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

22 January 2014

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

Dear Nina

RE: APPEAL AGAINST ORDERS MADE BY ADJUDICATOR CONCERNING GAZEBO STRUCTURE AND LICENCE FEES PAYABLE UNDER SPECIAL BY-LAW 42.5

I am writing to provide a report on the outcome of the owners corporation's appeal against the decision of the strata adjudicator to revoke Special By-Law 42.5 (which by-law increased the licence fees payable by the commercial owners to the owners corporation) and to order the owners corporation to repair the gazebo above the elevator tower adjacent to the Opah Restaurant.

Report on Appeal

I am pleased to report that the owners corporation's appeal was partially successful. On 20 December 2013 the Consumer, Trader and Tenancy Tribunal revoked the orders made by the strata adjudicator on 18 January 2013 which repealed Special By-Law 42.5 and required the owners corporation to give a credit to the owner of Lot 21, Universal Finance Holdings Pty Limited ("Universal"), for the licence fees paid by that owner to the owners corporation pursuant to the by-law. However, the Tribunal affirmed the order of the adjudicator which requires the owners corporation to repair the gazebo above the elevator tower adjacent to the Opah Restaurant within 60 days.

Analysis of Appeal Decision

Special By-Law 42.5 – Licence Fees

In 2005 the owners corporation made Special By-Law 42.5. This by-law gave the commercial owners the right to use exhaust systems and grease traps which service the commercial lots and are located on parts of the common property in Cote d'Azur in return for paying a lience fee to the owners corporation. On 26 March 2008 the owners corporation amended Special By-Law 42.5. The amendment increased from $1,000 per quarter to $2,500 per quarter plus GST the licence fee

payable by each of the commercial owners to the owners corporation in consideration for being able to use the common property exhaust systems and grease traps.

The owners corporation amended Special By-Law 42.5 without obtaining the written consent of the commercial owners in contravention of the strata legislation. On that basis, Universal applied to the strata adjudicator for an order to revoke the amendment of the by-law on the grounds that it was unlawful. The adjudicator agreed with Universal and revoked the amendment to the by-law and ordered the owners corporation to give Universal a credit for the increased licence fees it had paid under the by-law.

In the appeal, the Tribunal overturned the adjudicator's decision to revoke the amendment of Special By-Law 42.5 and to order the owners corporation to give a credit to Universal for any increased licence fees paid by it under the by-law. The Tribunal agreed with the owners corporation's arguments that the strata adjudicator had made errors when he revoked the by-law. The Tribunal concluded that even though the owners corporation amended Special By-Law 42.5 without obtaining the written consent of the commercial owners, as the amendment was made more than two years ago, it was now too late for Universal to challenge the validity of the amendment on that basis. This is because the strata legislation says that two years after a by-law granting owners special rights over the common property is made, it is conclusively presumed that all preconditions to the making of the by-law (such as obtaining owners' written consents) have been complied with and performed.

Once the Tribunal decided that the amendment of Special By-Law 42.5 should not be revoked it automatically followed that the strata adjudicator's decision to require the owners corporation to give Universal a credit for increased licence fees paid under the by-law should be overturned.

In relation to payment of the licence fees the Tribunal remarked that "the obligation [on the commercial owners] to pay the quarterly licence fees ought to be continued. The licence fee is not a levy and it may be paid under s.53 of the [Strata] Act in consideration for the right to keep an exhaust system on the common property roof and to use the common property grease trap".

Special By-Law 2 – Gazebo

On 2 May 2003 the owners corporation made Special By-Law 2. This by-law gave the owner of Lot 21 the right to extend the glazing for the Opah Restaurant outwards onto the adjacent common property balcony. The by-law also imposed on the owner of Lot 21 the responsibility to maintain and repair (among other things) the elevator and the elevator tower adjacent to the Opah Restaurant until a bridge is constructed over Gerrale St. The by-law required the owner to also maintain and repair the "roof" of the elevator tower. There is a gazebo structure above the elevator tower which has fallen into disrepair. The owners corporation argued that the gazebo was the roof of the elevator tower and therefore Universal (as the owner of Lot 21) was responsible for repairing it pursuant to special By-Law 2. The strata adjudicator disagreed and ordered the owners corporation to repair the gazebo. In the appeal, the Tribunal affirmed the adjudicator's decision.

The Tribunal was not satisfied that Special By-Law 2 imposed on Universal the responsibility to repair the gazebo. The Tribunal held that the gazebo is a separate structure to the elevator tower and

that the elevator tower as defined in the by-law connotes the elevator shaft, motor room and over-run (but not the gazebo). The Tribunal also concluded that the gazebo's function is to provide shelter from the elements and that it is designed for an ornamental or decorative purpose (but not as the roof of the elevator tower).

For these reasons the Tribunal affirmed the order made by the strata adjudicator on 18 January 2013 requiring the owners corporation to repair the gazebo within 60 days.

Finally, in the appeal Universal sought orders for Special By-Law 42.5 (concerning the licence fees payable by the commercial owners) and Special By-Law 2 (concerning the elevator tower) to be repealed. However the Tribunal declined to make any such orders.

Practical Outcome

The practical outcome of the Tribunal appeal is as follows:

- the owners corporation is able to (and should) charge each commercial owner, including Universal, a quarterly licence fee of at least $2,500 plus GST (increased in accordance with the Consumer Price Index) for the right to continue to use the exhaust systems and grease traps on the common property pursuant to Special By-Law 42.5;

- the licence fees should be automatically charged to each commercial owner's levy account and be adjusted by the CPI at the first quarter following the beginning of each calendar year;

- the licence fee should only be waived if at least 75% of the executive committee determine that the terms of Special By-Law 42.5 have not been breached in respect of any lot ;

- the owners corporation will need to engage suitably qualified contractors to carry out repairs to the gazebo above the elevator tower adjacent to the Opah Restaurant to place the gazebo into a state of good and serviceable repair;

- the repairs to the gazebo will need to be completed promptly (technically the repairs need to be completed within 60 days of the date of the strata adjudicator's orders made on 18 January 2013 but it is likely that the Tribunal intended that the deadline for completing the repairs would be 60 days after its orders made on 20 December 2013 – if you want me to apply to the Tribunal to have the orders clarified in this regard, please let me know);

- Universal continues to be responsible for reimbursing the owners corporation for the costs and charges it incurs under the elevator maintenance contractor for the elevator adjacent to the Opah Restaurant pursuant to Special By-Law 2.

A Further Appeal?

If the owners corporation is dissatisfied with the Tribunal's decision, it is able to appeal against that decision to the District Court. Normally, the appeal would need to be commenced within 28 days after the Tribunal's decision, although that time period can be extended in some circumstances. If

the owners corporation requires advice on its prospects for success in an appeal to the District Court, please let me know.

I trust you will find this summary of the Tribunal's decision helpful and I thank you for your instructions.

Yours faithfully

J.S. MUELLER & CO

Per: *Adrian Mueller*
Solicitor