covering of the elevator tower.

(iii) The applicant must also comply with the terms of a licence agreement dated 1 September 1997 pursuant to Special By-Law No. 2: see clause C(vii). The licence agreement imposes on the owner of Lot 21 the responsibility for the upkeep of the gazebo: see clause H in "Attachment to Licence Agreement".

(iv) By virtue of Special By-Law No. 2 being made pursuant to section 51 of the Strata Act, and the by-law imposing on the applicant the responsibility for the maintenance and repair of the gazebo, the owners corporation is discharged from its obligation to maintain and repair the gazebo by operation of section 54(3) of the Strata Act.

(v) It follows that there are no grounds for ordering the owners corporation to repair or restore the gazebo and this responsibility falls on the applicant.

(c) Order 3 - Amending Special By-Law 2

(i) The applicant does not have standing to apply for an order repealing and re-writing Special By-Law No. 2 or amending the by-law on the grounds that the by-law should not have been made because the applicant was not an owner at the time the by-law was made and is therefore disqualified from applying for an adjustment of the by-law on those grounds pursuant to section 157(5) of the Strata Act.

(ii) There are no grounds for repealing or amending the by-law to relieve the applicant from the responsibility for the maintenance and upkeep of the elevator, elevator tower and surrounding common property adjacent to Lot 21.

(iii) The by-law is not unlawful (despite what the applicant says). The by-law confers on the applicant special privileges over the common property in accordance with section 51 of the Strata Act. A by-law of that type is able to contain conditions including a condition to require an owner (such as the applicant) to maintain and repair common property such as the elevator, elevator tower and gazebo by reason of section 54(1) of the Strata Act.

(iv) The applicant cannot argue that the maintenance and repair obligations imposed on it under the by-law are unfair or unjust when:

the by-law existed at the time the applicant bought Lot 21 (so the applicant knew or ought to have know that it would be responsible for the maintenance and upkeep of certain parts of common property under the by-law); and

the by-law gave the owner of Lot 21 the right to extend onto the common property the shopfront of the restaurant which operates out of the Lot for free (so the consideration "payable" by the owner for acquiring those special privileges to considerably expand the size of the restaurant was, in part, the responsibility for the maintenance and upkeep of the elevator, elevator tower and the gazebo).

(v) Special By-Law No. 2 has been in place since 2 May 2003. The applicant has slept on its rights. No order to repeal the by-law should be made as a matter of discretion due to the significant period of time the applicant has waited to bring its application.

(d) Order 4 - Refund of Licence Fees Paid under Special By-Law No. 42.5

(i) The adjudicator has no power to order the owners corporation to refund monies to the applicant that were paid under Special By-Law No. 42.5: see section 138(3)(d) of the Strata Act.

(ii) There is no basis at law for ordering the owners corporation to refund the fees paid by the applicant when those fees were due and payable under Special By-Law No. 42.5. The by-law clearly requires the applicant to pay a licence fee each quarter in return for the special privilege to keep an exhaust system and grease trap on common property.

(iii) Even if Special By-Law No. 42.5 was repealed by an order made by the adjudicator (and there are no grounds repealing the by-law), the repeal does not operate retrospectively meaning the applicant's obligations to pay fees under the by-law would continue up until the date the by-law is repealed (so there would be no basis for refunding fees already paid under the by-law).

(iv) Section 157(3) of the Strata Act is not intended to give an adjudicator power to order an owners corporation to refund monies paid by an owner under a by-law which is repealed. It is intended to require an owners corporation to pay an owner compensation for a benefit (such as an exclusive use right) that is lost when a by-law is repealed by an order made by the adjudicator.

(e) Order 6 - Refund of Monies paid under Special By-Law No. 2 for Elevator Maintenance

(i) The adjudicator does not have power to order the owners corporation to refund monies paid by the applicant pursuant to Special By-Law No. 2 for elevator maintenance and repairs: see section 138(3)(d) of the Strata Act. Section 157(3) does not apply because the applicant was not an owner at the time Special By-Law No. 2 was made meaning the applicant is disqualified from applying for

compensation under section 157(3) (and in any event, section 157(3) cannot be used to order a refund for the reasons given earlier): see section 157(5).

(ii) There is no basis at law for the adjudicator to order the owners corporation to refund the applicant monies paid by it under Special By-Law No. 2 because the applicant was liable to pay those monies under the by-law. The by-law plainly makes the applicant responsible for maintaining and keeping in good repair the elevator and the elevator tower and for also indemnifying the owners corporation for the costs and charges under the elevator maintenance contracts it has entered.

(iii) Even if Special By-Law No. 2 was amended by an order of the adjudicator to relieve the applicant from the responsibility for maintaining and repairing the elevator (and there are no grounds for amending the by-law in that manner), the amendment of the by-law would not operate retrospectively. The applicant's obligations concerning elevator maintenance would continue up until the time the by-law was amended (meaning there would be no basis for refunding elevator maintenance costs already paid).

(iv) The applicant is not entitled to a refund of monies paid by it since 2004 because the applicant's claim for monies paid more than six years ago is statute barred under the *Limitation Act 1969.*

(f) Order 7 - Production of Details of Elevator Maintenance Expenditure

(i) There is no basis for ordering the owners corporation to produce details of expenditure relating to the elevator since 2003 or details associated with lift maintenance or Special By-Law No. 42.5 "as well as various charges and interest".

(ii) The applicant is able to inspect and take copies of the owners corporation's books and financial records if the applicant makes a request in accordance with section 108 of the Strata Act. The applicant has not done so.

(iii) The owners corporation should not be compelled to search for and produce a broad range of documents (many of which are unspecified) when the applicant has not even attempted to obtain those documents by exercising his statutory right to do so.

(g) Order 9 - Order for Costs

The adjudicator does not have power to make an order for costs: see section 176(1) of the Strata Act.

(h) Generally

The application should be dismissed because the applicant has not paid all contributions levied and payable in relation to Lot 21 under the Strata Act: see section 163(4)(d):see **Tab 16** – ledgers for Lot 21 showing an amount of $16,533.13 in arrears as at 15 November 2012.

24. The submissions made by the applicant will now be considered in more detail.

Order 1 – Repeal of Special By-Laws 42 and 42.5

Allegation - The By-Law is Illegal

25. The applicant complains that Special By Law No. 42.5 is unlawful and contravenes the Strata Act because it imposes levies on the applicant that are not raised in accordance with unit entitlement in breach of section 78 of the Strata Act. This complaint is misconceived.

26. Special By-Law No. 42.5 does not impose levies on the applicant. It imposes quarterly licence fees that are payable by the commercial owners (including the applicant) in consideration for the special privileges they acquired to each keep on the common property an exhaust system and grease trap to service their lots.

27. Section 53 of the Strata Act permits a by-law like Special By Law No. 42 to confer special privileges on owners subject to conditions including a condition requiring the payment of money by the owners at specified times or as determined by the owners corporation. Any money payable by owners pursuant to a condition included in a by-law of that type does not need to be paid in accordance with unit entitlement: see section 54(2) of the Strata Act.

28. In *The Owners of Strata Plan No. 3397 -v- Tate* [2007] NSWCA 207, the NSW Court of Appeal confirmed that a by-law conferring special rights on an owner over common property is able to include a condition requiring the owner to pay a periodic fee to the owners corporation, that the fee does not need to be charged in accordance with unit entitlement and that the fee does not impact on (and operates independent of) the amount of levies that are payable by the owner in accordance with unit entitlement pursuant to section 78 of the Strata Act.

29. The applicant's reliance on *Owners Strata Plan No. 60919 –v- CTTT* [2009] NSWSC 1158 is misplaced because that case did not concern a by-law which conferred special rights on an owner over common property (which type of by-law can include a condition imposing a fee on the owner that is not charged in accordance with unit entitlement).

Allegation - The By-Law is Uncertain

30. The applicant next complains that Special By Law No. 42.5 is ambiguous or uncertain. This complaint does not withstand scrutiny.

31. The by-law (in its original form) required the seven commercial owners to each pay a quarterly licence fee to the owners corporation in the sum of $1,000 plus GST. The by-law (as amended) requires each of the commercial owners to pay a quarterly licence fee to the owners corporation of $2,500 plus GST.

32. The obvious intent of the amendment made to Special By Law No. 42.5 was to increase the amount of the licence fee payable by each of the commercial owners from $1,000 plus GST per quarter to $2,500 plus GST per quarter. The wording of clause a) of the by-law must be read in that light.

33. When this is done, it becomes clear that the words in clause a) which require each of the commercial owners to pay a licence fee of $2,500 plus GST "for each quarter or any part thereof where the use might cease" contain a typographical error. The word "cease" is meant to read "continue". It cannot seriously be argued that this typographical error gives rise to ambiguity or uncertainty when the amendment of the by-law is viewed in this context. The applicant cannot seriously contend that it is unsure as to whether or not it is required to pay a licence fee under the by-law whilst it continues to use the exhaust system and grease trap on common property which service Lot 21.

Allegation - The By-Law is Discriminatory

34. The applicant then complains that Special By Law No. 42.5 operates in a discriminatory or penal way because the executive committee has the right to waive the licence fee but does not do so. No criticism can be levelled at the executive committee's conduct. Clause (b) of the by-law gives the executive committee the right (but not the obligation) to waive the quarterly licence fee if at least 75% of the executive committee members determine that the terms of the by-law have not been breached. The executive committee is frankly under no obligation to waive the licence fee and by electing not to do so it has not done anything wrong. In any event, there have been multiple breaches of the by-law which disentitle the applicant to a waiver of the licence fee: see **Tab 11** – letter from previous secretary of owners corporation to the applicant dated 23 February 2006.

Allegation - The By-Law Was Not Consented To

35. The applicant's principal complaint about Special By Law No. 42.5 is that it was amended without the applicant's written consent. But it is now too late for the applicant to challenge the amendment of the by-law on this basis.

36. Special By-Law No. 42 was made on 23 March 2005. The by-law was made under Division 4 of Part 5 in Chapter 2 of the Strata Act. Special By Law No. 42.5 was amended on 26 March 2008 (more than two years ago).

37. Section 52(3) of the Strata Act provides as follows:

> *After two years from the making, or purported making, of a by-law to which this division applies, it is conclusively presumed that all conditions and preliminary steps precedent to the making of the by-law were complied with and performed.*

38. Section 52(3) was considered in *James –v- the Owners Strata Plan No. 11478 (No. 4)* [2012] NSWSC 590. At [94] the Supreme Court said the following:

> *Section 52 of the SSM Act provides that the owners corporation may "make" a by-law under that section "but only" with the written consent of the owner or owners of the Lot or lots concerned. The by-law is made by the owners corporation, but a pre-condition to making the by-law is the required consent. In my opinion, the owners corporation "makes" a by-law when it passes a valid resolution adopting the by-law in accordance with the relevant requirements of the SSM Act. That conclusion is supported by s52(3) which provides for a conclusive presumption that "all conditions and preliminary steps precedent to the making of the by-law" were complied with after two years. Section*

> *52(3) draws a distinction between the making of the by-law and the conditions and preliminary steps precedent to the making of the by-law. The use of the words "preliminary" and "precedent" indicate that those steps are steps to be taken before the making of the by-law.* ***One such step must be the obtaining of written consent. Section 52(3) is saying (among other things) that that condition or preliminary step precedent is conclusively presumed to have taken place if no challenge is made to the by-law within two years.*** (emphasis added)

39. It follows that:

> pursuant to section 52(3) it is now conclusively presumed that the applicant (and the other commercial owners) provided their written consent to the making and amendment of Special By Law No. 42; and
>
> it is too late for the applicant to challenge the by-law (or its amendment) on the basis that it did not consent to it.

(the same argument defeats the challenge the applicant mounts against the by-law under section 65A of the Strata Act because 65A(6) says that section 52(3) applies to a by-law made under section 65A).

Order 2/8 – Maintenance of Gazebo under Special By-Law 2

40. The applicant argues that the owners corporation is responsible for maintaining and repairing the gazebo structure above the elevator tower. This argument is wrong.

Is the Gazebo Covered by Special By-Law 2?

41. Special By Law No. 2 imposes on the applicant (as the owner of Lot 21) the responsibility for the maintenance and repair of the roof of the elevator tower adjacent to Lot 21 which is the gazebo structure referred to by the applicant. It follows that the owners corporation is discharged from its obligation to maintain and repair the gazebo pursuant to section 54(3) of the Strata Act.

42. Clause C(iii) of the by-law requires the applicant to properly maintain and keep in good repair the elevator and to indemnify the owners corporation for the expenses it incurs under the elevator maintenance contracts it has entered into. Clause C(iv) of the by-law requires the applicant to properly maintain and keep in good repair the elevator tower. Both of these obligations continue to apply until, relevantly, a bridge is constructed from the area adjacent to the elevator over Gerrale Street.

43. Clause A(i) of the by-law defines the "elevator tower" to mean the structure housing the elevator (including the walls, surrounding stairs and roof) adjacent to the north western boundary of Lot 21. This definition shows that the expression "elevator tower" was intended to have an enlarged meaning to include more than just the elevator tower itself and to include the structures surrounding the tower such as the stairs, walls and roof.

44. The gazebo is the roof of the elevator tower. It sits directly above, is attached to and covers the elevator tower. It also acts like its roof. And it looks like a roof. The Macquarie Concise

Dictionary (5th Edition) defines a roof as: the external upper covering of a house or other building; the highest part or summit; and something which in form or position resembles the roof of a house. The gazebo plainly fits within these meanings. It follows that the applicant is responsible for its maintenance and repair under clause C (iv) of Special By-Law No .2

45. The applicant concedes in its submissions that the previous owner of Lot 21 maintained and repaired the gazebo. The previous owner was a party to the creation of the by-law. It would not have maintained and repaired the gazebo if it did not have to under the by-law. This confirms that it was always the intention of the parties that the owner of Lot 21 would be responsible for the maintenance and repair of the Gazebo.

46. This intention is also confirmed by a letter from the previous owner to the owners corporation putting forward a proposal for the exhaust ventilation and air-conditioning systems which became the subject of the licence agreement which was entered into on 1 September 1997 and the glazing works which became the subject of the by-law. The owner's proposal provided that, relevantly, the owner would meet the owners corporation's reasonable maintenance costs for "the architectural structure on the common property above the lift": see **Tab 12** – letter from Clydeworth Pty Ltd dated 26 August 1997. And as long ago as 1999, the owners corporation considered the gazebo to be the responsibility of the owner of Lot 21 pursuant to the by-law: see **Tab 13** – letter from previous strata manager to previous owner dated 19 March 1999.[1]

47. In any event, even if the gazebo is not part of the "elevator tower" within the meaning of the by-law, the applicant would still be responsible for maintaining and repairing it. Clause H in the attachment to the licence agreement between the owners corporation and the previous owner of Lot 21 dated 1 September 1997 provided that "the owner will be responsible for the cost of the lift maintenance contract for the lift servicing the level of the Lot and the upkeep of the structure above the lift". The reference to the "structure above the lift" is clearly a reference to the gazebo.

48. Clause C(vii) of the by-law requires the applicant (as the owner of Lot 21) to "comply with the terms of the licence dated 1 September 1997". There can be no doubt that clause C(vii) applies to the applicant and not just its predecessor because section 55(1) of the Strata Act says that the by-law continues to operate for the benefit of, and is binding on, the owner *for the time being* of the Lot specified in the by-law.

49. It follows that the applicant is responsible for maintaining and repairing the gazebo either under clause C(iv) of Special By Law No. 2 (until the bridge is constructed over Gerrale Street) or pursuant to clause C(vii) of the by-law.

50. The applicant advances a number of arguments as to why Special By Law No. 2 does not make it responsible for the maintenance and repair of the gazebo. These arguments will now be considered.

[1] It appears from the strata manager's letter that the by-law had been passed in 1998 but not registered. This explains why the strata manager referred to the by-law in 1999, several years before it was re-passed and registered.

Allegation - Special By-Law 21 Excludes Structural Repairs

51. The applicant argues that Special By Law No. 21, which confers on the applicant the exclusive use of the open area adjacent to Lot 21 to permit tables and chairs to be placed in that open area, excludes the applicant from any maintenance or repairs of a structural nature.

52. But this exclusion only applies to the applicant's responsibility to maintain and repair the "open area" which does not include the gazebo. Even the applicant concedes in its submissions that the gazebo has no association with the open area or "area 7" referred to in Special By-Law No. 21.

53. And, in any event, the specific maintenance and repair obligations imposed on the applicant under Special By Law No. 2 do not contain any exemption for structural repairs and would override the exclusion contained in Special By Law No. 21 (in the event that Special By Law No. 21 applied to the gazebo – which it does not).

Allegation - Special By-Law 2 is "Temporary"

54. The applicant next says that Special By Law No. 2 records a "temporary agreement" pursuant to which the owner of Lot 21 would only be responsible for the maintenance and repair of the elevator and the elevator tower for as long as the glazing works were in progress. But the by-law says nothing of the sort. The maintenance and repair obligations imposed on the applicant pursuant to Special By Law No. 2 remain in force and continue until the bridge is constructed over Gerrale Street (and no such bridge has been built).

55. This is confirmed by a letter from the previous strata manager to the previous owner which required the owner to maintain the elevator and elevator tower in accordance with the by-law "until Sutherland Shire Council agrees that the terms of the development application in relation to the construction of the bridge over Gerrale Street are complied with and the bridge is constructed and commissioned.": see **Tab 14** – letter from previous strata manager to previous owner dated 15 March 2000.

56. The applicant also argues (contrary to its previous argument) that the by-law only imposes maintenance and repair obligations on it for an unspecified "term". The applicant then says that the "term" expired some time in 2004. The applicant's interpretation of the by-law is plain wrong. The by-law does not say that the maintenance and repair obligations cast on it only remain operative for a "term". The by-law clearly says that the maintenance and repair obligations continue in force until the bridge is built over Gerrale Street.

Allegation - Special By-Law 2 Does Not Confer Rights Over the Gazebo

57. The applicant complains that Special By Law No. 2 does not confer on it special privileges in relation to the elevator or elevator tower and yet it imposes on it the obligation to maintain and repair those parts of the common property. But there is nothing wrong with this.

58. Section 53 of the Strata Act says that a by-law like Special By Law No. 2 may confer special privileges "subject to such conditions as may be specified in the by-law". Section 54(1) provides that one of those conditions may impose on the owner concerned the responsibility for the maintenance and upkeep of the common property.

59. It follows that the owners corporation is able to impose on the applicant by way of Special By Law No. 2 the responsibility for the maintenance and repair of the common property elevator, elevator tower and gazebo.

Allegation – Previous Adjudicator's Decision Exempts Applicant from Gazebo Maintenance

60. On 28 August 2009 the owners corporation applied to an adjudicator for an order to require the applicant to paint the "lift tower soffit" (see File No. SCS 09/40324). The owners corporation relied on Special By Law No. 2 to argue that the applicant was responsible for painting the soffit.

61. On 2 December 2009 Adjudicator S F Smith dismissed the application. In his reasons for decision, the adjudicator noted that the applicant did not dispute its obligation to "paint and keep in repair the lift tower soffit" but dismissed the application on the basis that the lift tower soffits did not require painting.

62. The applicant relies on the adjudicator's decision to argue that it is not responsible for maintaining the gazebo. But the adjudicator made no finding that the applicant was not responsible for the maintenance of the gazebo (so the adjudicator's decision does not assist the applicant).

63. The adjudicator's decision was made solely on the basis that the evidence presented to him did not reveal that the "lift tower soffit" required painting (not that the applicant was not responsible for same).

64. Indeed the adjudicator's decision supports the owners corporation's interpretation of the by-law because the adjudicator considered the gazebo to be part of the roof of the elevator tower.

65. To conclude, Special By Law No. 2 places on the applicant the responsibility for the maintenance and repair of the gazebo. It follows that the owners corporation is discharged from its obligations to maintain and repair the common property comprised in the gazebo pursuant to section 54(3) of the Strata Act.

Order 3 – Amendment of Special By-Law No. 2 to Remove Maintenance Obligations Concerning Elevator and Elevator Tower

66. The applicant presses for an order to amend Special By Law No. 2 to remove from the by-law the parts which impose on the applicant obligations to maintain and repair the elevator, elevator tower and surrounding common property.

67. The applicant provides no cogent reason as to why the by-law should be amended in this manner. The owners corporation has not acted unreasonably in refusing to amend the by-law in that manner and nor can it be said that the conditions relating to the maintenance and upkeep of the common property that are specified in the by-law are unjust.

Allegation - The By-Law is Unfair – Elevator Maintenance Obligations

68. Special By-Law No. 2 gave the owner of Lot 21 the right to extend the shopfront glazing of the Lot (and thereby extend the floor space of the restaurant) out onto the common property open area surrounding the restaurant for free.

69. Section 53 of the Strata Act permits a by-law such a Special By Law No. 2 to contain conditions including a condition imposed on an owner to maintain and repair common property: see section 54. The by-law contains a condition of this type by requiring the applicant to maintain the elevator and the elevator tower.

70. It was fair and reasonable to impose this condition on the owner of Lot 21 because:

> the elevator exclusively services Lot 21 and does not benefit any other Lot - it provides access solely to the restaurant operated out of Lot 21 from Gerrale Street level (so it makes sense for the owner of Lot 21 to maintain and repair the elevator and elevator tower)[2]; and
>
> the owner of Lot 21 was not required to pay the owners corporation any money in return for the special privileges it acquired to extend the glazing of the restaurant onto the common property - which would substantially increase the size and patronage of the restaurant (so instead the owner was required to take on the responsibility for the elevator maintenance).[3]

71. Further, Special By Law No. 2 was in place at the time the applicant bought Lot 21. Therefore the applicant knew, or should have known, that the by-law imposed on it the responsibility for elevator maintenance.

72. In all of these circumstances it cannot be said that the conditions in Special By Law No. 2 which require the applicant to maintain and repair the elevator and elevator tower are unfair or unjust.

Allegation - The By-Law is Unfair – Continuation of Elevator Maintenance Obligations

73. The applicant claims that it is unfair that the elevator maintenance obligations imposed under the by-law continue to apply because (the applicant says) those obligations should have ended when the bridge was constructed over Gerrale Street.

74. But the bridge was not a concept dreamed up by the owners corporation. Rather, it was Sutherland Shire Council's idea to construct the bridge over Gerrale Street: see **Tab 15** – Positive Covenant registered with Strata Plan No. 50785.

75. The owners corporation has certainly not given any undertaking to construct the bridge. And the owners corporation has done nothing wrong by not building the bridge.

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[2] This arrangement would end when the bridge was built over Gerrale Street and large numbers of public (not just restaurant staff and patrons) would use the lift to gain access to the bridge.

[3] see **Tab 8** – letter from previous strata manager dated 19 November 1999 which confirms that the owners corporation granted the owner permission to extend the restaurant quite substantially onto the common property "on the basis that they would maintain the lift and the tower".

76. In any event, there can be no unfairness arising out of the fact that the bridge has not been built because the applicant bought Lot 21 when the by-law was already in force so he knew or should have known that the elevator maintenance obligations would be imposed on him until the bridge was built (and he should have realised that there was a possibility that the bridge would never be built).

Allegation - The By-Law is Unfair – Elevator Maintenance Costs

77. The applicant complains that it is unfair that it is responsible for reimbursing the owners corporation for the costs and charges the owners corporation incurs under elevator maintenance contracts it has entered into. No unfairness arises.

78. Special By Law No. 2 does not give the owners corporation a licence to impose on the applicant an exorbitant amount of elevator maintenance costs. The costs for which the owners corporation is entitled to be indemnified must be reasonable in amount and properly incurred: see *Owners of Strata Plan 36131 -v- Dimitriou* [2009] NSWCA 27 where the NSW Court of Appeal held that the expenses recoverable by an owners corporation from an owner who did not pay his or her levies needed to be reasonable in amount and properly incurred.

79. The applicant complains that it could arrange for the elevator to be maintained for less cost. The owners corporation will obviously consider any competitive quotations for elevator maintenance which are provided by the applicant. The owners corporation has no interest in incurring and then on charging to the applicant exorbitant costs for elevator maintenance.

Allegation - Closure of Elevator

80. The applicant complains that the owners corporation has threatened to close the elevator and that this would interfere with its proprietary right to use the common property including the elevator. The applicant has no such proprietary right. That right was transferred to the lessee of the restaurant when Lot 21 was leased by the applicant: see *Proprietors of Centre Building Plan No 343 v Bourne* [1984] 1 Qd R 613; *Ashington Holdings Pty Ltd v Wipema Services Pty Ltd* (1998) 8 BPR 15,961.

81. But in any event the owners corporation does not intend to decommission the elevator or prevent the applicant or any other owner from using it. The applicant's claim that the owners corporation has committed a fraud on the minority by threatening to close down the elevator is without any factual basis and misconceived.

Order 4 – Refund of Fees Payable Under Special By Law No. 42.5

82. The adjudicator does not have power to order the owners corporation to refund to the applicant licence fees that it has paid under Special By Law No. 42.5: see section 138(3)(d) of the Strata Act.

83. In any event, the applicant does not specify the amount of money it requires to be refunded (which it must do in order to allow the owners corporation to know the case it is required to meet and to comply with section 124 of the Strata Act which requires the applicant to "specify the orders sought").

84. There is no basis for ordering the owners corporation to refund any fees to the applicant because the applicant was obliged to pay those fees under Special By Law No. 42.5. The by-law clearly imposes on the applicant the obligation to pay quarterly licence fees.

85. Even if Special By Law No. 42.5 is repealed (and there is no basis for repealing the by-law), the repeal would not operate retrospectively meaning the obligations of the applicant to pay the licence fee up until the repeal of the by-law would remain in force as a result of which the applicant would have no right to be refunded the licence fees paid by it.

86. Section 157(3) of the Strata Act does not give an adjudicator power to order the owners corporation to refund licence fees paid by the applicant under Special By Law No. 42.5. Section 157(3) is intended to give an adjudicator power to order an owners corporation to compensate an owner who loses a special right over the common property upon the repeal of a by-law by an adjudicator. It is not intended to give an adjudicator power to order a refund of licence fees required to be paid under a by-law.

Order 6 - Refund of Elevator Maintenance Costs Paid under Special By Law No. 2

87. The adjudicator does not have power to order the owners corporation to refund monies paid by the applicant pursuant to Special By-Law No. 2 for elevator maintenance and repairs: see section 138(3)(d) of the Strata Act. Section 157(3) does not apply because the applicant was not an owner at the time Special By-Law No. 2 was made meaning the applicant is disqualified for applying for compensation under section 157(3) (and section 157(3) cannot be used to order a refund for the reasons given in the previous paragraph): see section 157(5).

88. There is no basis at law for the adjudicator to order the owners corporation to refund the applicant monies paid by it under Special By-Law No. 2 because the applicant was liable to pay those monies under the by-law. The by-law plainly makes the applicant responsible for maintaining and keeping in good repair the elevator and the elevator tower and for also indemnifying the owners corporation for the costs and charges under the elevator maintenance contracts it has entered.

89. Even if Special By-Law No. 2 was amended by an order of the adjudicator to relieve the applicant from the responsibility for maintaining and repairing the elevator (and there are no grounds for amending the by-law), the amendment of the by-law would not operate retrospectively. The applicant's obligations concerning elevator maintenance up until the time the by-law was amended would remain.

90. Further, the applicant is not entitled to a refund of monies paid by it since 2004 because the applicant's claim for monies paid more than six years ago is statute barred under the *Limitation Act 1969*.

Order 7 – Production of Elevator Maintenance Expenditure Details

91. There is no basis for ordering the owners corporation to produce details of expenditure relating to the elevator since 2003 or details associated with lift maintenance or Special By-Law No. 42.5 "as well as various charges and interest".

92. The applicant is able to inspect and take copies of the owners corporation's books and financial records if the applicant makes a request in accordance with section 108 of the Strata Act. The applicant has not done so.

93. The owners corporation should not be compelled to search for and produce a broad range of documents (many of which are unspecified) when the applicant has not even attempted to obtain those documents by exercising his statutory right to do so.

Order 9 – Order for Costs

94. The adjudicator does not have power to make an order for costs: see section 176(1) of the Strata Act

Conclusion

There is no basis for making any of the orders sought. The application should be dismissed.

Yours faithfully

J.S. MUELLER & CO
Encls.