SUBMISSIONS FOR THE APPLICANT CONCERNING PROCEDURAL FAIRNESS

The Owners – Strata Plan No. 50785 -v- Universal Finance Holdings Pty Ltd
Consumer, Trader and Tenancy Tribunal File No. SCS 13/07378

1. The requirements of procedural fairness apply to strata adjudications: see *Buzrio Pty Ltd -v- Consumer, Trader and Tenancy Tribunal* [2009] NSWSC 836 at [34].

2. Procedural fairness requires a person whose rights will be adversely affected, by the determination of the Tribunal, to be informed of the application and given the opportunity to contest it, unless the statute conferring power on the Tribunal provides otherwise by express words: *Annetts -v- McCann* (1990) 170 CLR 596 at [598].

3. A denial of procedural fairness in a strata adjudication is grounds for setting aside the adjudicator's decision: *Owners Corporation Strata Plan 7596 -v- Risidore & Ors* [2003] NSWSC 966 at [25]; *Buzrio*.

4. In the adjudication, the respondent (Universal Finance Holdings Pty Ltd) sought an order that Special By-Laws 42 and 42.5 be repealed: see page 19 of annexure to adjudication application dated 24 September 2012.

5. Special By-Laws 42 and 42.5 grant the owners of Lots 1, 2, 3, 4, 5, 12 and 21 in Strata Plan No. 50785 (all of which are commercial lots) the right to use parts of the common property for the provision of an exhaust system and grease trap for those lots on certain conditions: Special By-Law 42 is reproduced in exhibit "A" behind coloured tab 2, tabs 9 and 10.

6. Therefore, by applying for an order to repeal Special By-Laws 42 and 42.5 the respondent moved for orders that would adversely affect the rights of the owners of Lots 1, 2, 3, 4, 5 and 12.

7. It was therefore incumbent on the respondent to name the owners of these six commercial lots as respondents to its application to ensure that those commercial owners would be *properly* informed of the application and be given the opportunity to contest it to ensure that their rights would not be adversely affected by the repeal of Special By-Law 42 or 42.5.

8. However the respondent failed to name any of these commercial owners as respondents to the application and, by doing so, none of these owners became parties to the adjudication that was determined by Adjudicator Smith and, by extension, the appeal that is presently before the Tribunal.

9. The Adjudicator denied these commercial owners procedural fairness when he made order 1 on 18 January 2013 revoking Special By-Law 42.5. By making that order, the Adjudicator affected the rights of these six commercial owners without them being *properly* informed of the application or given a *proper* opportunity to contest it.

10. The fact that the commercial owners may have been sent a copy of the adjudication application (and there is no evidence that they were) does not mean that they were afforded procedural fairness.

11. The adjudication application was extensive covering approximately 100 pages. If any of the commercial owners did receive the application it would not have been immediately apparent or obvious that their interests would be potentially adversely affected by the application.

12. The front page of the application (at section 6) is very clear. It states that the application is against "The Owners Corporation SP50785". A reasonable person in the position of the commercial owners having read that the application was not against any of them would have naturally assumed that their interests would not be adversely affected by the application and the application did not concern them in any way. The commercial owners (if they did receive the application) would have only realised that their interests were going to be affected if they read through the annexure to the application and found, buried among the 20 pages of closely typed submissions, a reference to the respondent's application to repeal Special By-Laws 42 and 42.5.

13. A party whose interests will be adversely affected by an application is entitled to know whether this is so from reading the application form itself. A party should not have to trawl through a detailed annexure appended to the application to try and work out whether its interests will be affected. The respondent's failure to name the other commercial owners as respondents to the adjudication application meant that the commercial owners either did not receive notice of the application or, if they did, they would not, acting reasonably, have realised that the application affected them and had the very real potential to adversely affect their interests.

14. It does not matter that it is the applicant which is raising the procedural fairness point rather than the commercial owners. If the Tribunal concludes that the commercial owners were denied procedural fairness when the Adjudicator made an order revoking Special By-Law 42.5 then that order should not be allowed to stand.

15. For these reasons, the applicant (owners corporation) says that order 1 made by Adjudicator Smith should be revoked (and it follows that order 2 should also be revoked because this order relies on order 1 to be effective) and, in substitution of orders 1 and 2 made by the Adjudicator, the Tribunal should make an order dismissing the respondent's application to the Adjudicator for those orders.

Special By-Law 2 is Not Void

1. The respondent says that Special By-Law 2 is void for uncertainty. The respondent did not raise this argument in the adjudication below, and it should not be permitted to do so in this appeal.

2. In any event, Special By-Law 2 is not uncertain or void. The applicant's written submissions at [13]-[17], and oral submissions advanced at the hearing, demonstrate why this is so. Put simply, the by-law is capable of being given a clear and certain meaning.

3. Even the respondent's written submissions at [5.8] acknowledge that "a finding of voidness due to uncertainty is a draconian solution and the Tribunal should be astute to adopt a constriction [of the by-law] which will preserve validity" citing Mason J in *Meehan -v- Jones* [1982] HCA 52 at [20].

4. *Meehan's* case applied to a commercial contract. A by-law is a form of delegated legislation: *The Owners of Strata Plan No 3397 -v- Tate* [2007] NSWCA 207 at [38]-[42]. The Courts are even more reluctant to reach a conclusion that delegated legislation is void for uncertainty. Indeed there is real doubt that delegated legislation is capable of being struck down as void on the grounds of uncertainty.

5. In *King Gee Clothing Co Pty Ltd -v- Commonwealth* (1945) 71 CLR 184, Dixon J (as his Honour then was) relevantly said at p194-197 that:

> *I am not prepared to subscribe to the doctrine that certainty is a separate requirement which all forms of subordinate legislation must fulfill, so that an instrument made under a statutory power of a legislative nature, though it is directed to the objects of the power, deals only with the subject of the power and observes its limitations, will yet be invalid unless it is certain … I cannot see how this history warrants the courts in adopting, as a general rule of law, the proposition that subordinate or delegated legislation is invalid if uncertain … I am unaware of any principle of law or of interpretation which places upon a power of subordinate legislation conferred upon the Governor-General by the Parliament a limitation or condition making either reasonableness or certainty indispensable to its valid exercise.*

6. Finally, the Tribunal must act according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms: see section 186(2)(b) of the *Strata Schemes Management Act 1996* ("Strata Act").

7. Declaring Special By-Law 2 void from the beginning (which it what the respondent wants) would result in considerable unfairness and would be a draconian result. The parties would be left with an exhaust system and a considerable shop front situated on common property without any by-law in place to regulate the parties' rights and obligations in relation to those structures. This is to be avoided.

"Term" of the By-Law

8. The respondent says that, properly construed, Special By-Law 2 subsists for a "term" of five years from the date it was made. This submission does not withstand scrutiny.

9. Special By-Law 2 subsists until it is repealed. It does not subsist for a term of five years. The text of the by-law, and circumstances surrounding the making of the by-law, plainly indicate that the parties intended to create something permanent.

10. Special By-Law 2 granted the owner of Lot 21 a right to keep an exhaust system and shop front (or glazing works) on common property. The exhaust system and shop front are significant, permanent structures. It would not be sensible to interpret the by-law in a way that would only permit these structures to remain on common property for a period of five years.

11. Special By-Law 2 was made shortly after the expiry of the 5 year licence agreement concerning the exhaust system between the owners corporation and the previous owner of Lot 21. If the parties had intended to permit the exhaust system to remain on the common property for a further 5 years they would have signed another licence agreement. Instead, the parties made a by-law which would remain on the title of the common property until it was repealed. This is a clear indication that the parties intended to put in place a permanent arrangement.

12. The respondent's written submissions emphasise that Special By-Law 2 must be interpreted in its statutory context. That statutory context includes, most relevantly, section 55(1) of the Strata Act which says that while the by-law remains in force, it 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. Section 55(1) gives statutory recognition to the fact that the by-law was intended to (and does) put in place a permanent arrangement that would subsist in perpetuity or at least until brought to an end by the consensus of the parties.

Gazebo is the Roof of the Elevator Tower

13. The respondent presses is submission that the gazebo is not the roof of the elevator tower within the meaning of Special By-Law 2. That contention is dealt with at [9]-[12] of the applicant's written submissions. However at the hearing evidence was given by the respondent's structural engineer, Mr Demlakian, which the respondent embraces to support its contention concerning the gazebo. That evidence will now be considered.

14. Mr Demlakian said that the gazebo is structurally independent from the elevator tower as a result of which it cannot be the roof of the tower. This opinion is plain wrong. A structure above a building does not have to be structurally dependent on the building in order to be the roof of the building. There are many roofs which are not structurally dependent on the buildings they cover. And the dictionary definition of "roof" does not require a roof to be structurally intertwined with the building it covers: see [11] of the applicant's written submissions for the dictionary definition of "roof".

15. Next Mr Demlakian said that the gazebo is not completely waterproof and allows some water to enter the elevator tower meaning it is not a roof. This opinion cannot be correct. The gazebo plainly operates as a weatherproof cover over the elevator tower and surrounding staircase. The fact that it might allow some water to enter the elevator tower does not mean it is not the roof of the tower. There are many roofs in Sydney which allow water to leak into the homes they cover. These structures are still considered as roofs.

16. In any event, Mr Demlakian made the concession in cross-examination that if the gazebo was removed, it was more likely that water would enter the elevator tower. This confirms that the gazebo acts as a weatherproof cover over the elevator tower and surrounding staircase and, in ordinary parlance, would be considered the roof of those structures.

17. There are other reasons why the gazebo is the roof of the elevator tower within the meaning of Special By–Law 2.

18. The evidence makes plain that the gazebo is the *only* cover above the elevator tower: see the final report of structural engineer Mark Malloy.

19. Further, the gazebo is the only cover above the staircase which surrounds the elevator tower. The surrounding staircase is part of the "elevator tower" as that expression is defined in the by-law. It follows that the gazebo must be the roof of the "elevator tower".

20. Finally, the respondent has not identified any alternate roof of the elevator tower. If the roof is not the gazebo, what is it?

Maintenance Obligations Unjust

21. The respondent submits that the maintenance obligations imposed on it under Special By-Law 2 are unjust for various reasons. This issue is dealt with in the applicant's written submission at [38]-[42].

22. However in its supplementary submissions, the respondent says that one of the reasons the maintenance obligations are unjust is because they are uncertain or unclear. There is no uncertainty concerning the respondent's maintenance obligations under Special By-Law 2.

23. The by-law, relevantly, makes the respondent responsible for maintaining and repairing the elevator and elevator tower including the surrounding staircase, walls and roof, until a bridge is constructed over Gerrale Street.

24. In any event, the maintenance obligations in the by-law cannot be unjust, so far as the respondent is concerned, because, most relevantly, those obligations were suggested by the previous owner (and the previous owner would not suggest that an "unjust" obligation be imposed on it) and the respondent bought Lot 21 at a time when those

obligations were already in place. As the NSW Court of Appeal observed in *Casuarina Rec Club Pty Ltd -v- Owners — Strata Plan 77971* [2011] NSWCA 159 at [51] "*people who buy a lot in the strata scheme buy with notice of the by-law, so that it can hardly ever be said that the by-law creates an injustice*."

Positive Covenant

25. The respondent places emphasis on the positive covenant which requires the owners corporation to make the elevator and walkway available for use by the public to explain why it should not have to maintain the elevator and elevator tower.

26. But the positive covenant cannot alter the legal obligations imposed on the respondent under the Special By-Law 2.

27. And, equally importantly, the positive covenant was put in place solely to ensure that members of the public would be able to use the elevator to gain access to the walkway or bridge over Gerrale Street. That bridge has never been built.

28. The reality is that the respondent, through its tenant and restaurant patrons and staff, is the only user of the elevator. In those circumstances, it is sensible for the respondent to maintain the elevator and its surrounding structures until that position changes (which is precisely what the by-law contemplates).

Maintenance Obligations Unjust

29. Finally, if the maintenance obligations are excised from Special By-Law 2, the respondent will receive a commercial windfall. This is because the respondent and its predecessor will have been granted a right to extend the shop front of the restaurant on Lot 21 considerably out onto the adjacent common property terrace (and keep the shop front there) for free, and the quid pro quo for acquiring those rights, namely the obligation to maintain the elevator, elevator tower, surrounding staircase, walls and roof, would be extinguished. That is a result which ought to be avoided.

Fraud on the Minority – Special By-Law 42.5

30. At the hearing the respondent pressed its submission that the Tribunal could set aside the amendments made to Special By-Law 42.5 (which were made without its consent) because those amendments amounted to a fraud on the minority. That submission does not withstand scrutiny.

31. At the time the amendments to Special By-Law 42.5 were made, the owners corporation did not have power to make those amendments because it did not obtain the written consent of the commercial owners to the amendments (even though it is now conclusively presumed that such consent was obtained by virtue of section 52(3) of the Strata Act).

32. It follows that because the owners corporation did not have power to amend the by-law, the doctrine of fraud on the minority has no work to do. This was explained by Slattery J in *Thoo -v- The Owners Strata Plan No 50276* [2011] NSWSC 657 at [179] in the following terms:

> ***Applicable Legal Principles — Fraud on a Power***
>
> *Second, the formal validity of an exercise of a power is a pre-condition for the grant of equitable relief against its fraudulent exercise; if the attempted exercise of a power was void, adequate relief was available at law, and there was no occasion for equity to intervene: Houghton v Immer (No 155) Pty Ltd (1997) 44 NSWLR 46 at 52 and Sugden on Powers, 5 th Edition 1831, at 415.*

33. The respondent was able to apply to an Adjudicator or the Supreme Court to invalidate the amendment to Special By-Law 42.5 on the grounds that it did not consent to the amendment, at any time within two years from the date the amendment was made. The respondent chose not to do so.

34. In any event, the respondent has not pointed to any fraud, in the relevant sense. The owners corporation's failure to obtain the commercial owners' written consent to amend the by-law (alone) does not amount to fraud. This is because it does not demonstrate that the owners corporation amended the by-law for an improper purpose (for example, to hold the commercial owners to ransom by charging them an exorbitant licence fee to keep their exhaust systems and grease traps on common property).

35. The respondent has not demonstrated that the increase in the quarterly licence fee from $1,000 to $2,500 effected by the amendment to Special By-Law 42.5 was exorbitant. That increase might have disadvantaged the commercial owners financial interests, but disadvantage alone is not enough for a finding of fraud to be made.

36. The bona fides of the owners corporation in amending the by-law are reinforced by the fact that none of the commercial owners voted against the motion that was passed in general meeting to amend Special By-Law 42.5 and the decision to amend the by-law to increase the quarterly licence fee from $1,000 to $2,500 was considered "fair and reasonable by owners as property and business values had greatly increased in the more than ten years since the building was established": see statement of Carey Beebe at [32]. These matters point to an absence of fraud.

37. Even if a fraud on the minority was established (which it has not been), the Tribunal is not a Court of Equity, and it has no power to grant the relief sought by the respondent.

Dated:

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Adrian Simon Mueller
Solicitor for the Applicant

THE FOLLOWING SUBMISSIONS WILL BE SERVED ON 20 SEPTEMBER 2013

SUBMISSIONS FOR THE APPLICANT CONCERNING ORDERS SOUGHT BY THE RESPONDENT IN THE APPEAL

Introduction

1. On 18 January 2013, Adjudicator J Smith, relevantly, made an order otherwise dismissing the respondent's application (order 4).

2. The strata legislation contains specific provisions dealing with appeals against orders made by Adjudicators. These provisions prescribe an exhaustive code for the manner in which appeals against orders made by Adjudicators are able to be made.

3. The respondent has not followed that code. This means there is presently no appeal by the respondent before the Tribunal. It follows that the Tribunal is not able to make any of the orders sought by the respondent.

Legislative Scheme for Appeals

4. Relevantly, section 177(1) of the *Strata Schemes Management Act 1996* ("Strata Act") provides that an appeal lies to the Tribunal against an order made by an Adjudicator and section 177(2) says that the appellant may be, relevantly, the applicant for the order appealed against (which, here, would be the respondent who was the party who sought orders from the Adjudicator).

5. Section 178(1) requires the appellant to lodge with the Registrar a written notice of appeal that specifies, among other things, the order appealed against and the grounds of the appeal. Section 178(3) provides that the notice of appeal against an order made by an Adjudicator dismissing an application must be lodged not later than 21 days after the order takes effect.

6. Section 181(3) gives the Tribunal power to determine an appeal by affirming, amending or revoking the order appealed against or substituting its own order for the order appealed against.

7. These provisions demonstrate that if a party to an adjudication is dissatisfied with the orders made by an Adjudicator the remedy for that party is to appeal against that order and this requires a written notice of appeal that must specify the order appealed against and the grounds of the appeal and that must be done no later than 21 days after the Adjudicator's order takes effect.

8. There is no other procedure available to a party who is dissatisfied with an order made by an Adjudicator and who wants that order to be overturned (such as "piggy backing" on the applicant's appeal).

The Respondent's Attempt to Appeal

9. In the adjudication, the respondent (Universal Financial Holdings Pty Ltd) sought nine orders from the adjudicator: see pages 19-20 of the annexure to the adjudication application dated 24 September 2012. On 18 January 2013, Adjudicator J Smith made three out of those nine orders. The fourth order the Adjudicator made was an order otherwise dismissing the respondent's application.

10. If the respondent was dissatisfied with the order made by the Adjudicator to otherwise dismiss its application, its remedy was to appeal against that order under section 177 of the Strata Act by lodging a notice of appeal specifying the order appealed against and the grounds of the appeal within 21 days after that order took effect. The respondent did not follow this procedure. It is therefore not possible for the Tribunal, in this appeal, to make any of the orders which the respondent unsuccessfully sought in the adjudication.

11. Instead of lodging a written notice of appeal that clearly specified the order appealed against, the grounds of the appeal and the order sought, the respondent, seven days before the hearing, served 13 pages of written submissions in which, for the first time, the respondent indicated that it essentially sought to appeal against the order made by the Adjudicator to dismiss part of its application and to move the Tribunal to make some of the orders it sought in the adjudication which the Adjudicator refused to make.

12. This is simply not permissible. A party cannot, in written submissions, delivered one week before the hearing, indicate for the first time that it is seeking to appeal against the Adjudicator's decision to dismiss parts of its application and to then have the Tribunal make, in the *applicant's* appeal, some of the orders the respondent sought in the adjudication.

Additional Reasons Why Tribunal Cannot Make Orders Sought by Respondent

13. Section 186(1) of the Strata Act requires the Tribunal, before making an order, to investigate, in the case of an appeal, the grounds for the appeal. Here, the Tribunal is not able to perform this function, in respect of the respondent, because the respondent has not lodged an appeal against the Adjudicator's decision, nor has the respondent specified any grounds for the appeal.

14. The respondent says that the applicant's appeal is a hearing *de novo* in which *all* issues that were before the adjudicator are able to be revisited. But that submission completely misses the point that this is the *applicant's* appeal. There is simply no appeal by the respondent that is before the Tribunal. This means that the only issues that are able to be

agitated in the appeal are those concerning the Adjudicator's orders which the applicant appeals against and then only to the extent necessary to allow the *applicant's* appeal to be determined.

15. There is simply no application or appeal by the respondent that is presently before the Tribunal and which would allow the Tribunal to make the orders sought by the respondent.

16. These remarks find support in the decision of Senior Member Phillipps in *Grusso -v- Owners Corporation SP36428* [2006] NSWCTTT 299. In *Grusso*, the learned Senior Member, after considering the decisions of the NSW Supreme Court in *Zouk* and *Risidore,* concluded that an appeal against an order made by an Adjudicator was not a fresh hearing and, more relevantly, the Strata Act makes it clear that there must be grounds for an appeal and that the respondent "must be able to discern from the appeal documents why it is the appeal is made".

17. The respondent has not lodged any "appeal documents". This is because the respondent simply has not lodged an appeal against the Adjudicator's decision. The respondent needed to do so if it wanted the Tribunal to make any of the orders which it sought in the adjudication but which the Adjudicator did not make.

18. It is a basic principle of litigation that if a party wants a Tribunal to make an order it must lodge an application with the Tribunal for that order. The respondent lodged an application to the adjudicator for certain orders. That application has been determined. The only application presently before the Tribunal is the appeal made by the applicant against the orders of the Adjudicator.

19. A further reason why the respondent cannot, in the applicant's appeal, move the Tribunal to make orders by way of written submissions is that none of the stakeholders in the applicant's strata scheme will receive notice of the respondent's attempt to have those orders made in the applicant's appeal. This would deny all of the lot owners the right to be heard on the orders sought by the respondent in the applicant's appeal. This explains why any party moving the Tribunal for orders needs to do so pursuant to a formal application (or in this case, an appeal) to ensure that interested parties are given notice of the application or appeal.

20. In any event, one of the orders sought by the respondent in the applicant's appeal was not sought in the adjudication below and therefore could not be sought in the appeal (even if the respondent had lodged its own appeal). This is the "application" for a declaration that the whole of Special By-Law 2 is void and an order for that by-law to be revoked. In the adjudication the respondent only sought an order for Special By-Law 2 to be redrafted to excise the conditions concerning maintenance.

Conclusion

21. To conclude, there is presently no appeal by the respondent against the order by the Adjudicator to otherwise dismiss its adjudication application. The respondent has not

lodged a written notice of appeal and neither has it specified the grounds of any appeal. It is simply not possible for the respondent to "piggy back" on the applicant's appeal (whether in the manner it has done through lodging submissions seeking orders one week before the hearing or otherwise) to move the Tribunal to make the orders it sought in the adjudication which the Adjudicator refused to make. The Tribunal does not have power to (and should not) make *in the applicant's appeal* any of the orders sought by the respondent.

Dated:

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Adrian Simon Mueller
Solicitor for the Applicant