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JEFFREY STEVEN MUELLER, B.Com., LL.B.
BRUCE WILLIAM BENTLEY, B.A., LL.B., LL.M.

1st Floor
240 Princes Highway
Arncliffe NSW 2205
Australia
DX 25315 Rockdale
Tel: 02 9562 1266
Fax: 02 9567 8551

Our Ref: AM:DR:22255
Your Ref: Nina Ashfield-Howell

24 January 2013

The Secretary
The Owners - Strata Plan No. 50785
c/- Strata Title Management
PO Box 2727
TAREN POINT NSW 2229

By Email: nhowell@stratatitle.com.au
cc: cb@hpschd.nu
dds@cbp.com.au

Dear Nina

APPLICATION TO STRATA ADJUDICATOR BY UNIVERSAL FINANCE HOLDINGS PTY LTD CONSUMER, TRADER AND TENANCY TRIBUNAL FILE NO. SCS 12/49745

I regret to advise that the application to the strata adjudicator by Universal Finance Holdings Pty Limited ("Universal") has been upheld in part.

I wish to provide you with an overview of the orders made by the adjudicator, the reasons why those orders were made and advice on the owners corporation's prospects for successfully appealing against those orders to help the executive committee decide on the way forward.

Review of Adjudicator's Orders

On 18 January 2013, Adjudicator J Smith determined Universal's application by making orders:

- repealing Special By-Law No. 42.5 (which increased the licence fees payable by Universal and other commercial owners to the owners corporation for the privilege to keep exhaust systems and grease traps on common property) - this order was made on the basis that Universal did not consent to Special By-Law No. 42.5 in circumstances where the strata legislation required the owners corporation to obtain its consent;

- requiring the owners corporation to calculate the amount paid by Universal to it pursuant to Special By-Law No. 42.5 (made on 26 March 2008) that is in excess of the amount payable pursuant to the previously existing by-law and credit the excess to Universal's account – this order was made on the basis that Special By-Law No. 42.5 was never valid and therefore did not impose an obligation on Universal to pay increased licence fees to the owners corporation; and

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- requiring the owners corporation to engage suitably qualified tradespeople to maintain and repair the gazebo above the elevator tower adjacent to Lot 21 within 60 days to ensure compliance with its obligations under section 62 of the *Strata Schemes Management Act 1996* – this order was made on the basis that Special By-Law No. 2 (which granted the owner of Lot 21 special privileges to carry out glazing works to extend the shopfront of the Opah restaurant and imposed on the owner the responsibility to maintain and repair, among other things, the elevator and elevator tower) does not impose on Universal the responsibility for maintaining and repairing the gazebo and Special By-Law No. 21 (which gives the owner of Lot 21 exclusive use of part of the terrace adjacent to the restaurant) specifically exempts Universal from the need to carry out any structural repairs.

Universal applied for several other orders which the adjudicator declined to make. These were orders to:

- repeal Special By-Law No. 42;

- redraft Special By-Law No. 2 to make the owners corporation (rather than Universal) responsible for the maintenance and upkeep of the elevator, elevator tower and surrounding common property;

- require the owners corporation to refund to Universal all charges paid by it under Special By-Law No. 2 for the elevator maintenance contract, elevator repairs and fees and interest charged by the owners corporation and paid by Universal since 30 September 2004;

- require the owners corporation to provide details of expenditure concerning the elevator since 2003 and an edited version of Universal's levy account showing the charges associated with elevator maintenance, Special By-Law No.'s 2 and 42.5 and various charges of interest;

- require the owners corporation to pay Universal's costs.

It follows that the adjudicator made four out of the nine orders sought by Universal.

Grounds to Appeal Against Adjudicator's Orders

In my view, the conclusions reached by the adjudicator are wrong and the owners corporation has strong prospects for successfully appealing against the orders made by the adjudicator.

Special By-Law No. 2 imposes on Universal (as the owner of Lot 21) the responsibility for the maintenance and repair of the 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).

In the adjudication the owners corporation argued that these parts of Special By-Law No. 2 meant that the elevator tower included the gazebo above it as a result of which Universal was responsible for maintaining and repairing the gazebo. The adjudicator rejected this argument. He held that the gazebo is a separate and substantial structure which has been in existence from the time of registration of your 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".

In my view, it is reasonably arguable that this conclusion is wrong and that the definition of "elevator tower" in the by-law shows that the elevator tower as defined in the by-law is intended to have an expanded meaning that covers the gazebo. But as I have advised the owners corporation previously, because the by-law has been poorly worded the position is not free from doubt, meaning success in any appeal against the adjudicator's conclusion on this issue cannot be guaranteed.

In the adjudication the owners corporation next argued that Special By-Law No. 2 makes Universal responsible for the maintenance and repair of the gazebo because clause C(vii) of the by-law requires Universal to comply with the terms of the licence agreement dated 1 September 1997 between the owners corporation and the previous owner of Lot 21 and clause H of the licence agreement provided that "the owner will be responsible for ... the upkeep of the structure above the lift". The adjudicator did not accept this argument. He observed that the licence 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 to Universal exclusive use of part of the common property terrace adjacent to the Opah restaurant) specifically exempted Universal from the requirement to carry out any common property maintenance or repairs of a structural nature. For these reasons, the adjudicator concluded that any by-law created after Special By-Law No. 21 that sought to impose on Universal 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 Universal under Special By-Law No. 21.

In my view, these conclusions are incorrect for two reasons. Firstly, the licence agreement clearly imposed on the previous owner of Lot 21 the responsibility for maintaining and repairing the gazebo and there is no reason why those obligations, as incorporated into Special By-Law No. 2, should be read down. Secondly, Special By-Law No. 21 only grants Universal exclusive use of a 100 square metre portion of the common property terrace adjacent to the northern boundary of the Opah restaurant, none of which (as I understand it) is covered by the gazebo (this point should be confirmed by the executive committee) as a result of which the clause in Special By-Law No. 21 which exempts Universal from any maintenance or repairs of a structural nature does not apply to the gazebo (that is to say, by-law 21 does not affect the common property occupied by the gazebo or have any bearing on the parties rights in relation to that common property).

Special By-Law No. 42 was made on 23 March 2005. It granted 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 owners corporation a licence fee of $1,000 plus GST per quarter. On 26 March 2008, the owners corporation purported to amend Special By-Law No. 42 by re-writing clause 42.5 to increase the licence fee payable by each of the commercial owners to $2,500 plus GST per quarter and to have the licence reviewed in accordance with the CPI each year. Section 52 of the *Strata Schemes Management Act 1996* says that the owners corporation 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. But the owners corporation did not obtain the consent of any of the commercial owners to the amendment of Special By-Law No. 42. Universal argued that for this reason the amendment of the by-law was invalid.

In the adjudication the owners corporation argued that it was too late for Universal to allege that the amendment of the by-law was invalid on the grounds that it did not consent to the amendment. The owners corporation relied on section 52(3) of the 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". Recently, the NSW Supreme Court held in *James -v- The Owners Strata Plan No. 11478 (No. 4)* [2012] NSWSC 590 that the step of obtaining an owner's consent to the amendment of a by-law is a preliminary step precedent to the amendment 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 owners corporation 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 all of the commercial owners consented to the amendment of the by-law and it is therefore too late for Universal to allege otherwise.

Quite remarkably, the adjudicator declined to follow the decision of the Supreme Court in *James* case. The adjudicator considered that he was able to disagree with and not follow the Supreme Court's decision because what the Court said in *James* case about section 52(3) was obiter dicta (being a judicial observation that is made in passing and does not form part of the reasoning of a case and is therefore not binding on lower courts). However the conclusions reached by the Supreme Court in *James* case were 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 one of the essential ingredients for making or amending a by-law such as Special By-Law No. 42 is the obtaining by the owners corporation of the written consent of the owners concerned 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 within the ambit of section 52(3)). And even if the conclusions in *James* case are obiter dicta, there is law to the effect that there are differing agrees of obiter dicta and that a well considered remark made by a judge of a superior court (such as that in *James* case) should be followed by lower courts and tribunals: see, for example, *Nowicka –v- Superannuation Complaints Tribunal* [2008] FCA 939. It follows, in my view, that the adjudicator was bound by the decision in *James* case and erred by refusing to follow it.

Further, in disagreeing with the Supreme Court, the adjudicator held that obtaining the consent of the commercial owners to amend the by-law was not a condition precedent to the making of the by-law but an indispensable part of the by-law making process. In my view, this conclusion is wrong and the analysis of the Supreme Court (which is supported by a leading text book on strata titles: see Bugden & Allen, *NSW Strata and Community Titles Law* at [¶ 10-805, point 10] is to be preferred.

The adjudicator sought to justify the conclusion he reached by arguing that if after two years an owner who did not consent to an amendment of a by-law such Special By-Law No. 42 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 owners corporation 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". But this overlooks the fact that the concerned owner would have a right to obtain an order restraining the owners corporation from registering the by-law unless and until he or she consented to it (which is precisely the order that was made in James case) or could lodge a caveat on the common property title to prevent the registration of the by-law without his or her consent.

In the adjudication the owners corporation 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 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 Special By-Law No. 42 because "the rights, privileges and obligations existing prior to the purported amendment would remain in situ". I do not agree with this conclusion. In my view, the repeal of the amendment to Special By-Law No. 42 affected the rights of the other commercial owners and it is a fundamental principle of our judicial system that any party whose rights will be affected by an order made by a court or tribunal (or here, an adjudicator) is required to know the substance of the case concerning him or her and be given the opportunity to respond to it: see *Kioa –v- West* (1985) 159 CLR 550 (an opportunity which the other commercial owners were denied).

Finally, the adjudicator purported to repeal the amendment to Special By-Law 42 pursuant to section 157 of the *Strata Schemes Management Act 1996* on the basis that the owners corporation did not comply with the strata legislation by failing to obtain the consent of the commercial owners 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 the by-law on the grounds that, having regard to the interests of all owners in the use and enjoyment of their lots or common property, the amendment should not have been made. This is not the basis upon which the adjudicator revoked the amendment to Special By-Law No. 42. In my view, section 157 did not give the adjudicator power to revoke the amendment to the by-law.

An Appeal

An appeal against the adjudicator's decision is able to be made to the Consumer, Trader and Tenancy Tribunal. The appeal would need to be commenced by no later than 18 February 2013. The appeal would take about six months to be heard and determined. The appeal would be conducted at the Tribunal in Hurstville and it would involve a formal hearing presided over by a Tribunal member at which evidence would be given and submissions made to support the parties' respective cases.

If the owners corporation decides to appeal against the adjudicator's decision, I am reasonably confident the owners corporation will secure a stay on the operation of the adjudicator's orders pending the outcome of the appeal. If a stay is granted, the owners corporation will not need to repair the gazebo within 60 days and, even if the appeal was unsuccessful, would have until 60 days after the determination of the appeal to carry out those repairs.

Conclusion

The owners corporation should make a commercial decision as to whether or not it will appeal against the adjudicator's decision. I estimate that an appeal will cost approximately $5,500 - $9,500 plus GST in legal costs. The owners corporation needs to weigh those costs against the costs it will incur complying with the adjudicator's orders. These will be the costs to: put the gazebo into a state of good and serviceable repair within 60 days; continue to maintain and repair the gazebo into the future; and give Universal credit for any licence fees paid by it under the amended Special By-Law No. 42.5 since 26 March 2008.

In my view, because the owners corporation has reasonable prospects for succeeding in an appeal, if the costs to comply with the adjudicator's orders will far exceed the costs to run an appeal, then it would be commercially feasible for the owners corporation to appeal against the adjudicator's decision. The owners corporation also needs to be mindful that the findings made by the adjudicator, if not challenged and overturned in an appeal, will operate to make the owners

corporation responsible for maintaining and repairing the gazebo for at least as long as Universal remains the owner of Lot 21.

Once the executive committee has considered by advice, I invite you to contact me to discuss the way forward.

Yours faithfully

J.S. MUELLER & CO

Per: Adrian Mueller
Solicitor