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

28 July 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: ADVICE ON MEDIATION APPLICATION LODGED BY ANAGOS PTY LTD (LOT 21)

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1. My Brief

I am asked to review and provide the executive committee with advice concerning the application for mediation lodged by the owner of lot 21, Anagos Pty Ltd, with NSW Fair Trading on 14 July 2014. I am specifically asked to advise the executive committee on its proper response to the mediation application.

2. Executive Summary

I have concluded that:

- you are not under any obligation to send a copy of the mediation application to each owner in Cote d'Azur;
- the executive committee members may attend the mediation session organised by NSW Fair Trading but are under no obligation to do so;
- if Anagos Pty Ltd applies to a Strata Schemes Adjudicator for orders in the terms sought in the mediation application, the application will most probably be dismissed on the basis that:
    - an Adjudicator does not have power to order the owners corporation to pay money to Anagos Pty Ltd, or its predecessor, Universal Finance Holdings Pty Ltd, to refund lift maintenance fees paid after 12 December 2005; and
    - the alleged "unfairness" of Special By-Law No. 2 and the by-law's requirement for the owner of lot 21 to pay lift maintenance fees was determined adversely to Universal

Finance Holdings Pty Ltd in a previous strata adjudication and that ruling is likely to be binding on all of the parties.

I will now explain how I have arrived at these conclusions.

3. Legal Analysis

The strata legislation does not contain any requirement for an owners corporation or executive committee to send to owners copies of mediation applications that are lodged with NSW Fair Trading. Rather, the strata legislation only requires an owners corporation to send to owners a copy of an application to a Strata Schemes Adjudicator for orders: see section 136 of the *Strata Schemes Management Act 1996.* It follows you have no obligation to send copies of the mediation application to owners.

The strata legislation requires an owner, such as Anagos Pty Ltd, to attempt to resolve a dispute through mediation before applying to a Strata Schemes Adjudicator for orders. However the legislation does not require the respondent to an application for mediation (here, the owners corporation) to mediate. This means that you have only been invited to attend the mediation session to be held at NSW Fair Trading on 14 August 2014, but you are under no obligation to attend mediation. If you believe there will be some benefit in attending mediation, then the executive committee members should attend. If, however, you believe there is little to be gained from mediating the dispute, you are perfectly able to (and should) advise NSW Fair Trading that you decline the invitation to mediate.

In the mediation application, Anagos Pty Ltd alleges that relevantly:

- clauses C(iii) and (iv) of special by-law no. 2 which require the owner from time to time of lot 21 to maintain and repair the elevator and elevator tower which service the Opah Restaurant, and pay all lift maintenance fees, until a bridge is constructed over Gerrale Street, are unfair and should be repealed because on 12 December 2005 Sutherland Shire Council decided it would not build (or that there was no need to build) a bridge over Gerrale Street;

- consequently, since 12 December 2005, the owner of lot 21 (now Anagos Pty Ltd and previously Universal Finance Holdings Pty Ltd) was not (or should not have been) liable for paying lift maintenance costs, or for maintaining the elevator and elevator tower; and

- therefore, you should refund to the current and previous owners of lot 21 all lift maintenance fees paid since 12 December 2005.

A mediator is not able to make any binding orders. The role of a mediator is to attempt to help the parties resolve their dispute amicably. However, if mediation is unsuccessful then Argos Pty Ltd will be able to apply to a Strata Schemes Adjudicator for orders against the owners corporation principally under section 138 of the *Strata Schemes Management Act 1996.* An Adjudicator has broad powers to resolve strata disputes. However, an Adjudicator does not have any power to order the payment of damages: see section 138(3)(d). In my view, this means that an Adjudicator does not have power to order you to refund to the past and present owners of lot 21 lift maintenance fees

paid by them since 12 December 2005. Further, even if such a power existed, it is not likely to be exercised because:

- firstly - any claim for lift maintenance fees paid more than six years ago would be statute barred or time barred,

- secondly - the previously owner of unit 21, Universal Finance Holdings Pty Ltd, does not appear to apply for a refund of the fees paid by it up until it sold lot 21 in November 2013 and the current owner has no standing to apply for a refund on the previous owner's behalf,

- thirdly – the previous owner has already applied for a refund of lift maintenance fees and that application was rejected by a Strata Schemes Adjudicator (see my comments below).

On 27 September 2012, the previous owner of lot 21, Universal Finance Holdings Pty Ltd, applied to a Strata Schemes Adjudicator for a variety of orders against you. These included orders that Special By-Law 2 be repealed or, alternatively, clauses C(iii) and (iv) be deleted from the by-law, and that all charges paid by the owner of lot 21 under the special by-law for lift maintenance charges, and for the maintenance and repair of the elevator servicing the Opah Restaurant, be refunded.

On 18 January 2013, Strata Schemes Adjudicator Jeffery Smith rejected the application for those orders. Adjudicator Smith rejected the lot owner's argument that the obligation imposed on it to maintain and repair the elevator and elevator tower was temporary only. The Adjudicator recorded that as there was no disagreement that the bridge had not been constructed over Gerrale Street, and that the owner "remains responsible for the repair and maintenance of the elevator and elevator tower": at [54].

The Adjudicator made the following concluding remarks:

> *"It is therefore apparent that the clarification of the applicant's responsibilities in respect of the lift that is sought in the application, must be that the applicant continues to remain responsible for the repair and maintenance pending any building of the bridge over Gerrale Street. The question of a refund of sums paid relating to the maintenance of the elevator therefore does not arise."*: at [55] – [56].

The owners corporation appealed against certain aspects of Adjudicator Smith's decision to the Consumer, Trader and Tenancy Tribunal. The previous owner of lot 21 made no such appeal and therefore the findings of Adjudicator Smith on those issues remains undisturbed.

Normally, rulings made by a competent Tribunal are binding on the parties to litigation: *Port of Melbourne Authority -v- Anshun Pty Ltd* (Anshun Case) (1981) 147 CLR 589. In my view, a Strata Schemes Adjudicator is a competent Tribunal that has the power to make binding orders and therefore the conclusions reached by Adjudicator Smith are binding on you and Universal Finance Holdings Pty Ltd. This would operate to prevent the previous owner of lot 21 from applying for a refund of lift maintenance fees it paid you from December 2005 until November 2013 (and the current owner has no standing to apply for a refund of these fees because it did not pay them).

However, lot 21 was sold by Universal Finance Holdings Pty Ltd to Anagos Pty Ltd on about 22 November 2013. The question that then arises is as follows: is the ruling made by Adjudicator Smith binding on Anagos Pty Ltd?

In my view, that ruling is binding on Anagos Pty Ltd to the extent that the Adjudicator ruled that the proper meaning of Special By-Law 2 makes the owner from time to time of lot 21 responsible for the maintenance and repair of the elevator and elevator tower and all lift maintenance costs, until the bridge over Gerrale Street is built. This is because this was a ruling on the proper meaning of the by-law and this type of ruling is a ruling in rem and binds the whole world: see *PE Bakers Pty Ltd -v- Yehuda* (1988) 15 NSWLR 437 (where a ruling on the validity of a development consent was held to be binding on the whole of the world and could not be disturbed or disputed in subsequent litigation between different parties).

Further, there is also a very good argument that Anagos Pty Ltd is not able to apply to an Adjudicator to have Special By-Law 2 amended on different grounds to the application made by Universal Finance Holdings Pty Ltd because the two companies are controlled by the same person, Paul Kavadas, and there is a rule of litigation that parties are meant to bring forward their entire case at the one time rather than bring their case forward in a piecemeal fashion because that would give rise to an uncontrolled amount of litigation: see Anshun Case.

It follows, in my view, that if Anagos Pty Ltd applies to an Adjudicator to have Special By-Law 2 amended on essentially the same (or slightly different) grounds as Universal Finance Holding Pty Ltd did in 2012, its application would probably be dismissed essential on the basis that the same issues have already been dealt with by an Adjudicator and cannot be re-litigated.

I trust my advice will prove helpful and I now **enclose** my memorandum of fees. Thank you for your instructions.

Yours faithfully



J.S. MUELLER & CO
Encl.

Per: Adrian Mueller
Solicitor