CTTT
Consumer, Trader & Tenancy Tribunal

CONSUMER, TRADER & TENANCY TRIBUNAL

File No: SCS 13/07378
Quote in all enquiries

TO: The Owners Corporation SP50785
C/–Strata Title Management
PO BOX 2727
TAREN POINT NSW 2229

Notice of Directions Hearing

Please see over page for further details about your directions hearing and what you need to do to prepare.

An application to the Tribunal has been made concerning:

Applicant: The Owners Corporation SP50785

Respondent: Universal Finance Holdings Pty Ltd

The application has been listed before the Tribunal and you are required to appear at:

Location: Hearing Room 2
Floor 3, 4–8 Woodville Street Hurstville NSW 2220

Date and Time: Tuesday 12th March 2013 at 10:45 AM (AEDT)

Please arrive at least 15 minutes before the start of the hearing and report to the hearing attendant or security officer.
It is important that you are on time as the Tribunal may decide the matter in your absence.
The decision made will be binding on you.

There are security procedures at all venues.

J Hoskin
for the Registrar
Date: **12 February 2013**

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

IMPORTANT INFORMATION ABOUT DIRECTIONS HEARINGS

The CTTT lists matters for hearing depending on the type of application and the nature of the dispute. All CTTT hearings are open to the public. The following explains the type of hearing you will be attending.

Directions hearing

This matter has been listed for a 'directions hearing'. Directions hearings are used to prepare for the formal hearing. They are used in complex matters where there may be a need to establish jurisdiction, identify issues in dispute, set a time frame for the hearing, or make directions for the exchange of evidence.

All parties are required to attend the first and any subsequent directions hearings and must comply with procedural directions or the matter may be dismissed. Failure to attend may also result in the matter being finally determined.

If your application concerns a home building dispute you should read the Chairperson's Directions on home building disputes over $30,000.

As this is a directions hearing **you are not required to bring witnesses**. However you should bring with you all relevant documents or materials related to your case.

If you cannot attend

You can seek to have the hearing postponed by asking for an 'adjournment'. Adjournment requests must be made in writing and addressed to the Registrar. A copy should be sent to the other party. Include any supporting documentation such as a copy of the medical certificate or airline ticket. If you have the consent of the other party your request is more likely to be considered favourably.

If you have resolved the dispute

If you are the applicant and you have been able to resolve your dispute and no longer require a hearing, you need to withdraw your application. You must advise the other party and the Registrar in writing prior to the hearing. This should be done as soon as possible prior to your hearing date. If written notice is received by the CTTT before the hearing you will not have to attend.

Tell us

Contact the CTTT Registry immediately in the following circumstances:

- If you need an interpreter (the CTTT arranges and pays for this service)
- If you have changed your address or phone number
- If you have special needs so we can discuss what assistance you may require.

Outcome of the directions hearing

The Tribunal Member will generally tell you the decision at the end of the hearing. Written orders will be provided at the hearing or sent to you by post.

Need more information?

Visit **www.cttt.nsw.gov.au** or call 1300 135 399. Read the CTTT's publication *What happens at the Tribunal?* and the Chairperson's Directions

CONSUMER, TRADER AND TENANCY TRIBUNAL

STRATA & COMMUNITY SCHEMES DIVISION APPLICATION

Under the Strata Schemes Management Act 1996, Community Land Management Act 1989 or Community Land Development Act 1989

CTTT Consumer, Trader & Tenancy Tribunal

Refer to 'A Guide to the CTTT' e-resource for an overview of how to resolve your dispute at the Consumer, Trader and Tenancy Tribunal.

A copy of this application and any attached information will be provided to the other party or parties. Please keep a copy of your application for your own records. This brochure and other CTTT forms may be downloaded at www.cttt.nsw.gov.au or obtained from CTTT Registries.

1. Have you tried to settle this dispute through mediation (where appropriate)?

☐ **Yes** – If yes, attach evidence of the mediation result *(a copy of the letter given to you by the mediator)*

☒ **No** – If no, why? Appeal against Adjudicator's order - mediation not required.

2. Address of the

☒ strata scheme or
☐ community scheme
(Please tick one)

1-3 McDonald Street
CRONULLA
NSW 2230

3. What is the Strata Plan No. or Community Plan No. (or DP Number)

Strata Plan No. 50785

If a Community Plan, how many lots are shown on the plan?

If a Community Scheme, is your lot in a ?

☐ Community Plan ☐ Neighbourhood Plan
☐ Precinct Plan ☐ Strata Corporation

4. Your Name
(Individual applicant(s) or corporation)

The Owners - Strata Plan No. 50785

Your postal address for Notices

c/- J S Mueller & Co Solicitors
1st Floor, 240 Princes Highway
ARNCLIFFE NSW 2205

Daytime telephone: 02/9562 1266

5. If a Strata Plan, are you applying as the...?

☐ Lot Owner of Lot ☐ Original Owner
☒ Owners corporation ☐ Lessor
☐ Other *(Specify)*

☐ Council / Public Authority / Statutory Body

OR If a Community Plan, are you applying as the...?

☐ Lot Owner of Lot ☐ Occupier
☐ Managing Agent ☐ Association
☐ Other *(Specify)*

☐ Strata Corporation

6. Who is the application against?
(Individual/s or corporation)

Universal Finance Holdings Pty Ltd (ACN 101 116 447)

Other party's postal address for Notices

c/- PO Box 355
ROUND CORNER
NSW 2158

7. If a Strata Plan, is the other party?

☒ Lot Owner of Lot 21 ☐ Tenant/occupier of Lot
☐ Owners Corporation ☐ Lessor
☐ Other *(Specify)*

OR If a Community Plan, is the other party?

☐ Lot Owner of Lot ☐ Tenant/occupier of Lot
☐ Community, Precinct or Neighbourhood Association
☐ Other *(Specify)*

8. If there are any exceptional circumstances
which would prevent you from attending a hearing in **the next 28 days.** provide details when you are not available.

7, 8, 15, 20, 21 and 22 March 2013 and 5, 8 and 22 April 2013

OFFICE USE ONLY:

RECEIVED
- 8 FEB 2013
CONSUMER TRADER & TENANCY TRIBUNAL HURSTVILLE

Receipt No: 1360[illegible]
Date: 08-02-2013
File No: [illegible] Fee $76.00
Receipt Total: $76.00

CTTT-SCSH-01/2013

9. Is an interpreter needed?
What language/s or other special needs?

For Applicant	No	For Respondent	No

10. Have there been previous applications involving the same or related dispute?

☐ No ☒ Yes Please list the file numbers

SCS12/49745

11. Where can the Tribunal contact the Managing Agent or Secretary of the Owners Corporation/Association/ Strata Corporation?

Strata Title Management
PO Box 2727
TAREN POINT NSW 2229

12. What order or orders do you want?

Select from the following legislation and insert the appropriate section of the Act. Write out or attach the order you want. *(Refer to the table of orders in the attached information.)*
Time limits apply for certain applications. You should obtain information before making the application about the kinds of orders which the Tribunal can make.

☒ Strata Schemes Management Act 1996 Section(s) 177, 180 and 181
☐ Community Land Management Act 1989 Section(s)
☐ Community Land Development Act 1989 Section(s)

☒ An appeal against an order of an Adjudicator. File No: SCS12/49745 When did the order take effect? 28/01/2013
☐ Leave to appeal where appeal lodged out of time
☒ A stay on the order made
☐ An order by the Tribunal to be varied or revoked. File No: When did the order take effect?
☐ An order waiving, varying or extinguishing a restriction during the initial period
☐ An order reallocating unit entitlements *(Attach Valuer's Report)*
☐ An order re Caretaker's Agreement
☐ To impose a penalty for contravention of a by-law
☐ To impose a penalty for contravention of an order

Order: See Annexure A attached hereto

13. What are your reasons for requesting the order(s)?

This application will be forwarded to the other party. Therefore you must describe why you are seeking the order so that the other party can be prepared for the hearing, if you do not provide this information your application may be dismissed or adjourned to a later date. Additional information may be attached to this application.

See Annexure B attached hereto

14. Your Name(s) *(Please print)*

Adrian Simon Mueller

Your Signature(s)

If an Owners Corporation or Association, your position

Solicitor for Owners Corporation

Date

7 FEBRUARY 2013

When you attend a hearing you should bring relevant documents e.g. copies of the strata plan, minutes of meetings, resolutions, notices and any correspondence between the parties. A copy of this application and any attachments will be sent to the other party with the Notice of Conciliation & Hearing.

Fee details: A fee must be paid with an application. Refer to the separate fee schedule. You may claim a concession and pay a fee of $5.00 if you receive a Government pension, social security or education benefit, or hold a Seniors Card. If so, enclose a photocopy of your current pension or benefit card or Austudy advice. If this fee is payable and it is not paid, the application may be dismissed.
Please make cheques payable to: Consumer, Trader and Tenancy Tribunal.

Return application with fee to: Registrar, Consumer, Trader and Tenancy Tribunal

For all CTTT Registry Offices ☎ T: 1300 135 399 F: 1300 135 247 www.cttt.nsw.gov.au

Sydney Registry
Level 12, 175 Castlereagh Street
Sydney NSW 2000
GPO Box 4005, Sydney NSW 2001

Hurstville Registry
Level 3, 4-8 Woodville Street
Hurstville NSW 2220
PO Box 148, Hurstville BC NSW 1481

Liverpool Registry
Level 3, 33 Moore Street
Liverpool NSW 2170
PO Box 723, Liverpool BC NSW 1871

Penrith Registry
Ground Floor, 2-6 Station Street
Penrith NSW 2750
PO Box 988, Penrith NSW 2751

Newcastle Registry
Level 1, 175 Scott Street
Newcastle NSW 2300
PO Box 792, Newcastle NSW 2300

Tamworth Registry
Suite 3- 5, Kable Korner Complex
Cnr Kable Ave & Darling St
PO Box 1033, Tamworth NSW 2340

Wollongong Registry
Level 3, 43 Burelli Street
Wollongong NSW 2500
PO Box 319, Wollongong NSW 2520

CTTT Consumer, Trader & Tenancy Tribunal

12. What orders do you want?

The applicant applies for the following orders pursuant to sections 177, 180 and 181 of the *Strata Schemes Management Act 1996*:

(1) An order staying the operation of orders 1, 2 and 3 of Strata Schemes Adjudicator J Smith made on 18 January 2013 in File No. SCS 12/49745 until the appeal is determined.

(2) An order revoking the orders of Strata Schemes Adjudicator J Smith made on 18 January 2013 in File No. SCS 12/49745.

(3) An order dismissing the application in File No. SCS12/49745 in substitution for the orders made by Strata Schemes Adjudicator J Smith on 18 January 2013.

13. What are your reasons for requesting the above orders?

Reasons for Requesting a Stay

(1) The applicant appeals against the orders made by Strata Schemes Adjudicator J Smith on 18 January 2013 in File No. SCS 12/49745.

(2) The adjudicator made three orders against the applicant. The adjudicator ordered the applicant to revoke a by-law (order 1), give the respondent a credit for monies paid pursuant to the revoked by-law (order 2) and repair a large gazebo (order 3).

(3) The applicant will need to comply with orders 1 and 2 immediately and with order 3 by 18 March 2013. This appeal will not be heard and determined by then.

(4) If no stay of the adjudicator's order is granted, the applicant will need to comply with the orders whilst this appeal is still current by revoking the by-law (order 1), reimbursing money to the respondent (order 2) and repairing the gazebo at an estimated cost of $87,000 (order 3).

(5) This would render the appeal nugatory and worthless because the central issue in this appeal is whether or not the applicant should have to comply with these orders.

(6) The courts have frequently recognised that a stay should be placed on a decision at first instance pending the outcome of an appeal against that decision where the appeal would be rendered nugatory and worthless if a stay was not granted.

(7) In *Alexander -v- Cambridge Credit Corp Ltd* [1985] 2 NSWLR 685 the Court of Appeal said that:

> *"Where there is a risk that the appeal will prove abortive if the appellant succeeds and a stay is not granted, courts will normally exercise their discretion in favour of granting a stay ... where it is apparent that unless a stay is granted an appeal will be rendered nugatory this will be a substantial factor in favour of the grant of the stay."* at 694-5 per Kirby P, Hope and McHugh JJA.

(8) The applicant will suffer irremediable prejudice, which will not redressed by a successful appeal, if a stay is not granted, because by the time the appeal is determined, it will have had to comply with the adjudicator's orders, revoke the by-law, give the applicant a credit and spend in the order of $87,000 repairing a gazebo for which it says it is not liable.

(9) There are further reasons why a stay ought to be granted.

(10) There are reasonably arguable grounds of appeal meaning the applicant may well succeed in overturning the orders made by the adjudicator.

(11) Further, the respondent will not suffer any prejudice if a stay is granted as a stay will do nothing more than maintain the status quo that has existed for several years.

Reasons for Appealing

Introduction

(12) This appeal concerns a large, mixed use strata scheme known as Cote d'Azur situated on the corner of McDonald and Gerrale Streets and the Kingsway, Cronulla. Strata Plan No. 50785 relates to that strata scheme.

(13) The applicant is the owners corporation of Cote d'Azur. The respondent is the owner of Lot 21 in Strata Plan No. 50785. The respondent leases Lot 21 to the proprietor of the Opah Restaurant which operates from the lot.

(14) On 27 September 2012 the respondent applied for a variety of orders from a Strata Schemes Adjudicator. On 18 January 2013 Adjudicator J Smith granted the respondent's application in part and otherwise dismissed the application (see File No. SCS 12/49745).

(15) Briefly, the adjudicator made orders revoking Special By-Law No. 42.5 (order 1), requiring the applicant to give the respondent credit for any overpayments made pursuant to the revoked by-law (order 2) and requiring the applicant to repair a gazebo situated adjacent to Lot 21 within 60 days (order 3).

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

(16) Special By-Law No. 42 was made on 23 March 2005. It grants the owners of certain commercial lots special privileges to each keep an exhaust system and grease trap on the common property on certain conditions. One of those conditions required the commercial owners to each pay the applicant a license fee of $1,000 plus GST per quarter.

(17) On 26 March 2008, the applicant amended Special By-Law No. 42 by re-writing clause 42.5 to increase the license fee payable by each of the commercial owners to $2,500 plus GST per quarter and to have the license fee reviewed in accordance with the CPI each year.

(18) Section 52 of the *Strata Schemes Management Act 1996* ("Strata Act") says that the applicant is only able to amend a by-law of this type if it does two things: pass a special resolution at a general meeting *and* obtain the written consent of each of the commercial owners who would be affected by the amendment to the by-law. The applicant did not obtain the consent of the respondent to the amendment of Special By-Law No. 42.5. On this

basis, the respondent argued in the adjudication that the amendment of the by-law was invalid. The adjudicator agreed.

(19) In the adjudication the applicant argued that it was too late for the respondent to allege that the amendment of the by-law was invalid on the grounds that it did not consent to the amendment. The applicant relied on section 52(3) of the Strata Act which states that after two years from the making of a by-law such as Special By-Law No. 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".

(20) Recently, the NSW Supreme Court held in *James -v- The Owners Strata Plan 11478 (No. 4)* [2012] NSWSC 590 that the step of obtaining an owner's consent to a by-law is a preliminary step precedent to the making of the by-law and 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*". The applicant relied on the Supreme Court's decision to argue that as more than two years have passed since the by-law was amended, it is conclusively presumed that the respondent consented to the amendment of the by-law and it is therefore too late for the respondent to allege otherwise.

(21) The adjudicator declined to follow the decision of the Supreme Court in *James'* case. The adjudicator held that he was not bound by the Supreme Court's decision because what the Court said in *James'* case about section 52(3) was *obiter dicta.*

(22) The applicant says this conclusion is wrong and the reasoning of the Supreme Court in *James*'s case concerning section 52(3) was not *obiter dicta* but rather formed part of the essential reasoning of the Court (the *ratio decidendi*) and was therefore binding on the adjudicator. This is because the Supreme Court had to decide that obtaining the written consent of the owners concerned is a prerequisite to the making or amending of a by-law and that that consent must be obtained *before* the by-law is approved at a general meeting (and is therefore a preliminary step to the making of the by-law which falls squarely within the ambit of section 52(3)). Alternatively, the applicant says that even if the conclusions in *James* case are *obiter dicta* they were well considered conclusions made by a judge of a superior court which should be followed by lower courts and Tribunals: see, for example, *Nowicka -v- Superannuation Complaints Tribunal* [2008] FCA 939.

(23) By disagreeing with the Supreme Court, the adjudicator held that the obligation of the applicant to obtain the consent of the respondent to amend the by-law was not a condition precedent to the making of the by-law but "an indispensible part of the by-law making process". The applicant says that this conclusion is wrong and the analysis of the Supreme Court in *James* case demonstrates why. That is to say, the obligation to obtain the respondent's written consent to the making of the by-law is a condition or preliminary step precedent to the making of the by-law which is now conclusively presumed to have taken place by operation of section 52(3).

(24) The adjudicator justified the conclusion he reached by arguing that if after two years an owner who did not consent to an amendment of a by-law could not argue that the by-law was invalid because he or she did not consent to it, that owner would be without remedy and the applicant could simply pass a by-law without the owner's consent and wait "23 months and 29 days" before registering the by-law and the concerned owner would be "powerless to object to it". The applicant says this overlooks the fact that the concerned owner would have a right to prevent the by-law being registered by lodging a caveat on the title of the common property or by obtaining an order restraining the applicant from registering the by-law without its consent (which is precisely the order that was made in *James* case).

(25) Consequently, the applicant says that it is now too late for the respondent to argue that the amendment of the by-law was invalid and should be revoked owing to its failure to consent to the amendment and that the adjudicator's order revoking Special By-Law No. 42.5 is wrong.

(26) In the adjudication the applicant also argued that it would be procedurally unfair to the other six commercial owners who are benefitted by Special By-Law No. 42 for the adjudicator to repeal clause 42.5 of the by-law "in their absence" because the other commercial owners were not a party to the adjudication proceedings. The adjudicator rejected this argument. He concluded that it would not be procedurally unfair to the other commercial owners to repeal the amendment to the by-law because "the rights, privileges and obligations existing prior to the purported amendment would remain in situ". The applicant says that this reasoning is erroneous because revoking Special By-Law No. 42.5 affected the rights of the other commercial owners meaning procedural fairness required those owners to become parties to the adjudication proceedings and be given the opportunity to respond to it before any such order was made (an opportunity which the other commercial owners were denied).: see *Kioa -v- West* (1985) 159 CLR 550.

(27) Finally, the adjudicator purported to revoke Special By-Law No. 42.5 pursuant to section 157 of the Strata Act on the basis that the applicant did not comply with the Act by failing to obtain the consent of the respondent to amend the by-law as a result of which the amendment is invalid. But section 157 only permits an adjudicator to revoke an amendment to a by-law on the grounds that, having regard to the interests of all owners in the use and enjoyment of lots or common property, the amendment should not have been made. The adjudicator did not consider this test and proceeded to revoke the by-law on other grounds. Consequently there was no basis for the adjudicator to revoke the by-law pursuant to section 157.

(28) For these reasons the applicant says that the adjudicator's order revoking Special By-Law 42.5 is wrong and should be set aside.

Order 2 - Reimbursement of Amounts Paid Under Special By-Law No. 42.5

(29) In the adjudication the respondent argued that Special By-Law No. 42.5 should be revoked and that the applicant should refund the additional license fees paid by it pursuant to the

revoked by-law. The adjudicator essentially accepted the respondent's argument and ordered the applicant to, relevantly, give the respondent a credit for the additional amounts paid under the revoked by-law.

(30) The applicant says that the adjudicator's decision is wrong for three reasons.

(31) Firstly, there were no grounds for the adjudicator to revoke Special By-Law No. 42.5 (for the reasons given above) meaning there was no basis for ordering the applicant to give the respondent a credit for amounts paid under the by-law.

(32) Secondly, the applicant says that an order revoking Special By-Law No. 42.5 cannot operate retrospectively and takes effect on and from the date of the order, meaning the by-law would remain in force until it was revoked as a result of which there was no basis for ordering the applicant to give the respondent a credit for amounts paid under the by-law whilst it remained in force.

(33) Finally, the applicant says that the adjudicator had no power to order it to pay or refund to the respondent, whether by way of a credit or otherwise, the additional amounts paid under the revoked by-law because section 138(3)(d) of the Strata Act prohibits an adjudicator from making an order that includes the payment by a person to another person of damages.

Order 3 – Gazebo Repairs

(34) There is a gazebo which is attached to and situated above an elevator tower adjacent to Lot 21. It is common ground that the gazebo is situated on the common property and is in need of repair. In the adjudication, the respondent argued that the applicant is responsible for repairing the gazebo pursuant to section 62 of the Strata Act. The adjudicator agreed and ordered the applicant to repair the gazebo.

(35) The applicant says that the conclusion reached by the adjudicator is wrong. The applicant contends that it is not responsible repairing the gazebo and that the respondent bears that responsibility by operation of Special By-Law No. 2.

(36) Special By-Law No. 2 was made on 2 May 2003. It granted the respondent (as the owner of Lot 21) special privileges to carry out glazing works to extend the shop front of the Opah Restaurant onto the adjacent common property and imposes on the respondent the responsibility to maintain and repair (among other things) an adjacent elevator and elevator tower: see clauses C(iii) and (iv). 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: see clause A(i).

(37) In the adjudication, the applicant argued that the elevator tower includes the gazebo as a result of which the respondent is responsible for maintaining and repairing the gazebo by operation of Special By-Law No. 2. The adjudicator rejected this argument. He held that the gazebo was a separate and substantial structure which has been in existence from the time of registration of the strata scheme and that whilst the gazebo may provide a covering for

the elevator tower, it is not part of the tower and "its purpose and extent goes far beyond that usage".

(38) The applicant says these conclusions are wrong. The applicant contends that the definition of "elevator tower" in the by-law 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. The applicant says that the gazebo is the roof of the elevator tower because it sits directly above it, and is attached to, supported by, and covers the elevator tower. It also acts like a roof shielding the elevator tower from the elements. And it looks like a roof.

(39) Consequently, the applicant says that by operation of clause C(iv), Special By-Law No. 2 imposes on the respondent the responsibility for repairing the gazebo and the adjudicator was wrong to hold otherwise and to order the owners corporation to repair the gazebo.

(40) In the adjudication, the applicant also argued that Special By-Law No. 2 makes the respondent responsible for repairing the gazebo for an additional reason. Clause C(vii) of the by-law requires the respondent to comply with the terms of a license agreement dated 1 September 1997 and clause H of the license agreement provides that "the owner [of lot 21] will be responsible for ... the upkeep of the structure above the lift".

(41) The adjudicator did not accept this argument. He observed that the license agreement expired in about September 2002 before Special By-Law No. 2 was made and at the time the by-law was made, Special By-Law No. 21 (which granted the respondent exclusive use of part of the common property terrace adjacent to the Opah Restaurant) specifically exempted the respondent from the requirement to carry out any structural repairs. For these reasons, the adjudicator concluded that any by-law created after Special By-Law No. 21 that sought to impose on the respondent an obligation that did not already exist needed to deal expressly with the issue of structural repairs rather than indirectly by reference to an expired agreement. The adjudicator was therefore not satisfied that Special By-Law No. 2 does anything to alter the obligations imposed on the respondent under Special By-Law No. 21.

(42) The applicant says these conclusions are wrong. Firstly, the license agreement clearly imposed on the owner of Lot 21 the responsibility for maintaining and repairing the gazebo and there is no reason why those obligations, incorporated as they are into Special By-Law No. 2, should be read down. Secondly, Special By-Law No. 21 does not affect in any way the obligations imposed on the respondent under special By-Law No. 2. This is because Special By-Law No. 21 does not relate to the common property which Special By-Law No. 2 deals with. Special By-Law No. 21 grants the respondent exclusive use of a 100 m^2 portion of the common property terrace adjacent to the northern boundary of the Opah Restaurant. But none of this common property is covered by the gazebo. Thirdly, the gazebo is not a structural element, and the repairs that are required to it are not of a structural nature. It follows that Special By-Law No. 21 (and the clause in the by-law which exempts the respondent from structural repairs) do not apply to the gazebo.

(43) Consequently, the applicant says that by operation of Special By-Law No. 2, clauses C(iv) and (vii), the respondent is responsible for repairing the gazebo and the adjudicator was wrong to order the applicant to carry out those repairs.

(44) Even if there were grounds for the adjudicator to order the applicant to repair the gazebo, the adjudicator did not specify (at all) the work the applicant is required to carry out to the gazebo. This was an error. A party that is ordered to do something must be told precisely what it is required to do otherwise there will be uncertainty over what it is the party needs to do to comply with the order. The order must be couched in unambiguous terms directing what is to be done or what is not to be done: see *Nexus Mortgage Securities Pty Ltd v ECTO Pty Ltd* [1998] 4 VLR 220 at 221-222. On this additional basis the order for the applicant to repair the gazebo should be set aside.

Conclusion

(45) The gazebo forms part of the "elevator tower" within the meaning of Special By-Law No. 2 meaning the respondent (not the applicant) carries the obligation to repair the gazebo pursuant to clause C(iv) of the by-law.

(46) Further, Special By-Law No. 2 imposes on the respondent an obligation to comply with the terms of the license agreement dated 1 September 1997 and clause H of that agreement requires the respondent to be responsible for the upkeep of the gazebo.

(47) Special By-Law No. 21 (and the exemption it contains concerning structural repairs) do not apply to the gazebo.

(48) Consequently the adjudicator erred by ordering the applicant to repair the gazebo.

(49) It is too late for the respondent to argue that the amendment of Special By-Law No. 42.5 was invalid on the basis that it did not consent to the amendment because more than two years has been passed since the amendment was made and it is now conclusively presumed that the respondent consented to the amendment by operation of section 52(3) of the Strata Act.

(50) Consequently there was no basis for the adjudicator to revoke Special By-Law No. 42.5 or to order the applicant to give the respondent credit for amounts paid under the revoked by-law. Further the adjudicator should not have made any orders affecting Special By-Law No. 42.5 without the other commercial owners who benefit from the by-law being made parties to the adjudication.

(51) The appeal should be upheld. The orders made by the adjudicator should be revoked. And an order should be made dismissing the adjudication application.

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 590.

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 is 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 to 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 No. 2, clause C(iv).

20. The adjudicator should have held that the respondent is obliged to maintain and repair the gazebo pursuant to Special By-Law No. 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 No. 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 No. 2, clause C(vii).

23. The adjudicator erred by concluding that Special By-Law No. 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 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 No. 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.

ENGLISH

The Orders of the Tribunal are legally binding.

Therefore:

- You are required to be present at the Tribunal at the time specified in the Notice of Hearing.
- If you are not present the matter will be dealt with in your absence.
- If you are able to demonstrate to the Tribunal that due to exceptional circumstances you are unable to attend personally and wish someone else to act for you, that person must have your authority to act in Tribunal proceedings. The authority must be in writing, signed and specify the name of the person to whom you have granted authority.
- The Tribunal may hear the matter without you being represented if an authority is not provided by a person seeking to act for an absent Tenant or Landlord.

ARABIC

الامور الصادرة عن المحكمة ملزم بها قانونيا.

لذالك:

* عليك ان تكون حاضرا امام المحكمة في الوقت المعين في اشعار الجلسة.
* اذا لم تكن حاضرا سوف يتعامل مع الامر في غيابك.
* اذا كان بامكانك ان تبرهن للمحكمة انك لاسباب استثنائية غير قادر للحضور شخصيا وترغب بتعين شخصا ما ليتوب عنك، يلزم لذالك الشخص شهادة منك للعمل في اجراءات الجلسة. يجب ان تكون الشهادة خطيا،ممضية وتوضح اسم الشخص الذي منحته شهادتك.

CHINESE

法庭的決議是有法律約束力的。因此：

- 你被要求在審訊通知中指明的時間到法庭出庭。
- 如果你没有出庭就會作爲缺席處理。
- 如果你能向法庭證明你由于特殊的原因而不能出庭並且希望别人代你出庭，那麼此人必須在法庭訴訟中獲得你的授權。這一書面形式的授權必須有簽名和你授權人的名字。
- 如果某人没有獲得缺席的承租人或房東的授權， 法庭可以在你不出庭的情況下對事件進行聽證。

VIETNAMESE

Theo pháp luật, mọi người đều phải tuân thủ lệnh của Toà Hoà Giải. Do đó:

- Anh/chị buộc phải có mặt tại Toà Hoà Giải vào ngày giờ có ghi trên Giấy Báo Hầu Toà.
- Nếu Anh/chị vắng mặt mọi việc sẽ được xử khiếm diện.
- Nếu Anh/chị chứng minh được với Toà rằng vì một lý do ngoại lệ nào đo mà Anh/chị không thể có mặt tại Toà được và Anh/chị muốn có người đại diện cho mình thì người ấy phải được Anh/chị uỷ thác cho công việc hầu toà. Anh/chị phải viết giấy uỷ quyền, ký tên trên giấy ấy và chỉ định tên của người được Anh/chị uỷ thác làm công việc ấy thay cho Anh/chị.
- Toà Hoà GiảI sẽ vẫn xử khiếm diện vụ kiện này nếu không có ai xuất trình giấy uỷ quyền người đạI diên cho Người thuê hoặc Chủ nhà.

GREEK

Οι εντολές του ειδικού δικαστηρίου είναι δεσμευτικές κατά το νόμο. Ως εκ τούτου:

- Χρειάζεται να παρευρίσκεστε στο δικαστήριο κατά την ώρα που έχει καθοριστεί στην ανακοίνωση της δικάσιμης.
- Εαν δεν είστε παρών, η υπόθεση θα εξεταστεί κατά την απουσία σας.
- Εάν μπορείτε να αποδείξετε στο δικαστήριο ότι, λόγω εξαιρετικών περιστάσεων, αδυνατείτε να παρευρεθείτε προσωπικά και επιθυμείτε να σας εκπροσωπήσει κάποιος άλλος, αυτό το πρόσωπο πρέπει να έχει τη δική σας εξουσιοδότηση για να σας αντιπροσωπεύσει κατά τη διαδικασία. Η εξουσιοδότηση πρέπει να είναι γραπτή, υπογεγραμμένη και να αναφέρει το όνομα του προσώπου το οποίο έχετε εξουσιοδοτήσει.
- Το δικαστήριο μπορεί να εξετάσει την υπόθεση, χωρίς να αντιπροσωπεύεστε, εάν δεν υποβληθεί εξουσιοδότηση από πρόσωπο που επιθυμεί να εκπροσωπήσει απόντα ενοικιαστή ή ιδιοκτήτη.

KOREAN

법적인 명령은 합법적인 의무지시입니다. 그러므로:

- 경고장을 받으신후에는 적혀진 시간에 나오셔야 합니다.
- 만약 불참하실 경우에는 당신의 참여없이 재판할수있읍니다.
- 만약 부득이한 사정이유로 참석하실수 없거나 다른사람을 합리적인 이유없이 대신 고용하실 경우에는, 그 사람은 법정에 설수있는 당신의 허가를 받아야합니다. 그 허가서내용에는 당신의 싸인과 고용한 사람의 이름이 적혀져 있어야합니다.
- 만약 고용인이 당신의 허가서를 지참하지않고 출두하실 경우에는 당신이 참여하지 않은것으로 인정하고 당신없이 재판을 할수 있읍니다

ITALIAN

Le ordinanze del Tribunale sono legalmente coattive (obbligatorie). Quindi:

- A Lei e' richiesto di presenziare in Tribunale in data e tempo specificato nel "Notice of Hearing".
- Se Lei non sara' presente il caso verra' trattato in sua assenza.
- Se Lei e' in grado di dimostrare al Tribunale che per cause di forza maggiore non puo' attendere di persona e vuole qualcun altro che la rappresenti, questa persona deve essere da Lei autorizzata ad agire nel procedimento in Tribunale. L'autorizzazione deve essere scritta, firmata e deve specificare il nome della persona a cui Lei a dato l'autorizzazione.
- Il Tribunale puo' trattare il caso senza che Lei venga rappresentato se l'autorizzazione non viene presentata dalla persona che cerca di agire per un assente Inquilino o Locatore.

JAPANESE

裁判所命令には、法的拘束力があります。
よって、

- 命令を受けた者は、審問通告に明記された時間に裁判所に出頭しなければなりません。
- 裁判所命令を受けた者が出頭しない場合は、本人不在のまま審議が行われることになります。
- 特別の理由により本人が出頭できない旨を裁判所に対し証明でき、代理人を立てることを希望する場合は、代理人は本人から訴訟手続き代行の委任許可を受けなければなりません。許可を受けた代理人の氏名を明記した署名つきの書面を以って、委任許可状とします。
- 賃借者または賃貸者の代理人が所定の委任許可状を提出しなかった場合は、裁判所は代理人不在のまま審問を行うことになります。