Our ref: 13030007
Your ref: SCS 13 / 07378

6 September 2013

The Registrar
Consumer, Trader and Tenancy Tribunal
(Hurstville)
PO Box 148
HURSTVILLE BC NSW 1481

Facsimile: (02) 8567 0099
Pages: 24

Attention: The Registrar

Dear Registrar

Consumer, Trader and Tenancy Tribunal Appeal SCS 13 / 07378 Universal Finance Holding Pty Ltd ats The Owners – Strata Plan No 50785

We confirm we act for Universal Finance Holding Pty Ltd.

Further to order 4 of the Tribunal made 22 August 2013 please find **enclosed** submissions of the Respondent.

If you have any queries please contact us.

Yours sincerely
Chambers Russell Lawyers

Daniel Russell
Partner
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cc Adrian Mueller
JS Mueller & Co
BY EMAIL

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Chambers Russell LAWYERS

CONSUMER, TRADER AND TENANCY TRIBUNAL

FURTHER WRITTEN SUBMISSIONS

Applicant:	The Owners – Strata Plan No 50785
Respondent:	Universal Finance Holding Pty Ltd

1 Background

1.1 These submissions are filed pursuant to Order 4 made on 22 August 2013, which provides:

> The respondent is to file and serve written submissions regarding the power of the Tribunal to hear any matters of appeal of his own regarding Order 4 of otherwise in the appellant's appeal without the need of filing his own appeal and grounds of appeal on or before 6 September 2013.

2 Appeal De Novo

Appeal is Appeal De Novo

2.1 An appeal such as the present one is an appeal "de novo", limited in its bounds by the question that was before the Adjudicator (*Owners Corporation Strata Plan 7596 v Risidore and Ors [*2003] NSWSC 966 (28 October 2003), *Franks v Consumer, Trader and Tenancy Tribunal* [2013] NSWSC 341 at [37]).

2.2 An appeal "de novo" is a fresh hearing of the matter in which all issues must be retried, the party who succeeded below enjoys no advantage, and jurisdiction arises regardless of whether there was error in the original decision.

2.3 As cited by the Court of Criminal Appeal in *Gianoutsos v Glykis* [2006] NSWCCA 137 (1 May 2006) at [37]:

> In *Allesch v Maunz* [2000] HCA 40; (2000) 203 CLR 172 the High Court considered the appeal provisions under the Family Court Act. In the course of the joint judgment of Gaudron, McHugh, Gummow and Hayne JJ their Honour's said at 180:
>
> "For present purposes, the critical difference between an appeal by way of rehearing and a hearing de novo is that, in the former case, the powers of the appellate court are exercisable only where the appellant can demonstrate that, having regard to all the evidence now before the appellate court, the order that is the subject of the appeal is the result of some legal, factual or discretionary error (see CDJ v VAJ (1998) 197 CLR 172 at 201-202), whereas, in the latter case, those powers may be exercised regardless of error.

2.4 In an earlier passage in *Gianoutsos v Glykis* (op cit) the Court of Criminal Appeal cited as follows (emphasis added):

> The following passage from Glass JA's decision in Turnbull v New South Wales Medical Board [1976] 2 NSWLR 281 at 297-298 is illuminating:
>
> "Appeal is a term loosely employed to denote a number of different litigious processes which have few unifying characteristics. They vary greatly in the extent to which the appellate court may interfere with the result below. Graded in ascending order, in accordance with the width of the corrective power exercised by the appeal court, they are as follows:
>
> ...
>
> (f) Appeals involving a hearing de novo, e.g. appeals from a Court of Petty Sessions to a Court of Quarter Sessions. **All the issues must be retried. The party succeeding below enjoys no advantage, and must, if he can, win**

the case a second time: Sweeney v. Fitzhardinge [(1906) [1906] HCA 73; 4 C.L.R. 716]."

1.1 In *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* [1976] HCA 62; (1976) 135 CLR 616 (26 November 1976) Mason J (as he then was) held (at 620, paragraph [6]) (**emphasis** added):

> [6.] It was observed by Viscount Sankey L.C. in *Powell v. Streatham Manor Nursing Home* (1935) AC 243, at p 249 , that "There are different meanings to be attached to the word 'rehearing'". The appeal to Quarter Sessions in New South Wales is frequently described as a rehearing although the Justices Act, 1902, as amended, contains no specific provision to that effect. In truth the appeal to Quarter Sessions is most aptly described as a hearing de novo because, **even if it be the defendant who appeals, the informant or complainant starts again and has to make out his case and call his witnesses.** The appeal to Quarter Sessions is the outcome of historical development and its only utility for present purposes is that it provides an illustration of what is in truth a hearing de novo, although, as I have said, it is frequently described as a rehearing. (at p620)

1.2 In *Re Hans Traut v Faustmann Bros Pty Ltd* [1983] FCA 137; (1983) 77 FLR 98 (8 July 1983) the Federal Court, constituted by Toohey, Lockhart and Jenkinson JJ held, relying on the judgment of Mason J (as he then was) in *Builders Licensing Board v Sperway Constructions* (supra):

> An appeal 'de novo' is really a fresh or original hearing. Sometimes the complainant or informant begins and the appeal is an appeal in name only. The usual onus that lies on an appellant does not lie on him. An appeal to Quarter Sessions in New South Wales, although generally described as an appeal, was really a hearing de novo; the complainant began and proved his case notwithstanding that he may have been the respondent to the appeal. As Mason J. said in Builders Licensing Board v. Sperway Constructions (Syd.) Pty. Limited (supra) at p.620:-
>
> > 'The appeal to Quarter Sessions is the outcome of historical development and its only utility for present purposes is that it provides an illustration of what is in truth a hearing de novo, although, as I have said, it is frequently described as a rehearing.'

1.3 In *Thompkins v South Australian Health Commission No. SCCIV-01-274* [2001] SASC 147 (9 May 2001) Justice Martin of the Supreme Court of South Australia held (at 30) (**emphasis** added):

> The third type identified is an appeal de novo in which the appeal court hears the matter afresh. **Regardless of which party appeals, the appeal is conducted as an original cause** and all the evidence is given afresh unless the parties agree to the material used before the original body being used on the appeal. The judge who hears such an appeal will determine the question upon the material presented before the judge and will not be limited in any way by the decision that has been made by the body appealed from.

1.4 In *Belle v Chiropractors Board of SA* [2006] SASC 250 (23 August 2006) Justice Debelle of the Supreme Court of South Australia held in nearly identical terms to the passage extracted above from *Thompkins v South Australian Health Commission* (supra), and additionally citing Mason J (as his Honour then was) in *Builders Licensing Board v Sperway Constructions* (supra) (at [3]) (**emphasis** added):

> The third kind of an appeal is an appeal where the court hears the matter afresh. It is usually called an appeal de novo. In *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* Mason J gave as an example the appeal from a court of summary jurisdiction to Quarter Sessions under the Justices

Act (NSW) as it stood in 1976. **In such a case, even if it is the defendant who appeals, the informant or complainant starts again and has to make out his case and call his witnesses.** It is frequently called "a rehearing": per Mason J in Builders Licensing Board at 620.

1.5 The matter before the Tribunal is therefore not limited to the challenge of discrete elements of the Adjudicator's decision and does not proceed on the basis of grounds of appeal in the legal sense. Importantly, it does not matter which party instigates the appeal—the matter is heard the same way. It is a fresh hearing of the application that was before the Adjudicator. The whole of that application must be decided upon.

3 Grounds

1.6 It should be apparent from the preceding that the Respondent says no grounds of appeal are required in the strict sense of demonstrating errors on the record.

1.7 The Respondent relies on the submissions made before the Adjudicator and its submissions made in these proceedings, both in writing and at the hearing of the matter.

1.8 The Respondent summarises its position as set out below.

4 Summary

Special By-Law 2

1.9 The Respondent maintains that:

(a) The maintenance obligations sought to be imposed in respect of the lift, lift tower, staircase and the contested "roof" of the lift tower are incompetent and outside power as there is no corresponding grant of exclusive use (and there could not be due to the existence of a positive covenant for public access).

(b) The maintenance obligations sought to be imposed in respect of the contested "roof" of the lift tower do not in any event extend to the Gazebo, which does not fall within a proper interpretation of those provisions of the by-law.

(c) Special By-Law 2 is inherently uncertain due to its reference to an undefined "Term", its contemplation of its own expiry and repeal at the end of that undefined "Term", and the existence of conditions subsequent applying to maintenance obligations (relating to the construction of a bridge over Gerrale St) without sufficient express provision regarding their proper operation.

(d) The purported incorporation of an external licence agreement is incompetent to achieve the result pressed by the Applicant.

(e) The maintenance obligations are otherwise unjust as the Respondent does not in fact have the benefit of exclusive use of the relevant property, the by-law was relevantly intended to be temporary only, and the strata scheme was registered with a positive covenant (and no exclusive use by-law) which presumed that public access for the purpose of the commercial operations from the Respondent's lot would be maintained by the owners corporation at no cost to the Respondent.

(f) In the circumstances:

(i) The purported obligations for the Respondent to repair and maintain the lift, lift tower, surrounding stairs and the (disputed) "roof" of the lift tower should be declared void, or ineffective against the Respondent.

(ii) In any event a declaration should be made that the Respondent is not and has not ever been obligated to maintain or repair the Gazebo.

(iii) Consequential or ancillary orders can be made to order restitution, as opposed to damages, of amounts paid by the Respondent pursuant to those purported obligations under Special By-Law 2 due to mistake of law or on the grounds of unjust enrichment of the Applicant.

(iv) In the alternative, the conditions of Special By-Law 2 regarding the maintenance of common property are in all the circumstsances unjust within the meaning of section 158 (1) (c) of the Strata Schemes Management Act 1996 and the by-law should be ordered amended to remove those obligations.

(v) The Respondent relies on *Reen v Owners Corporation SP 300 (Strata & Community Schemes)* [2007] NSWCTTT 57 (25 January 2007) to the effect that conditions as to maintenance can be "unjust" within the meaning of section 158 (1) (c) on the grounds that they are unclear, ambiguous in their drafting, and have given rise to dispute.

(vi) As to section 158 of the Strata Schemes Management Act 1996, the Respondent further says that the original allocation of rights and responsibilities in the strata scheme contemplated the commercial use of the lift by the Respondent and did not impose any maintenance obligations on the Respondent. The Applicant cannot be heard to argue that the original composition of the strata scheme was unjust as all original owners purchased with knowledge of these arrangements (Casuarina Rec Club Pty Limited v The Owners - Strata Plan 77971 [2011] NSWCA 159 (24 June 2011))

1.10 The Respondent further submits, in outline:

(a) A by-law can be void for uncertainty to the extent to which it is to be read as a commercial contract under *Tate.*

(b) The by-law making power is to be read, consistent with the Respondent's previous submissions, as requiring certainty and clarity in its exercise. To the extent that a by-law is to be read as delegated legislation under *Tate* then it can be void for uncertainty (Cann's Pty Ltd v Commonwealth [1946] HCA 5; (1946) 71 CLR 210 (9 April 1946).

(c) The failure of Special By-Law 2 to incorporate a definition of the "Term" is an uncertainty sufficient to render the by-law void. A lease without a term is void for uncertainty (Toyota Motor Corporation Australia Ltd and Another v Ken Morgan Motors Pty Ltd and Others [1994] VicRp 55; [1994] 2 VR 106 (10 September 1993)).

(d) However, if the Tribunal is against the Respondent that the by-law is void, the Respondent says that, if the by-law is to be saved from being void due to uncertainty:

(i) It is not possible to imply an obligation that the by-law would persist for a reasonable period of time, since there is no event specified by reference to which "within a reasonable time" could be determined (African Minerals Limited v Pan Palladium Limited [2003] NSWSC 268 (9 April 2003) at [97]).

(ii) It is not possible to select the construction of the bridge over Gerrale St, since there would be no purpose to providing that date as a separate sunset clause to the obligations in clauses C iii and C iv if the whole by-law was to expire at the same time.

(iii) **However** the Licence Agreement which preceded Special By-Law 2 itself contained a Term of 5 years. The Respondent says that this can be relied upon in the commercial context in interpreting the by-law

(*Tate,* Codelfa Construction Pty Ltd v State Rail Authority of NSW [1982] HCA 24; (1982) 149 CLR 337 (11 May 1982), Franklins Pty Ltd v Metcash Trading Ltd [2009] NSWCA 407 (16 December 2009)).

(iv) Therefore if a meaning is to be given to the "Term" the Respondent says that the only possible such meaning in the context would be 5 years further to the period specified in the superseded Licence Agreement.

(v) In any event the Respondent maintains that these issues of clarity and certainty make the terms and conditions of the by-law unjust within the meaning of section 158 (1) (c) of the Strata Schemes Management Act 1996 as submitted above.

(e) The Respondent further says that in the circumstances Special By-Law 2 must either be:

(i) Declared void for uncertainty from its beginning; or

(ii) The "Term" must be implied as a period of 5 years. That Term has long since expired. The obligations under the by-law on the Respondent should be declared void since that date and the by-law ordered repealed; or

(iii) The by-law should be amended under section 158 of the Strata Schemes Management Act 1996 to bring the Respondent's maintenance obligations to an end on the basis that such conditions are unjust under section 158 (1) (c) of the Strata Schemes Management Act 1996.

Special By-Law 42.5

1.11 The Respondent maintains as follows:

(a) The Respondent agrees that the Adjudicator and this Tribunal should follow the clearly stated *obiter dictum* of a higher jurisdiction in the circumstances, as to the presumption of written consent having been given to the change of by-laws concerned.

(b) However the Respondent contends that the Adjudicator's findings can be upheld on the alternative grounds that they restrain an abuse of process, or cure a fraud on the minority, and prevent the Strata Schemes Management Act 1996 from become the instrument of a fraud.

(c) In the circumstances:

(i) The purported amendment should be declared void, or ineffective against the Respondent.

(ii) Consequential or ancillary orders can be made to order restitution, as opposed to damages, of amounts paid by the Respondent pursuant to the purported amendment due to mistake of law or on the grounds of unjust enrichment of the Applicant.

1.12 The Respondent annexes its previous written submissions hereto.

DANIEL RUSSELL

PARTNER

CHAMBERS RUSSELL LAWYERS

Chambers Russell LAWYERS

CONSUMER, TRADER AND TENANCY TRIBUNAL

WRITTEN SUBMISSIONS FOR THE RESPONDENT

Applicant:	The Owners – Strata Plan No 50785
Respondent:	Universal Finance Holding Pty Ltd

1 Summary

1.1 The Respondent submits, in summary, as follows:

(a) As to Special By-Law 2:

(i) The maintenance obligations sought to be imposed in respect of the lift, lift tower, staircase and the contested "roof" of the lift tower are incompetent and outside power as there is no corresponding grant of exclusive use (and there could not be due to the existence of a positive covenant for public access).

(ii) The maintenance obligations sought to be imposed in respect of the contested "roof" of the lift tower do not in any event extend to the Gazebo, which does not fall within a proper interpretation of those provisions of the by-law.

(iii) Special By-Law 2 is inherently uncertain due to its reference to an undefined "Term", its contemplation of its own expiry and repeal at the end of that undefined "Term", and the existence of conditions subsequent applying to maintenance obligations (relating to the construction of a bridge over Gerrale St) without sufficient express provision regarding their proper operation.

(iv) The by-law, to be saved from being void due to uncertainty, must be read as including additional obligations on the Applicant to do everything to permit the Respondent to have the benefit of the sunset clauses, to use its best endeavours to put effect to the construction of the bridge, or to achieve that construction within a reasonable time. The Respondent is in breach of these implied obligations and should be estopped from enforcing the relevant maintenance clauses against the Respondent.

(v) The purported incorporation of an external licence agreement is incompetent to achieve the result pressed by the Applicant.

(vi) The maintenance obligations are otherwise unjust as the Respondent does not in fact have the benefit of exclusive use of the relevant property, the by-law was relevantly intended to be temporary only, and the strata scheme was registered with a positive covenant (and no exclusive use by-law) which presumed that public access for the purpose of the commercial operations from the Respondent's lot would be maintained by the owners corporation at no cost to the Respondent.

(vii) In the circumstances:

(A) The purported obligations for the Respondent to repair and maintain the lift, lift tower, surrounding stairs and the (disputed) "roof" of the lift tower should be declared void, or ineffective against the Respondent.

(B) In any event a declaration should be made that the Respondent is not and has not ever been obligated to maintain or repair the Gazebo.

(C) Consequential or ancillary orders can be made to order restitution, as opposed to damages, of amounts paid by the Respondent pursuant to those purported obligations under Special By-Law 2 due to mistake of law or on the grounds of unjust enrichment of the Applicant.

(D) In the alternative, the conditions of Special By-Law 2 regarding the maintenance of common property are unjust within the meaning of section 158 (1) (c) of the Strata Schemes Management Act 1996 and the by-law should be ordered amended to remove those obligations.

(b) As to Special By-Law 42.5:

(i) The Respondent agrees that the Adjudicator and this Tribunal should follow the clearly stated *obiter dictum* of a higher jurisdiction in the circumstances, as to the presumption of written consent having been given to the change of by-laws concerned.

(ii) However the Respondent contends that the Adjudicator's findings can be upheld on the alternative grounds that they restrain an abuse of process, or cure a fraud on the minority, and prevent the Strata Schemes Management Act 1996 from become the instrument of a fraud.

(iii) In the circumstances:

(A) The purported amendment should be declared void, or ineffective against the Respondent.

(B) Consequential or ancillary orders can be made to order restitution, as opposed to damages, of amounts paid by the Respondent pursuant to the purported amendment due to mistake of law or on the grounds of unjust enrichment of the Applicant.

2 Maintenance obligations under Special By-Law 2

2.1 The Respondent contends that Special By-Law 2:

(a) Does not grant the Respondent any exclusive use or special privilege in respect of the gazebo, the lift or the lift tower but purports to impose an obligation on the Respondent to repair and maintain those parts of common property. The Respondent says this is not permissible on a true construction of sections 53 and 54 of the Strata Schemes Management Act 1996.

(b) Cannot in any event operate to grant the Respondent exclusive use of the lift or the stairway adjacent to the lift due to the positive covenant imposed by the strata plan and accompanying section 88B instrument requiring that the areas be made available for public use, which is inconsistent with exclusive use by the Respondent.

2.2 The Adjudicator held that Special By-Law 2 could validly impose the obligation to repair and maintain the lift and lift tower on the Respondent as "quid pro quo" for the benefits which flowed to the Respondent under the by-law (see paragraph [53]).

2.3 The Respondent says that the Adjudicator was incorrect to decide this.

2.4 The Respondent says that a proper interpretation of the relevant provisions of the Strata Schemes Management Act 1996 constrains the power to impose the obligation to repair and maintain common property to the common property over which rights of exclusive use or special privilege are granted under that by-law.

2.5 The Respondent says that:

(a) Exclusive use and special privilege by-laws must be construed consistently with the statutory context and any departure from that statute must be authorised by the governing statute (*The Owners of Strata Plan No 3397 v Tate* [2007] NSWCA 207 (16 August 2007)).

(b) Section 62 of the Strata Schemes Management Act 1996 imposes the obligation on the Applicant to repair and maintain the common property.

(c) Any departure from the Applicant's obligations under section 62 must be authorised by the Act, and accordingly a close reading of the power under Division 4 of Part 5 of the Act to make by-laws altering that obligation is required.

(d) The Respondent says that the phrase "the common property" in sub-section 54 (1) (a) of the Act refers to common property that is the subject of a grant of exclusive use or special privilege as referred to in section 51.

(e) Section 54 makes clear that the obligation to maintain the subject common property must be clearly allocated to either the owners corporation or the lot owner as to its maintenance. The Respondent says that section 54 is also the source of power to allocate responsibility to maintain common property to a lot owner that would otherwise be the obligation of the owners corporation.

(f) Sub-section 54 (3) supports this view, as it expressly provides that, in the case of the direct imposition of the obligation to repair and maintain common property the owners corporation is excused from its statutory obligation.

(g) That is, absent sub-section 54 (3), the owners corporation would remain responsible for that maintenance of repair.

(h) The remaining power of the owners corporation to avoid its obligations to repair and maintain common property is found in section 62 (3) of the Act, which is not relevant here.

(i) In this context, the Respondent says that there can be no general source of power for the Applicant to escape its obligations to repair and maintain common property.

(j) The argument that the Applicant could retain the obligation to maintain and repair common property and simultaneously impose that obligation on another party is, the Respondent's says, contrary to the statutory intention of imposing a strict obligation on the owners corporation and providing limited constraints on its avoidance.

(k) Moreover, if the owners corporation were to impose an obligation on a lot owner to repair common property which the owners corporation *de jure* remained responsible to maintain and repair, it would amount to a delegation of the owners corporation's function in respect of repair and maintenance done in contravention of the strict prohibitions on delegating such a function to any person apart from a strata managing agent (see eg *Regis Towers Real Estate v The Owners - Strata Plan 56443* [2002] NSWSC 1153 (3 December 2002)).

(l) Consistent with this statutory scheme, the Respondent says that any obligation imposed as a condition of an exclusive use or special privilege by-law for a lot owner to reimburse the owners corporation for its costs in repairing and maintaining common property must also be read as being limited to the reimbursement of expenses in connection with the common property the subject of a grant of exclusive use or special privilege.

(m) In any event, the obligations imposed under Special By-Law 2, Clause C, paragraphs "iii" and "iv" are obligations to repair and maintain the common property.

(n) On the Respondent's submission these paragraphs must either therefore be void as outside the limited power to pass on the obligation to repair and maintain common property, void as an unlawful delegation of the owners corporation's function in that regard, or of no effect by operation of section 43 (4) for either or both of those reasons.

(o) The Respondent further says that the obligations in respect of the lift and lift tower must be considered in light of the Applicant's obligations to make the lift available for public use under the positive covenant registered with the strata plan. The Respondent says this forms an important part of the context in which Special By-Law 2 must be interpreted, since:

(i) It is the Applicant which bears the obligations under the positive covenant, and the by-laws cannot derogate from those obligations; and

(ii) Those obligations are in any event for the benefit of strangers to the strata scheme who are not bound by, and cannot vote on, the creation or amendment of by-laws.

2.6 If the Adjudicator did not have the power pursuant to section 157 of the Strata Schemes Management Act 1996 to order the repeal of the by-law, the Respondent says that the Adjudicator had, and the Tribunal in these proceedings has the power to order under section 138 of the Act that clauses C "iii" and C "iv" of Special By-Law 2 are and have been of no force or effect under section 49 (4) as against the Respondent.

2.7 Further the Respondent says that an order under section 138 can be made for restitution for money had and received for the use of the Respondent or on the grounds of unjust enrichment as a consequence of an order of the type referred to in the previous paragraph. The Respondent says that such an order is not prohibited by sub-section 138 (3) (d) as it is not an award of damages but rather for restitution (see eg *Equuscorp Pty Ltd v Haxton; Equuscorp Pty Ltd v Bassat; Equuscorp Pty Ltd v Cunningham's Warehouse Sales Pty Ltd* [2012] HCA 7 (8 March 2012)). Alternatively the order can be made as an ancillary order under section 169.

2.8 The Respondent accordingly seeks an order that the Applicant make restitution to the Respondent for all amounts paid by the Respondent to the Applicant for lift maintenance under Special By-Law 2. The matter should be set down for determination of the amount in which such an order should be made.

2.9 In the alternative the Tribunal has the power to order that the Respondent be excused from payment of any additional amount under Special By-Law 2 into the future.

3 Gazebo repairs

3.1 It is common ground that a structure, referred to here as a "gazebo", which sits above the elevator tower adjacent to the Respondent's lot, forms part of the Applicant's common property and was in place from the time of registration of the strata plan.

3.2 Accordingly the obligation to repair and maintain the gazebo would fall within the obligation of the Applicant to repair and maintain the common property in the strata scheme, unless by some other lawful means the Applicant is excused from that obligation.

3.3 The Applicant contends that, by operation of Special By-Law 2, the obligation to repair and maintain the gazebo is imposed on the Respondent.

3.4 For the reasons set out above, the Respondent says that Special By-Law 2 is incompetent to impose that obligation.

3.5 In the alternative, the Respondent says that Special By-Law 2, on its terms, does not impose any obligation on the Respondent to repair and maintain the gazebo.

3.6 The relevant provisions of Special By-Law 2 provide as follows:

> **C. Conditions**
>
> Maintenance of Glazing Works
>
> i. The Owner must properly maintain and keep the common property to and on which the Glazing Works are erected or attached in a state of good and serviceable repair.
>
> ii. The Owner must properly maintain and keep the Glazing Works in a state of good and serviceable repair and must replace the Glazing Works as required from time to time.
>
> iii. The Owner must properly maintain and keep the Elevator in a state of good and serviceable repair and this obligation includes indemnifying the Owners Corporation for the costs and charges under the Elevator maintenance contracts that the Owners Corporation has entered into until Sutherland Shire Council agrees that the terms of the Development Application in relation to the construction of the bridge over Gerrale Street are complied with and the bridge is constructed and commissioned.
>
> iv. The Owner must properly maintain and keep the Elevator Tower in a state of good and serviceable repair until Sutherland Shire Council agrees that the terms of the Development Application in relation to the construction of the bridge over Gerrale Street are complied with and the bridge is constructed and commissioned.
>
> Maintenance of Exhaust System
>
> v. The Owner must properly maintain and keep the common property to and on which the Exhaust System is erected or attached in a state of good and serviceable repair.
>
> vi. The Owner must properly maintain and keep the Exhaust System in a state of good and serviceable repair and must replace the Exhaust System as required from time to time.
>
> vii. The Owner must comply with the terms of the licence dated 1 September 1997.

3.7 It is not contended that the responsibilities relating to the "glazing works" or the responsibilities relating to the maintenance of the exhaust system impact on the repair or maintenance of the gazebo structure.

3.8 Instead, the Applicant contends that the definition of "Elevator Tower" was intended to give that term an enlarged meaning broad enough to capture the gazebo. It is therefore paragraph "iii" of clause C of Special By-Law 2 that is relevant (although the Applicant also relies on paragraph "vii" of clause C, which is considered elsewhere in these submissions).

3.9 The definition of Elevator Tower is as follows:

> "Elevator tower" means the structure housing the Elevator (including the walls, surrounding stairs and roof) adjacent to the north western boundary of Lot 21.

3.10 The Applicant contends that the gazebo is the "roof" within the meaning of this definition.

3.11 In accordance with the report of Ken Demlakian relied upon by the Respondent, the Respondent says that:

(a) The gazebo is structurally separate from the elevator tower.

(b) The gazebo is self-supporting (cf supported by the elevator tower)

(c) The gazebo could not in any event be structurally connected to the elevator tower as such an arrangement would result in damage to the elevator tower due to differential movement as between the masonry/concrete tower and the steel structure.

(d) The gazebo is a cosmetic feature that provides no structural support to the elevator tower.

(e) The gazebo above the elevator tower is in fact open to the elements (cf providing protection from the elements).

3.12 The Respondent therefore says that the gazebo simply does not fall within the definition as the "roof" of the elevator tower.

3.13 Further and in the alternative, a by-law that imposes obligations to repair and maintain common property must be carefully interpreted (*Tate)* and in particular there should be clear words before a by-law will be read to derogate from the statutory context (such as the obligation of the Applicant to repair and maintain the common property gazebo).

3.14 Accordingly, whilst the Respondent says the gazebo is simply clearly not the roof of the elevator tower as contended by the Applicant, to the extent that it is possible to view the definition as catching the gazebo, that interpretation must be considered to be highly ambiguous and contentious. In accordance with *Tate* the Respondent says that such a level of ambiguity is simply inadequate to impose an obligation to repair and maintain under an exclusive use by-law.

4 Licence agreement

4.1 The Applicant further contends that clause C "iv" of Special By-Law 2 imports, by reference to a licence agreement, an obligation for the Respondent to repair and maintain the gazebo.

4.2 The Respondent maintains that, as no grant of exclusive use or special privilege is made in respect of the gazebo, the maintenance obligation sought to be imposed is incompetent.

4.3 In the alternative, the Respondent says:

(a) It is not permissible for an obligation in respect of repair and maintenance of common property to be allocated by a document referred to, but not incorporated into, a by-law. A search of the register by a prospective purchaser must itself clearly indicate who bears what responsibilities without the need to enquire as to the terms of secondary documents, especially where the terms of those documents might be difficult to ascertain or not publically available from a reliable source.

(b) The licence agreement referred to is a simple contract. The Respondent is not a party to the contract. The Respondent can therefore have no obligations under that contract. On that basis, the Respondent "complies" with the licence agreement by doing nothing.

(c) The licence agreement referred to had expired by the time of the making of Special By-Law 2, as held by the Adjudicator. Therefore no obligations

subsisted under that contract. Again, the Respondent therefore complies with the licence agreement by doing nothing.

5 Term and conditions subsequent

5.1 Clauses C "iii" and C "iv" of Special By-Law 2 are subject to a condition subsequent that would bring those obligations to an end if fulfilled:

> iii. The Owner must properly maintain and keep the Elevator in a state of good and serviceable repair and this obligation includes indemnifying the Owners Corporation for the costs and charges under the Elevator maintenance contracts that the Owners Corporation has entered into until Sutherland Shire Council agrees that the terms of the Development Application in relation to the construction of the bridge over Gerrale Street are complied with and the bridge is constructed and commissioned.
>
> iv. The Owner must properly maintain and keep the Elevator Tower in a state of good and serviceable repair until Sutherland Shire Council agrees that the terms of the Development Application in relation to the construction of the bridge over Gerrale Street are complied with and the bridge is constructed and commissioned.

5.2 The terms of the conditions subsequent are the same for both sub-clauses, namely:

> ... until Sutherland Shire Council agrees that the terms of the Development Application in relation to the construction of the bridge of Gerrale Street are complied with and the bridge is constructed and commissioned.

5.3 The rights under clause B of Special By-Law 2 are expressed to subsist "for the Term":

> **B. Rights**
>
> Subject to the conditions in paragraph C of this by-law, the Owner will have for the Term:
>
> (a) special privilege in respect of the common property to erect and keep the Glazing Works to and on the common property; and
>
> (b) the exclusive use of those parts of the common property occupied by the Glazing Works;
>
> (c) a special privilege in respect of the Roof to install and maintain the Exhaust System.

5.4 Clause C "xviii" of Special By-Law 2 refers to the cost of repealing Special By-Law 2 after the expiry of the Term:

> xviii. The Owner will indemnify the Owners Corporation for all of the following costs incurred by the Owners Corporation and will pay those amounts to the Owners Corporation when requested:
>
> (a) the costs of considering and making this by-law;
> (b) the costs of considering, approving and certifying the Glazing Works; and
> (c) the costs of repealing this by-law after the expiry of the Term.

5.5 No-where in Special By-Law 2 is the capitalised expression "Term" defined.

5.6 However it is clear that, on an objective reading of Special By-Law 2, it was intended to subsist for a period, apparently not defined (in error), and then be repealed.

5.7 To the extent that, under *Tate,* it is permissible to interpret the by-law as a commercial contract, in the circumstances there is no other conclusion than that Special By-Law 2 must be void for uncertainty (or that, clause B is void, and since all the other conditions of the by-law rely upon that grant of rights under Division 4 of Part 5 of the Strata Schemes Management Act 1996, the remainder of the by-law is also void).

5.8 In accordance with the High Court's decision in *Meehan v Jones* [1982] HCA 52; (1982) 149 CLR 571 (17 September 1982), a finding of voidness due to uncertainty is a draconian solution and the Tribunal should be astute to adopt a construction which will preserve validity (per Mason J at 589, paragraph [20]).

5.9 However since there is no content to the defined "Term", and it has no ordinary meaning of itself, it is impossible from the express terms of the by-law to determine what that period is intended to be.

5.10 However in the circumstances the Respondent contends that it is clearly not a proper interpretation of Special By-Law 2 to permit the Respondent's purported obligations under it to exist into perpetuity.

5.11 In those circumstances, terns should be implied into Special By-Law 2 to the effect that:

(a) each party to it will do everything to permit the other party to have the benefit of the by-law (eg *Expectation Pty Ltd v Pinnacle Vrb Ltd* [2002] WASCA 160 (19 June 2002)), including the benefit to the Respondent of the cessation of its obligations under clauses C "iii" and C "iv"; and

(b) the Applicant will use its best endeavours to put effect to the construction of the bridge (and the other conditions subsequent) referred to in clauses C "iii" and C "iv"; and

(c) the Applicant will put effect to the conditions subsequent in clauses C "iii" and C "iv" within a reasonable time.

5.12 The Applicant has declined to pursue the construction of the bridge referred to in clauses C "iii" and C "iv".

5.13 The Applicant is therefore in breach of the implied terms to do all things necessary to secure the benefits of the contract, to use its best endeavours to put effect to the conditions subsequent in clauses C "iii" and C "iv", and to do so in a reasonable time.

5.14 A party should not be entitled to rely on its wrongful conduct to secure a benefit (*Suttor v Gundowda Pty Ltd* [1950] HCA 35; (1950) 81 CLR 418 (26 September 1950) at [14]). The Applicant should therefore not be permitted to rely on its failure to put effect to the conditions subsequent in clauses C "iii" and C "iv" to secure the benefit of the Respondent's purported obligations to maintain the relevant common property in those sub-clauses in perpetuity.

5.15 The Tribunal should therefore order that the Applicant is estopped from seeking the benefit of the clauses C "iii" and C "iv" of Special By-Law 2 as against the Respondent.

6 Unjust conditions regarding repair and maintenance

6.1 The Respondent has addressed above the proper interpretation of Special By-Law 2 and orders arising from the same.

6.2 The Respondent says, further and in the alternative, that additional jurisdiction arises under sub-section 158 (1) (c) of the Strata Schemes Management Act 1996, for the Adjudicator (and in these proceedings the Tribunal) to order that Special By-Law 2 be amended or repealed on the basis of a finding that the terms and conditions of Special By-Law 2 relating to the maintenance or upkeep of common property are unjust.

6.3 In *Reen v Owners Corporation SP 300 (Strata & Community Schemes)* [2007] NSWCTTT 57 (25 January 2007) Member Ross decided the following in respect of the application of section 158 (1) (c):

> In relation to s.158 (1) (c), I accept that a finding of misinterpretation of conditions relating to obligations to repair would not in itself be sufficient to reach a determination that conditions of a by-law were unjust for the purposes of consideration of repeal. However, that is not what the Adjudicator's reasons indicate. He found that the term of the by-law providing for maintenance lacked clarity. The definition of the area over which the privileges were granted and therefore over which obligations to maintain arose were "at best unclear; at worst incomprehensible". The Adjudicator commented that is was "extremely difficult, with any confidence, to attribute to the benefiting party any obligation to contribute to repair and maintenance". The effect of this lack of clear and equitable apportionment of liability to repair was, the Adjudicator found, that the by-law conditions were unjust. He then went on to the considerations set out in s.158 (2).
>
> I find this analysis of the conditions as to maintenance and upkeep of the common property subject to By-law 28 to be extremely appropriate. It is common ground that there is a long history of disputation over what is necessary and appropriate for maintenance and upkeep of the property in question and, indeed, what the extent of the property in question is (given the deficiency in its identification on the strata plan or in the by law itself). The lack of clarity in drafting of the conditions and lack of specificity in the registration of the By-law without any modification or notation of the strata plan, have formed the fertile ground for this ongoing conflict. Indeed it could be said that the limitations and ambiguities in the drafting of the conditions have been exploited. The Adjudicator's finding that the conditions as to maintenance and upkeep are unjust is, in all these circumstances, entirely appropriate.

6.4 To this end, the Respondent says:

(a) The by-law is unclear and ambiguous as considered in *Reen* as:

(i) It does not identify clearly the areas the subject of the repair and maintenance obligation, as evidenced by dispute regarding the meaning and extent of the term "roof".

(ii) It is clearly intended to operate, in whole and in respect of certain obligations, for a limited time, however "Term" is used but undefined, and the conditions subsequent included are unworkable in their drafting.

(b) The conditions requiring the maintenance or upkeep of the lift and related property are otherwise unjust in that:

(i) They were clearly intended to subsist for a limited period however significant drafting errors have stultified that intention.

(ii) A positive covenant for public access registered with the strata plan provides for the use of the lift and surrounding stairs for the express purpose of the public accessing the Respondent's lot for commercial purposes.

(iii) No obligation to maintain was imposed on the Respondent under that covenant nor under any by-law registered with the strata plan.

(iv) Accordingly the strata scheme was created with the contemplation that public use would be made of the lift and stairs for access to the Respondent's lot with no maintenance obligation on the Respondent.

(v) The temporary increase in demand for use of the lift and staircase in connection with the installation of the glazing works provided a temporary justification for the Respondent to bear the maintenance costs of the lift and staircase.

(vi) However, in light of the above, it is clearly unjust for the obligation to be imposed on the Respondent on a continuing basis. The obligation should now be reverted to the Applicant as was provided for in the strata scheme as originally registered.

(vii) As set out earlier in these submissions, the Respondent is not granted under Special By-Law 2 the exclusive use of the lift and staircase. The Respondent has said that this is a defective purported exercise of the power to impose obligations in respect of maintenance and repair of common property on a lot owner. Moreover, in this context, even if such is within power (which is denied) the Respondent further submits that it is unjust to impose on the Respondent the obligation to maintain the lift and staircase without also granting the Respondent exclusive use of those areas (which cannot be done in the Respondent's submission due to the existing positive covenant for public access).

6.5 In making such an order, regard must be had, under sub-section 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 a benefit under a by-law of the kind referred to in section 51.

6.6 The Respondent says that the interest of all owners in the use and enjoyment of common property is not harmed by the obligation to maintain in respect of the lift and staircase to revert to the owners corporation as:

(a) That was intended to be the case on creation of the strata scheme.

(b) The lift and stairs do not exclusively service the Respondent's lot but service the lower levels and car-park access.

(c) The Respondent should not be penalised for the Applicant's failure to progress the matter of the construction of the bridge over Gerrale St.

6.7 The Respondent says that the rights and reasonable expectations of the Respondent in deriving or anticipating a benefit under Special By-Law 2 are substantially prejudiced by the continued imposition of a maintenance obligation on the Respondent in the above circumstances.

6.8 On balance of these factors the Respondent's maintenance obligations in respect of the lift and stairs (and including the disputed obligation in respect of the "roof") should be removed from Special By-Law 2 by way of amendment under section 158 of the Strata Schemes Management Act 1996.

7 Orders for repair of the gazebo

7.1 The Applicant contends that orders for the Applicant to effect repair and maintenance to the gazebo were insufficiently clear.

7.2 The Respondent says that the Tribunal can in these proceedings order the Applicant to attend to the repair and maintenance works required to the gazebo as set out in the report of the Applicant's own expert.

7.3 In the alternative, to resolve the controversy between the parties, the Tribunal should, in the Respondent's submission, make orders at a minimum declaring that the Applicant is responsible for the repair and maintenance of the gazebo.

8 Special by-law 42.5

8.1 The Applicant contends that the Adjudicator erred in finding that lack of consent to the making of the amendment in question was not a "condition precedent" deemed to have been complied with after 2 years under section 52 (3).

8.2 The Applicant contends that the Adjudicator was bound to follow *ratio* of the Supreme Court in Jennifer Elizabeth James v The Owners Strata Plan No. SP 11478 (No 4) [2012] NSWSC 590 (4 June 2012), or alternatively should have followed those same statements even if they were *obiter.* The Respondent acknowledges the force of the Applicant's submissions that an Adjudicator should follow either *ratio* or clearly stated *obiter* of a superior jurisdiction.

8.3 However the Respondent contends that the Adjudicator's decision can be upheld on alternative grounds.

8.4 The Adjudicator's comments show that the Adjudicator was concerned that such a universal application of section 52 (3) would "provide a very simple way for any Owners Corporation to avoid the necessity of obtaining the consent required by s 52 (1) (a)".

8.5 The Respondent says the Adjudicator was therefore concerned with the potential for abuse of the section by an Owners Corporation. The Adjudicator said that by such an abuse "the concerned lot owner would be powerless to object to it".

8.6 In this light, the Adjudicator's reasoning points to:

(a) A concern that section 52 (3) might be constrained by a broader jurisdiction in a strata adjudicator to restrain an abuse of process.

(b) A concern that the use of section 52 (3) to grant power to make by-laws that would otherwise be absent due to a failure to comply with the obligation to obtain written consent could amount to a "fraud on the minority" (eg Young and 1 Ors v The Owners S/P 3529 and 2 Ors [2001] NSWSC 1135 (11 December 2001)).

8.7 In this case the Applicant was notified within the 2 year period that consent had not been provided. The Applicant therefore knew, before any deeming provision had taken effect, that its decision to make the amendment in question was made without power.

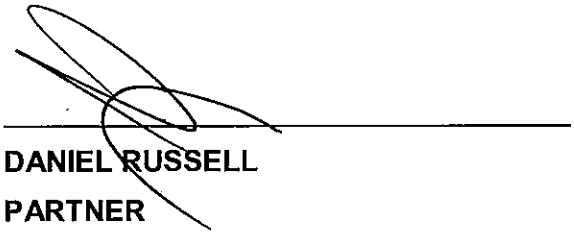
8.8 The Applicant slept on that knowledge. Having been put on notice that it had made a decision without power, it did not take any steps to correct is error. It allowed the deeming provision in section 52 (3) to take effect, purportedly correcting its *ultra vires* act, to the detriment of the Respondent.

8.9 In that circumstance, the Applicant should be estopped from relying on section 52 (3) to prevent the Strata Schemes Management Act 1996 becoming the instrument of a fraud on the minority, namely the Respondent.

8.10 If the Adjudicator did not have power, or erred in the application of that power, under section 157, the Respondent says that the Tribunal is now able to properly exercise power, whether under section 157, 159, or under section 138 by way of an order that the by-law has no effect against the Respondent under section 43 (4) of the Strata Schemes Management Act 1996.

8.11 The Respondent says that the Tribunal has the power under section 138 and/or under section 169 to order restitution of the amounts paid on a cause of action in money had and received or unjust enrichment. The Respondent says that such an order is not prohibited by sub-section 138 (3) (d) as it is not an award of damages but rather for restitution.

8.12 In the alternative the Tribunal has the power to order that the Respondent be excused from payment of any additional amount under by-law 42.5 into the future.



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CONSUMER, TRADER AND TENANCY TRIBUNAL

SUPPLEMENTARY OUTLINE OF SUBMISSIONS

Applicant:	The Owners – Strata Plan No 50785
Respondent:	Universal Finance Holding Pty Ltd

1 Outline

Special By-Law 2

1.1 The Respondent maintains that:

(a) Certain maintenance obligations under Special By-Law 2 are incompetent and void as there is no corresponding grant of exclusive use.

(b) The gazebo is not the "roof" within the meaning of those provisions and does not fall within any obligation on the Respondent to maintain.

1.2 The Respondent further submits, in outline:

(a) A by-law can be void for uncertainty to the extent to which it is to be read as a commercial contract under *Tate.*

(b) The by-law making power is to be read, consistent with the Respondent's previous submissions, as requiring certainty and clarity in its exercise. To the extent that a by-law is to be read as delegated legislation under *Tate* then it can be void for uncertainty (Cann's Pty Ltd v Commonwealth [1946] HCA 5; (1946) 71 CLR 210 (9 April 1946).

(c) The failure of Special By-Law 2 to incorporate a definition of the "Term" is an uncertainty sufficient to render the by-law void. A lease without a term is void for uncertainty (Toyota Motor Corporation Australia Ltd and Another v Ken Morgan Motors Pty Ltd and Others [1994] VicRp 55; [1994] 2 VR 106 (10 September 1993)).

(d) However, if the Tribunal is against the Respondent that the by-law is void, the Respondent says that, if the by-law is to be saved from being void due to uncertainty:

(i) It is not possible to imply an obligation that the by-law would persist for a reasonable period of time, since there is no event specified by reference to which "within a reasonable time" could be determined (African Minerals Limited v Pan Palladium Limited [2003] NSWSC 268 (9 April 2003) at [97]).

(ii) It is not possible to select the construction of the bridge over Gerrale St, since there would be no purpose to providing that date as a separate sunset clause to the obligations in clauses C iii and C iv if the whole by-law was to expire at the same time.

(iii) **However** the Licence Agreement which preceded Special By-Law 2 itself contained a Term of 5 years. The Respondent says that this can be relied upon in the commercial context in interpreting the by-law (*Tate,* Codelfa Construction Pty Ltd v State Rail Authority of NSW [1982] HCA 24; (1982) 149 CLR 337 (11 May 1982), Franklins Pty Ltd v Metcash Trading Ltd [2009] NSWCA 407 (16 December 2009)).

(iv) Therefore if a meaning is to be given to the "Term" the Respondent says that the only possible such meaning in the context would be 5 years further to the period specified in the superseded Licence Agreement.

(v) In any event the Respondent maintains that these issues of clarity and certainty make the terms and conditions of the by-law unjust within the meaning of section 158 (1) (c) of the Strata Schemes Management Act 1996.

(e) The Respondent further says that in the circumstances Special By-Law 2 must either be:

(i) Declared void for uncertainty from its beginning; or

(ii) The "Term" must be implied as a period of 5 years. That Term has long since expired. The obligations under the by-law on the Respondent should be declared void since that date and the by-law ordered repealed; or

(iii) The by-law should be amended under section 158 of the Strata Schemes Management Act 1996 to bring the Respondent's maintenance obligations to an end on the basis that such conditions are unjust under section 158 (1) (c) of the Strata Schemes Management Act 1996.

1.3 The Respondent maintains that obligations must be implied in Special By-Law 2 on the Applicant to take steps regarding the construction of the bridge over Gerrale St. and the Applicant should be estopped from seeking to enforce the disputed maintenance obligations against the Respondent due to breach of those implied terms.

1.4 The Respondent maintains that the purported incorporation of the Licence Agreement is incompetent to achieve the imposition of maintenance obligations on the Respondent.

1.5 The Respondent maintains that in the circumstances:

(a) The purported obligations for the Respondent to repair and maintain the lift, lift tower, surrounding stairs and the (disputed) "roof" of the lift tower should be declared void, or ineffective against the Respondent.

(b) In any event a declaration should be made that the Respondent is not and has not ever been obligated to maintain or repair the Gazebo.

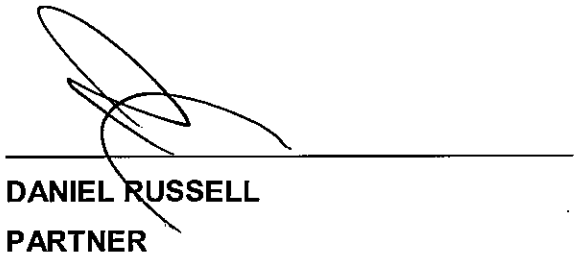
(c) Consequential or ancillary orders can be made to order restitution, as opposed to damages, of amounts paid by the Respondent pursuant to those purported obligations under Special By-Law 2 due to mistake of law or on the grounds of unjust enrichment of the Applicant.

(d) In the alternative, the conditions of Special By-Law 2 regarding the maintenance of common property are unjust within the meaning of section 158 (1) (c) of the Strata Schemes Management Act 1996 and the by-law should be ordered amended to remove those obligations.

1.6 As to section 158 of the Strata Schemes Management Act 1996, the Respondent further says that the original allocation of rights and responsibilities in the strata scheme contemplated the commercial use of the lift by the Respondent and did not impose any maintenance obligations on the Respondent. The Applicant cannot be heard to argue that the original composition of the strata scheme was unjust as all original owners purchased with knowledge of these arrangements (Casuarina Rec Club Pty Limited v The Owners - Strata Plan 77971 [2011] NSWCA 159 (24 June 2011))

Special By-Law 42.5

1.7 The Respondent maintains its submissions as to Special By-Law 42.5.



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