CONSUMER, TRADER & TENANCY TRIBUNAL
NOTICE OF ORDER

Received 31/12/2013

The Secretary, Owners Corporation SP 50785
1–3 McDonald Street
CRONULLA NSW 2230

File No: SCS 13/07378
(Quote in all enquiries)

Application to the Tribunal concerning 1–3 McDonald Street CRONULLA NSW 2230 Australia – SP50785

On 20–DEC–2013, the following orders were made:

1. The Tribunal allows the appeal and revokes orders 1 and 2 made by the Adjudicator in matter number SCS 12/49745.

2. The application to the Adjudicator for orders 1 and 2 is dismissed.

3. The Tribunal affirms order 3 made by the Adjudicator in matter number SCS 12/49745.

Please read this information carefully

- **Display of the Order:** Within 72 hours of receiving this order the owners corporation must put a copy on the scheme notice board, unless the order states otherwise or if the by–laws do not require the owners corporation to maintain a notice board. It must stay there for 14 days. If there is no notice board the owners corporation must give a copy to each person shown on the strata roll.
- **Your Rights of Appeal:** If you wish to appeal against a dismissal of an application by an Adjudicator, you must lodge an appeal to the Tribunal within 21 days of the date the order takes effect. The date the order takes effect will vary. See s210 of the Strata Schemes Management Act 1996 and s99 of the Community Land Management Act 1989. An Appeal from any other order must also be lodged within 21 days of the date the order takes effect, although if sufficient cause is shown, time may be extended to 90 days. Section 81 of the Consumer, Trader and Tenancy Tribunal Act 2001 may also apply.
- An order of the Tribunal may be varied or revoked in certain limited circumstances. Such application may only be made with the approval of the Registrar within 28 days. Orders made by an Adjudicator may be clarified or time extended.
- The only right of appeal against an order of the Tribunal made at hearing is to the District Court on a point of law and must be made within 28 days from the date the order is made. In certain circumstances this time may be extended.
- **Penalty for Non–Compliance:** If an order is not complied with an application may be made to the Tribunal to impose a penalty up to $5,500.00.

More Information: If you need more information your rights and responsibilities or Mediation enquiries please contact Fair Trading Information Centre on 13 32 20.

N Vrabac
Tribunal Member
24/12/13

Level 3, 4–8 Woodville Street, HURSTVILLE NSW 2220
PO Box 148, HURSTVILLE BC NSW 1481
hurstville@cttt.nsw.gov.au
Ph: 1300 135 399 Fax: 8567 0099
www.cttt.nsw.gov.au

CONSUMER, TRADER AND TENANCY TRIBUNAL
Strata and Community Schemes Division

APPLICATION NO:	SCS 13/07378
APPLICANT:	The Owners Corporation SP 50785
RESPONDENT:	Universal Finance Holdings Pty Ltd
APPLICATION:	Appeal against the orders made by Strata Schemes Adjudicator
HEARING:	22 August 2013
APPEARANCES:	Mr J Muller, Solicitor, represented the appellant Owners Corporation; Mr D Russell, represented the respondent Universal Finance Holdings Pty Ltd
ISSUES:	Is the decision to revoke Special By-Law 42.5 wrong
LEGISLATION:	*Strata Schemes Management Act 1996* ("the Act").
KEYWORDS:	Special By-Law

ORDERS

1. The Tribunal allows the appeal and revokes orders 1 and 2 made by the Adjudicator in matter number SCS 12/49745.

2. The application to the Adjudicator for orders 1 and 2 is dismissed.

3. The Tribunal affirms order 3 made by the Adjudicator in matter number SCS 12/49745.

N Vrabac
Senior Member
Consumer, Trader and Tenancy Tribunal

20 December 2013

CONSUMER, TRADER AND TENANCY TRIBUNAL
Strata and Community Schemes Division

REASONS FOR DECISION

APPLICATION NO: **SCS 13/07378**

BACKGROUND

1. Strata Plan 50785 is situated on the site of the old Workers Club, Cronulla. The plan comprises of three buildings.

2. Block "A" has five restaurants on the ground level and two levels above there are twelve apartments. Block "B" has six one-bedroom apartments on three floors and two restaurants situated on the first and second floor. Block "C" has seventy seven apartments and two levels of basement car park. The lower level of the car park is shared with Blocks A and B.

3. Strata Plan 50785 was registered on 11 September 1995. The building was completed in 1996. The strata plan was registered by the developer with a Special By-Law 1. The by-law gave the commercial lot owners in Blocks A and B the exclusive use of various parts of common property. The previous owner of Lot 21 was given the exclusive use of part of the balcony adjacent to his Lot. The by-law permitted the appellant to place and maintain on the common property area tables and chairs to be used by customers for the consumption of food and beverages purchased from Lot 21.

4. Special By-Law 1 placed on the respondent the responsibility for the maintenance and keeping in good repair and the cleaning of the defined strip of an open area. Any maintenance or repair of a structural nature was excluded in the by-law.

5. On 20 April 1996 the appellant made a new by-law, Special By-Law 21. The by-law was in substantially the same terms to Special By-Law 1. It conferred on the owner of Lot 21, exclusive use and enjoyment of the defined open area adjacent to Lot 21.

6. In about August 1997 the previous proprietor of Lot 21 approached the executive committee for permission to install roof top ventilation system above the restaurant; to have air a conditioning plant and to extend the glazed shop front out onto the common property balcony surrounding the restaurant.

7. On 1 September 1997 the Owners Corporation entered into a license agreement with the previous owner of Lot 21 concerning the installation of 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. The previous owner paid to the Owners Corporation a licence fee in the sum of $1,000.00 per quarter.

8. The licence agreement imposed on the previous owner of Lot 21 an obligation for the cost of lift maintenance contract for the elevator servicing the restaurant and the upkeep of the structure above the elevator.

9. In 1998 a by-law was passed to permit Lot 21 to extend the glazed shop front of the restaurant onto the common property balcony. Due to an oversight, the by-law was not registered.

10. On 2 May 2003 Special By-Law 2 was passed by the Owners Corporation to remedy the oversight made in 1998. The by-law compelled Lot 21 to maintain and repair the common property on which the glazing work and exhaust system were affixed. Special By-Law 2 came in to affect a couple of days after five year license agreement expired.

11. Subclause c(iv) compelled Lot 21 to properly maintain and keep the Elevator Tower in a state of good and serviceable repair until Sutherland 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.

12. Subclause c(vii) stated that Lot 21 must comply with the terms of the licence agreement dated 1 September 1997.

13. The respondent purchased Lot 21 in August 2003. Lot 21 premises are leased to the operator of the restaurant known as "Opah". The restaurant has about 250m² in area. The restaurant occupies some of the common property balcony which was granted to Lot 21 as an exclusive use area.

14. On 23 March 2005 Special By-Law 42 was made. Clause 42.5 provided for the payment of the quarterly license fee in the sum of $1,000.00 per quarter in return for consent to continue to keep and maintain on the common property an exhaust system and shared grease traps.

15. Common property grease traps are shared among the seven commercial lots. They are situated below the B2 basement car park level. Grease traps were to be maintained by the seven commercial lots.

16. On 26 March 2008 the Owners Corporation amended Special By-Law 42.5 by increasing the license fee payable to $2,500.00 plus GST per quarter. The licence fee is to be reviewed in accordance with the CPI each year.

17. By-Law 42.5 amendment was passed with no vote cast against. However, Lot 21 was not given an opportunity to consent in writing to the proposed amendment as mandated by s 52(1)(a) or s 65A(5)(b) of the Act.

18. A dispute arose between the parties around 2009 when the gazebo over the lift tower deteriorated and repairs were required to it. The cost of the repair is in excess of $83,000.00.

19. For the past four years, the parties could not resolve the dispute by way of mediation.

20. The first issue to be decided is whether the Adjudicator made an error when he determined that Special By-Law 42.5 should be revoked.

21. The second issue to be decided is whether the Adjudicator made an error when he determined that the appellant should reimburse the appellant the fees collected under Special By-Law 42.5 to the respondent.

22. The third issue for determination is who has the responsibility under Special By-Law 2 to maintain the gazebo over the Lift Tower.

APPLICATION

23. On 27 September 2012 the respondent applied for nine orders from a Strata Schemes Adjudicator. On 18 January 2013 the Adjudicator granted the respondent's application in part.

24. The following orders were made:

> 1) *"Special by-law 42.5 made in general meeting on 26 March 2008 and registered on 11 September 2008,to the extent that it amends or repeals by-law 42 that was registered in 1996 is, pursuant to s 157(1)(a) revoked.*
>
> 2) *The respondent shall calculate the sum paid by the applicant to the Owners Corporation pursuant to the revoked by-law that is in excess of the sum payable pursuant to the previously existing by-law in that regard and shall credit the excess to the account of the applicant.*
>
> 3) *The respondent shall take all necessary steps to engage suitably qualified tradespeople to repair and maintain the gazebo as necessary to ensure compliance by the respondent with its obligations in that regard under SSMA s 62. All the work is to be completed within 60 days of the date of these orders.*
>
> 4) *The application is otherwise dismissed."*

25. The appellant is the Owners Corporation.

26. The appellant sought a stay of the Adjudicator's orders. A stay was granted on 11 February 2013.

27. The appellant sought an order revoking the orders of Strata Scheme Adjudicator and an order dismissing the application in File No. SCS12/49745.

28. The appellant's grounds of appeal are very extensive and they are as follows:

Order 1 – Revoking of Special By-Law No. 42.5

1. The adjudicator erred by finding that he was not bound by, and by disagreeing with, the reasoning of the Supreme Court as to the proper meaning of section 52(3) of the *Strata Schemes Management Act 1996* in *James –v- The Owners Strata Plan No. 11478 (No.4)* [2012] NSWSC 950.

2. The adjudicator should have held that he was bound by, and obliged to follow, the reasoning of the Supreme Court concerning the proper meaning of section 52(3) in *James* case.

3. The adjudicator erred by holding that the obligation of the applicant to obtain the written consent of concerned lot owners to the making or amendment of a special privileges by-law is not a condition precedent to the making or amendment of such a by-law and therefore does not fall within the purview of section 52(3).

4. The adjudicator should have held that the obligation of the applicant to obtain the written consent of concerned lot owners to the making or amendment of a special privileges by-law is a condition or preliminary step precedent to the making or amendment of the by-law that falls within the purview of section 52(3).

5. The adjudicator erred by concluding that section 52(3) is intended to preclude a challenge to the validity of a registered by-law more than two years after the applicant has met its obligations under section 52(1) because of some irregularity at or in the notice given for the meeting at which the by-law passed.

6. The adjudicator should have held that section 52(3) is intended to preclude a challenge to the validity of a registered by-law more than two years after the by-law is made, or purportedly made, on the basis of a defect in a condition or preliminary step precedent to the making of the by-law such as a failure to obtain the written consent of a concerned lot owner to the making of the by-law.

7. The adjudicator erred by finding that a concerned lot owner would be powerless to object to the registration of a special privileges by-law to which the owner had not consented in writing.

8. The adjudicator should have held that a concerned lot owner who had not consented in writing to the making of a special privileges by-law would be capable of protecting its interests and preventing the registration of the by-law by lodging a caveat over the common property title concerned or obtaining an injunction to restrain the owners corporation from registering the by-law (as the applicant did in *James* case).

9. The adjudicator erred by concluding that the revoking of Special By-Law No. 42.5 would not be procedurally unfair to the other six lot owners who benefit under the by-law when those lot owners were not parties to the adjudication proceedings.

10. The adjudicator should have held that it would have been a denial of procedural fairness to the other six lot owners to make an order revoking Special By-Law No. 42.5 when those owners were not parties to the adjudication and the adjudicator should have refrained from making any such order until those owners were made parties to the adjudication and given an opportunity to make submissions concerning the order sought.

11. The adjudicator erred by making an order revoking Special By-Law No. 42.5 whether pursuant to section 157(1)(a) of the *Strata Schemes Management Act 1996* or otherwise.

12. The adjudicator should have held that there were no grounds to make an order revoking the by-law whether pursuant to section 157(1)(a) or otherwise.

Order 2 – Credit of Monies Paid Pursuant to Special By-Law No. 42.5

13. The adjudicator erred by deciding that the order revoking Special By-Law No. 42.5 would operate retrospectively.

14. The adjudicator should have held that the order revoking Special By-Law No. 42.5 would operate on and from the date on which the order was made or took effect as a consequence of which he could not order the applicant to refund the respondent, or give the respondent credit for, the sums previously paid by the respondent to the applicant pursuant to the revoked by-law.

15. The adjudicator erred by concluding that he had power to order, and by ordering, the applicant to calculate the sum paid by the respondent to the applicant pursuant to the revoked Special By-Law No. 42.5 that is in excess of the sum payable pursuant to

the previously existing by-law and to credit the excess to the account of the respondent.

16. The adjudicator should have held that by virtue of section 138(3)(d) of the *Strata Schemes Management Act 1996* he did not have power to order the applicant to credit any such excess to the account of the respondent.

Order 3 – Repair of Gazebo

17. The adjudicator erred by concluding that the gazebo does not form part of the "elevator tower" as that expression is defined in Special By-Law No. 2.

18. The adjudicator should have held that the gazebo forms part of the "elevator tower" as that term is defined in Special By-Law No. 2.

19. The adjudicator erred by concluding that the respondent is not obliged to maintain and repair the gazebo pursuant to Special By-Law 2, clause C(iv).

20. The adjudicator should have held that the respondent is obliged to maintain and repair the gazebo to Special By-Law 2, clause C(iv).

21. The adjudicator erred by concluding that the respondent is not obliged to maintain and repair the gazebo pursuant to Special By-Law 2, clause C(vii).

22. The adjudicator should have held that the respondent is obliged to maintain and repair the gazebo pursuant to Special By-Law 2, clause C(vii).

23. The adjudicator erred by concluding that Special By-Law 21 operates to exempt the respondent from the maintenance or repair of the gazebo.

24. The adjudicator should have held that the common property covered by Special By-Law No. 21 does not include the gazebo, that the gazebo is not a structural element and that the repairs required to the gazebo are not of a structural nature, and therefore the provision in clause A of the by-law exempting the respondent from any maintenance or repairs of a structural nature did not apply to the gazebo.

25. The adjudicator erred by concluding that the applicant is responsible for keeping the gazebo in in a state of good and serviceable repair.

26. The adjudicator should have held that the respondent is responsible for maintaining and repairing the gazebo pursuant to Special By-Law 2, clauses C(iv) and (vii).

27. The adjudicator erred by ordering the applicant to repair and maintain the gazebo as necessary to ensure compliance by the applicant with its obligations under section 62 of the *Strata Schemes Management Act 1996*.

28. Additionally, the adjudicator erred by failing to specify (with precision or at all) the work the applicant would be required to carry out to maintain and repair the gazebo in order to comply with the order.

APPELLANT'S EVIDENCE

29. The appellant relied on the following in his appeal:

- All of the documents, submissions and statements in the Adjudication File SCS 12/49745
- Submissions, dated 7 February 2013
- Expert Report, M Molloy, dated 19 March 2013
- Surveyors Report, M Holt, dated 17 April 2013
- Replacement Report, M Molloy, dated 16 August 2013
- Submissions in Reply, dated 22 August 2013
- Sworn evidence, M Molloy, 22August 2013
- Submissions, dated 6 September 2013
- Submissions, dated 20 September 2013

30. The appellant submitted that the Adjudicator erred in order 1 revoking Special By-Law 42.5 made on 26 March 2008.

31. Special By-Law 42.5 amended a clause 42.5 in Special By-Law 42. Special By-Law 42 was made on 23 March 2005.

32. By rewriting clause No. 42.5 the license fee payable by each of the commercial owners was increased from $1,000.00 plus GST per quarter to $2,500.00 plus GST per quarter and to have the license fee reviewed in accordance with the CPI each year.

33. Section 52(1)(a) of the Act provides that an owners corporation is only able to amend a by-law if it does two things: obtain the written consent of each of the commercial lot owners who would be affected by the amendment to the by-law and pass a special resolution at a general meeting.

34. In this matter the appellant did not obtain the written consent of the respondent to the amendment of Special By-Law 42.5.

35. The respondent, owner of Lot 21, argued in the adjudication that the amendment of the by-law was invalid. The Adjudicator agreed with the respondent's contention. He made an order pursuant to s 157(1)(a) revoking the amendment of the by-law.

36. The appellant contended that the amendment to the by-law was valid. He relied on s 52(3) of the Act in support of his argument. The section states that after two years from the making of a by-law such as Special By-Law 42.5 "it is conclusively presumed that all conditions and preliminary steps precedent to the making of the by-law were complied with and performed".

37. The appellant relied in on the decision of the Supreme Court, James-v-The Owners Strata Plan 11478 (No.4) NSWSC 590. The court held that "section 52(3) is saying (among other things) that that condition or preliminary step precedent is conclusively presumed to have taken place if no challenges are made to the by-law within two years". Section 52(3) reads as follows:

> *"After 2 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. The Adjudicator held that he did not agree with the proposition in *James'* case. He stated that the decision by the Supreme Court was made for other reasons (the by-law was in fact defeated because consent was not given), the proposition is obiter dicta. He therefore felt that he was not bound to follow it.

39. It is important to note here that it was common ground between the parties at the appeal that the Adjudicator's view about the James' case was erroneous.

40. The appellant submitted that the Adjudicator's conclusion is wrong. The decision in James' case is not obiter dicta. It was the *ratio decidendi* and it was therefore binding on the Adjudicator. That is, it is the case that consent of the owners concerned is a prerequisite to making or amending of a by-law and that that consent has to be obtained before the by-law is approved at a general meeting.

41. Obtaining consent is a preliminary step to the making of the by-law. If the preliminary step of obtaining consent has not taken place, after two years from the making of the by-law, the condition precedent is considered conclusively to have taken place because of the operation of s 52(3) of the Act.

42. The appellant argued that the Adjudicator should not have concluded that the amended by-law may be revoked without affording an opportunity to the other commercial lot owners to be a party to the proceedings. The Adjudicator concluded that the decision to repeal the amended by-law may be made in the absence of the other commercial owners because their rights, existing prior to the amendment would remain in situ.

43. The appellant contended that the Adjudicator could not have revoked the amended by-law pursuant to section 157 of the Act because he applied the wrong test. The Adjudicator applied the test used in section 52 which states that written consent has to be obtained of all owners to have the by-law amended as a basis to revoke the by-law under section 157 of the Act. The ground to have the by-law revoked under section 157 is that regard had to be had to the interests of all owners in the use and enjoyment of lots or common property.

44. In relation to order 2 made by the Adjudicator the appellant submitted the following.

45. The appellant argued that the Adjudicator made an order for the refund of the additional license fees. The additional license fees were called for from March 2008 under the amended Special By-Law 42.5. It is contended by the appellant that that decision is wrong for three reasons.

46. Firstly, there were no grounds for the Special By-Law 42.5 to be revoked for the reasons given above. That is, if Special By-Law 42.5 could not have been revoked because of what was held in James' case, order 2 could not have been made by the Adjudicator.

47. Secondly, the order revoking the Special By-Law No. 42.5 cannot operate retrospectively.

48. Thirdly, the Adjudicator had no power to order the appellant to pay or refund to the respondent, whether by credit or otherwise. The section 138(3)(d) of the Act prohibits an Adjudicator from making an order that includes the payment by a person to another person of damages.

49. In relation to order 3 made by the Adjudicator in favour of the respondent, the appellant submitted the following.

50. The Adjudicator held that the gazebo was not a part of the elevator tower. Therefore, it was not to be maintained by the respondent under Special By-Law 2, granted to the respondent on 2 May 2003. Special By-Law 2 grants special privilege to the respondent over the common property that is the elevator, elevator tower, exhaust system and the glazing works.

51. The appellant argues that the gazebo has to be maintained by the respondent because of the provisions made in clauses c(iv) and c(vii) of Special By-Law 2.

52. Clause c(iv) states that the Owner must maintain and keep the Elevator Tower in the state of good and serviceable repair until the Council approves and the bridge over Gerrale Street, the bridge is constructed and commissioned for public use.

53. Clause c(vii) provides that the Owner must comply with the terms of the License dated the 1 September 1997. The license agreement mandates the owner of Lot 21 will be responsible for the upkeep of the structure above the lift.

54. The license agreement clearly imposed on Lot 21 the responsibility for maintaining and repairing the gazebo. The appellant contends that there is no reason why this responsibility, incorporated in Special By-Law 2 should be read down.

55. The appellant stated that Special By-Law 21 which granted the respondent the exclusive use of part of the common property terrace, specifically exempted the respondent from the requirement to carry out any structural repairs. However, it is submitted further that the Adjudicator concluded wrongly that any by-law created after Special By-Law 21 that sought to impose on the respondent an obligation that did not already exist needed to address expressly the issue of structural repairs rather than indirectly by reference to an expired agreement.

56. The appellant submitted that the conclusion of the Adjudicator is wrong on this point because Special By-Law 21 which exempts the respondent from structural repairs does not apply to the gazebo. The appellant also contended that the repairs to the gazebo should be carried out by the respondent because they are not of a structural nature.

57. Additionally, the appellant submitted that Special By-Law 21 does not affect in any way the obligations on the respondent under Special By-Law 2. This is because Special By-Law 21 does not cover the same common property referred to in Special By-Law 2. The obligation imposed on the respondent under Special By-Law 21 relates to exclusive use of 100m² terrace adjacent to the restaurant. The terrace which is on the northern boundary of the restaurant is not covered by the gazebo.

58. The appellant contends that the expression and the definition of the elevator tower in the by-law is intended to have an enlarged meaning to include gazebo as the roof of the elevator tower because it sits directly above it.

59. The appellant tendered at the hearing the reports of Jones Nicholson Pty Ltd Consulting Engineers, dated 19 March 2013 and 16 August 2013.

60. The author of the reports Mr M Molloy was called and gave evidence. His evidence was that the gazebo structure neither supports nor gains support from the blockwork lift shaft. They are structurally independent. The gazebo is not connected to the lift shaft because if connected there could be damage caused to one another due to differing thermal movements.

61. Mr Molloy's evidence was that despite disconnection between the gazebo and the lift shaft, the gazebo is a waterproof roof over the lift structure. He could not establish another form of roof cover over the lift shaft which would make the gazebo an independent structure over the lift shaft.

RESPONDENT'S EVIDENCE

62. The respondent relied on the following materials in reply:

- All of the documents, submissions and statements in the adjudication File SCS 12/49745
- Submissions and supporting authorities, dated 28 August 2013
- Expert Report, K Demlakian, undated.
- Supplementary Submissions and supporting authorities, dated 28 August 2013
- Sworn evidence, K Demlakian 22 August 2013
- Submissions, dated 9 September 2013
- Further Written Submissions, dated 9 September 2013

63. The respondent's case in support of the Adjudicator's decision is detailed and extensive. I will attempt to make a brief summary.

64. The respondent conceded that Special By-Law 42.5 should not have been revoked by the Adjudicator on his interpretation of the decision in *James*' case.

65. However, the respondent contended that the Adjudicator's findings may be upheld on the alternative ground, because the findings restrain an abuse of process, or cure a fraud on the minority, and prevent the Strata Schemes Management Act 1996 from becoming the instrument of a fraud.

66. The respondent submitted that Special By-Law 42.5 was passed in 2008 without the consent of lot 21. The appellant was notified within two years that consent has not been provided. The appellant "slept on that knowledge". The deeming provision in s 52(3) was allowed to take effect.

67. The respondent contends that the appellant should be estopped from relaying on s 52(3) to prevent the Strata Schemes Act 1996 becoming the instrument of a fraud on the minority, namely the respondent.

68. The respondent states that if the Adjudicator erred in the application of power under s 157, the Tribunal is now able to properly exercise power under s 157, 159, or under s 138 by way of an order that Special By-Law 42.5 has no effect against the respondent under section 43(4) of the Act.

69. Any monies paid to the appellant by the respondent under Special By-Law 42 should be refunded under section 138 or 169 of the Act as a restitution, which is not an award of damages, not to be made because of the prohibition in section 138(3).

70. The respondent submitted that the Adjudicator had power under s 138 or 169 to order restitution of the license fees paid on a cause of action or unjust enrichment.

71. In relation to Special By-Law 2, which imposes on maintenance obligations on the respondent in respect of the lift, lift tower, staircase and the contested "roof", several contentions are made why the obligations are incompetent and outside power.

72. The first contention is that Special By-Law 2 should be repealed because there is no corresponding grant of exclusive use. A grant of exclusive use over the lift was not possible, in any event, because of the existence of the positive covenant for public use. The positive covenant was made in respect of the lift in area A in 1995 by the Council of Sutherland Shire.

73. The second contention is that Special By-Law 2 is void for uncertainty. The by-law states that it will remain in force until the bridge over Gerrale Street is constructed. There is no time limit imposed in the by-law on the appellant as to when the Development Application ought to be made to the Council for the construction of the bridge. The respondent states that the by-law is therefore void, due to its reference to an undefined term.

74. The third contention is that a proper interpretation of the relevant provisions of the Act constrain the Adjudicator from imposing an individual lot owner to repair and maintain common property over which exclusive use or special privilege are granted under that by-law. Section 62 of the Act mandates that the owners corporation is responsible for repair and maintenance of the common property. The respondent concludes that in this matter there is no clear allocation to him of the obligation to repair and maintain common property under s 54. The obligation to repair and maintain falls to the appellant under s 62 of the Act.

75. The respondent argues that in the alternative, Special By-Law 2, on its terms, does not impose any obligation on the respondent to repair and maintain the gazebo. The gazebo is in accordance with the evidence given by Ken Demlakian structurally separate from the elevator tower.

76. The respondent argued that Special By-Law 2 should be amended or repealed on the basis of a finding that the terms and conditions relating to the maintenance or upkeep of the common property are unjust. That is, if the terms of the by-law providing for maintenance lacked clarity, the by-law may be declared unjust under s 158 of the Act.

77. The continuing obligation imposed under Special By-Law 2 on the respondent is unjust because it runs in to the future on a continuing basis. The temporary increase in demand for the lift and staircase due to the expansion of the restaurant on to the common property provided justification for the respondent to bear the maintenance cost of the lift and staircase. The indefinite period imposed on the respondent for repair and maintenance by the by-law should now be reverted to the appellant was intended when the strata scheme was originally registered.

78. The respondent further submits that it is unjust to have the obligation to maintain the lift imposed on him because the grant of exclusive use of the lift and staircase cannot be done due to the existing positive covenant for public access.

79. The respondent says regard must be had to s 158 (2):

a) the interests of all owners in the use and enjoyment of their lots and common property, and

b) the rights and reasonable expectations of any owner deriving or anticipating benefit under a by-law of the kind referred to in section 51.

80. The respondent argues that the interest of all owners in the use and enjoyment of common property would not be harmed by the obligation to maintain the lift and the staircase reverting back to the owners corporation. That is, it was intended at the creation of the strata scheme that the bridge over Gerrale Street be constructed. The obligation to maintain the lift and the stairs would have been the responsibility of the Owners Corporation. Failure to construct the bridge by the Owners Corporation should not be allowed to be a penalty on the respondent by way of imposing the responsibility of repairing the lift and stairs on him indefinitely.

DECISION

81. I am satisfied that the appellant has made out the grounds one to six and Order number 1 has to be revoked.

82. The appellant argued that the Adjudicator had to follow the decision in James case. This was agreed between the parties at the hearing. Special By-Law 42 was made in March 2005. It granted commercial lot owners special privileges to each keep an exhaust system and grease trap.

83. Special By-Law 42 imposed on each commercial lot owner special condition to pay a license fee of $1,000.00 plus GST per quarter.

84. In March 2008 the appellant amended Special By-Law 42. Clause 42.5 was rewritten to increase the license fee to $2,500.00 per quarter plus GST. The license fee was to be reviewed in accordance with the CPI each year.

85. The respondent argued before the Adjudicator that By-Law 42.5 was passed in contravention of s 52(1) (a). That is, the by-law was amended without the written consent of the commercial lot owners.

86. The appellant submitted to the Adjudicator that the respondent was out of time to have section 52(1) (a) invoked because the two years have passed and s 52(3) is to be applied. Under s 52(3) it is conclusively presumed after two years of passing or purported passing of the by-law that all conditions and preliminary steps precedent to the making of the by-law, required in s 52(1), have been complied with.

87. The appellant relied in support of his argument before the Adjudicator on James case in which it was held that if more than two years have passed since the by-law was amended, it is conclusively presumed that the respondent has consented to the amendment of the by-law and it is too late for the respondent to allege otherwise.

88. The Adjudicator rejected the proposition that he was bound by the decision in James case. He concluded that what James case had to say about s 52(3) was obiter dicta. The Adjudicator revoked Special By-Law 42.5 pursuant to s 157(1) (a). He held that the by-law was void *ab initio* because requirements set out in s 52(1) were not met at the time of its amendment.

89. The appellant submitted that the Adjudicator's conclusion about James case was wrong. The respondent conceded as much at the hearing of the appeal.

90. I adopt the appellant's argument because the Adjudicator was bound and should have followed the decision in *James* case.

91. The respondent argued in the alternative that Special By-Law 42.5 should be revoked because the appellant was notified within two year period that written consent was not given for the amendment of Special By-Law 42.5, before any deeming provision could take effect. The

appellant did not take any steps to correct the error. He allowed deeming provisions of s 52(3) to take effect.

92. The respondent says that the appellant should be estopped from relaying on s 52(3) to prevent the Strata Schemes Management Act 1996 becoming the instrument of fraud, namely the respondent.

93. I am not persuaded that in 2008 when Special By-Law 42.5 was amended, the appellant avoided its obligation to obtain written consent for the proposed amendment under s 52, exercised the power with intent to be beyond the scope of power. It seems to me that no one took any action to remedy the omission to call for written consent to amend Special By-Law 42 until the dispute arose as to who is responsible for the extensive repairs to the gazebo.

94. In view of my decision to revoke Order 1 made by the Adjudicator, it follows that Order 2 has to be revoked as well. That is, Special By-Law 42.5 was amended to increase the quarterly license fee from $1,000 per quarter to $2,500 for having the exhaust system and shared grease traps on the common property.

95. In relation to the credit of monies paid pursuant to Special By-Law 42.5, I am in agreement and adopt the submissions of the appellant. That is, even if Special By-Law 42.5 was repealed, the repeal does not operate retrospectively. The respondent's obligation continued to pay fees under the by-law up until the date the by-law is repealed.

96. In view of my decision that Special By-Law 42.5 ought not to have been repealed by the Adjudicator the obligation to pay the quarterly license fees ought to be continued. The license fee is not a levy and it may be paid under s 53 of the Act in consideration for the right to keep an exhaust system on the common property roof and to use the common property grease trap.

97. I agree with the Adjudicator that the appellant is responsible for the repairing and maintaining the gazebo. Hence, the grounds 17 to 28 have not been made out.

98. The Adjudicator concluded at [66] that it is perfectly clear from the description and photographs that the repairs to the gazebo are structural rather than non-structural. The Adjudicator was referring to Special By-Law 21, passed in August 1996. He concluded at [59] that the by-law specifically excludes the respondent from an obligation to carry out repairs and maintenance of a structural nature.

99. The Adjudicator stated at [64] that in his view any by-law created after Special By-Law 21 that sought to impose an obligation on the respondent an obligation that did not already exist needed to deal expressly with the exclusion provided in the by-law rather than indirectly by reference to an expired agreement. The appellant

submitted that the Adjudicator erred by concluding that the gazebo does not form the part of the elevator tower as that term is defined in Special By-Law 2, clauses c(iv) and c(vii).

100. The respondent submitted that s 54(3) expressly provides that, in the case of the direct imposition of the obligation to repair and maintain the common property the owners corporation is excused from its statutory obligation. I am not persuaded on the material before me that there has been a direct imposition of the obligation to repair and maintain the gazebo made on the respondent under Special By-Law 21 or Special By-Law 2.

101. Special By-Law 21 states that the respondent is excluded from any maintenance or repair of a structural nature. The by-law does not mention the lift, the lift tower or the gazebo. The exclusive use and enjoyment granted in 1996 under this by-law refers to an open area to be used by the restaurant.

102. The licence agreement made between the parties in 1997 foreshadows that the respondent will apply to the appellant for exclusive use of the common property roof over Lot 21. The appellant would consider the making of a by-law for that purpose. Furthermore, the license agreement contemplates that under the by-law the respondent will be responsible for the cost of lift maintenance contract and the upkeep of the structure above the lift.

103. The appellant contends that under the license agreement the respondent is responsible for the upkeep of the structure above the elevator namely, the gazebo. I do not agree with this conclusion. The license agreement contemplates passing of a by-law under which the respondent will be responsible for the upkeep of the structure above the elevator. The word gazebo is not mentioned in the license. My view is that the gazebo, as argued by the respondent, is a separate structure to the lift tower. The lift tower generally connotes the lift motor room, the lift over-run and the lift shaft. The gazebo function is to provide shelter from the elements or as contended by the respondent's expert they are designed for ornamental or decorative purpose.

104. Special By-Law 2 was passed in 2003, after the license agreement had lapsed. The by-law relevantly imposed on the owner of Lot 21, the present respondent, the obligation to properly maintain and keep the Elevator in a state of good and serviceable repair c(iii), to properly maintain and keep the Elevator Tower in a state of good and serviceable repair c(iv) and the owner of Lot 21 must comply with the terms of the licence dated 1 September 1997 c(vii).

105. Section 62 of the Act imposes the obligation on the owners corporation to maintain and repair the common property.

106. Section 54 of the Act makes clear that the obligation to maintain and repair the common property under a by-law may be imposed on either the owners corporation or the owner or owners concerned.

107. My view is that in this matter Special By-Law 2 does not excuse the appellant from the obligation to maintain and repair the common property, namely the gazebo. I agree with the respondent in that Special By-Law 2 does not impose any obligation on him to maintain and repair the gazebo.

Nikki Vrabac

N Vrabac
Senior Member
Consumer, Trader and Tenancy Tribunal

20 December 2013