Supreme Court

New South Wales

Case Name:	Khadivzad v The Owners – Strata Plan 53457
Medium Neutral Citation:	[2019] NSWSC 157
Hearing Date(s):	31 January 2019
Date of Orders:	26 February 2019
Decision Date:	26 February 2019
Jurisdiction:	Equity
Before:	Darke J
Decision:	Summons dismissed, with no order as to costs.
Catchwords:	LAND LAW – strata title – validity of by-laws – by-law granted exclusive rights to certain lot owners to use parts of common property for car parking – by-law purportedly repealed in 1999 by special resolution of Owners Corporation – no written consent obtained from lot owners concerned prior to repealing the by-law as required by Strata Schemes Management Act 1996 (NSW) ("SSM Act"), s 52(1)(a) – Change of By-Laws recorded on title within two years – proceedings commenced in 2018 to challenge validity of repeal – effect of SSM Act, s 52(3) – conclusive presumption after two years that all conditions and preliminary steps precedent to the making of a repealing by-law have been complied with and performed – requisite consent of owners is a condition or preliminary step precedent to the making of a repealing by-law – proceedings dismissed
Legislation Cited:	Strata Schemes (Freehold Development) Act 1973 (NSW), Part 4, Division 1 Strata Schemes Management Act 1996 (NSW), ss 42, 48, 51, 52, 162

Cases Cited:	James v The Owners Strata Plan No 11478 (No 4) [2012] NSWSC 590
Category:	Principal judgment
Parties:	Khosrow Khadivzad (Plaintiff) Strata Plan No 53457 (Defendant)
Representation:	Counsel: Mr M W Sneddon (Plaintiff) Solicitors: Fox & Staniland Lawyers (Plaintiff)
File Number(s):	2018/228417
Publication Restriction:	None

JUDGMENT

Introduction

1 Strata Plan No 53457 was established in October 1996. The strata scheme consisted of 32 lots located in a residential development in Milsons Point, NSW. The development involved a building of 8 storeys, with two basement levels.

2 The plaintiff is the sole registered proprietor of Lot 9 in Strata Plan 53457. The plaintiff initially acquired an interest in Lot 9 when he and his wife entered into a contract to purchase the lot in late 1999 or early 2000. The purchase was completed in April 2000 and the couple became the registered proprietors. In about January 2008 the plaintiff's wife transferred her interest in the property to the plaintiff.

3 These proceedings concern a special by-law that in its terms conferred upon a number of proprietors of lots in the strata scheme rights to exclusively use certain parts of the common property for the purpose of carparking. The special by-law provided, inter alia, that the proprietor of Lot 9 and persons authorised by the proprietor were entitled to the exclusive use and enjoyment of an area (marked "H" on the relevant plan) located on basement level 1 of the building.

4 At the time the plaintiff and his wife acquired Lot 9, the special by-law was noted in Item 3 in the Second Schedule on the title to the common property in the scheme. The notification read:

> By-law pursuant to section 58(7B) of the *Strata Titles Act, 1973*.

5 However, at the Annual General Meeting of the Owners Corporation held on 14 December 1999, a special resolution was passed to the effect that certain By-laws and Additional by-laws "be confirmed", and that "the Bylaws in existence up to this time be repealed".

6 The plaintiff alleges that the special resolution was not effective to validly repeal the special by-law. The plaintiff contends that the special by-law could only be validly repealed if done in accordance with s 52(1) of the *Strata Schemes Management Act 1996* (NSW) ("the Act"), which had come into operation on 1 July 1997. Section 52(1) of the Act provided:

> An owners corporation may make, amend or repeal a by-law to which this Division applies, but only:
>
> (a) with the written consent of the owner or owners of the lot or lots concerned and, in the case of a strata leasehold scheme, the lessor of the scheme, and
>
> (b) in accordance with a special resolution.

7 The plaintiff submitted that at least one of the owners of the lots concerned did not provide written consent to the repeal. In these circumstances, the plaintiff seeks declaratory relief to the effect that the special by-law remains in full force and effect.

8 The defendant Owners Corporation initially filed an ordinary appearance in the proceedings, but on 11 October 2018 it filed a submitting appearance whereby it submitted to the making of all orders sought save as to costs.

9 The matter was listed for hearing on 31 January 2019, at which time Mr Sneddon of counsel appeared for the plaintiff. Two affidavits of the plaintiff were read, together with an affidavit of Mr Adrian Culey who was at relevant times the owner of Lot 14. At the conclusion of the hearing directions were made to enable the plaintiff to make further submissions in writing. These further submissions were received by the Court on 15 February 2019.

The purported repeal of existing by-laws and adoption of new by-laws

10 On about 23 November 1999 notice was given of an Annual General Meeting of the Owners Corporation to be held on 14 December 1999. The agenda for the meeting included in the notice set out numerous motions to be considered at the meeting. One such motion was in the following terms:

> 10. Resolved that the Bylaws and Additional Bylaws, as attached to the Agenda for this meeting, be confirmed and that the Bylaws in existence up to this time be repealed.

11 The minutes of the Annual General Meeting record:

> 10. BY SPECIAL RESOLUTION RESOLVED that the Bylaws and Additional Bylaws, as attached to the Agenda for this meeting, be confirmed and that the Bylaws in existence up to this time be repealed.

12 The form of the By-laws and Additional By-laws said to have been attached to the agenda for the meeting is not in evidence. However, I am prepared to infer, based on a Change of By-Laws form lodged in November 2001, that the By-Laws and Additional By-laws attached to the agenda were in the form of the 32 by-laws set out in the annexure to the Change of By-Laws form (dealing number 8143795),

13 The terms of the special resolution do not expressly state that the special by-law is to be repealed. However, the terms, read as a whole, indicate clearly enough that all existing by-laws were to be repealed, including the special by-law. That is so even if, as submitted by the plaintiff, the special by-law is one that confers rights of a proprietary nature. I also do not accept the submission that the special resolution should be construed as merely intending to "amend the model by-laws recently introduced by the 1996 Act". The language rather suggests an intention that a new set of by-laws, in the form of the By-laws and Additional By-laws attached to the agenda, would supersede the existing by-laws, which would be wholly repealed.

14 I am satisfied, based on the evidence of Mr Culey, that the written consent of the owners of "the lots concerned" was not obtained prior to the passing of the special resolution on 14 December 1999 which purported to repeal the existing by-laws. Mr Culey was the owner of Lot 14, one of the lots that had the benefit of the special by-law. He was relevantly an owner of a lot concerned within the meaning of s 52(1)(a) of the Act in relation to any amendment or repeal of the

special by-law. He gave evidence that he was never requested to give his consent to the repeal of the special by-law, and he never gave his consent to its repeal. The conclusion that the requisite consents were not obtained is further supported by the terms of a letter dated 27 May 2000 sent by Mr Le Page, solicitor, to the secretary of the Owners Corporation.

15 It appears that the special resolution generated some controversy within the strata scheme. On 27 July 2000 a tenant of Lot 9 wrote to the plaintiff and his wife in the following terms:

> As your tenant of the above unit and carpark, we are writing to express our concern about recent events relating to the above carspace. Your right to the carspace was created as an "exclusive use of common property" in terms of Special By-Law 1 dated 27th June, 1995.
>
> At the last Annual General Meeting, an attempt was made to extinguish your right to the carspace in resolution 10, which purported to repeal the BYE-LAW. Subsequent advice from solicitors retained by the Management Committee confirms this resolution was invalid unless it was consented to by all 9 affected owners.
>
> Based on the AGM resolution, the building manager then proceeded to erect "VISITOR PARKING" signs on all 9 affected spaces and members of the management committee caused a variety of vehicles to be parked in those spaces, despite our repeated protests.
>
> It is plain from the proceedings at the last two Executive Committee Meetings (details attached), a further attempt is being made to cancel or restrict your right to use the car space.
>
> If these attempts are successful, the value of your unit would be greatly reduced and the terms of your lease with this company would be breached.
>
> We suggest you seek independent legal advice regarding defending your rights at this time. In that regard we would be pleased to put you in touch with the eight other owners similarly affected.

16 The plaintiff and his wife consulted a solicitor, Mr Rowlandson. Mr Rowlandson sent a letter to the secretary of the Owners Corporation on 1 September 2000 which included the following:

> We act for Khosrow Khadivzad and Yvonne Khadivzad, the owners of the above property ("the property") who are entitled to the exclusive use and enjoyment of the carparking area marked "H" ("the carpark") on strata plan no. 53457 by virtue of special by-law 1 created pursuant to Section 58(7B) of the Strata Titles Act 1973 ("the by-law").
>
> …
>
> Our clients instruct us that (the executive committee of) the Owners Corporation has –
>
> endeavoured/is endeavouring to repeal the by-law, and

> proceeded to erect visitor parking signs in the carpark and encouraged and/or caused vehicles to be parked therein ("the activities") despite the repeated protest of the tenant Kirribilli Lodge Motel Pty Ltd.
>
> As you are or should be aware, the by-law cannot be repealed without the consent of our clients who purchased the property on the basis that they and the persons authorised by them would be entitled to the continuing exclusive use and enjoyment of the carpark. Our clients will not consent to the repeal of the by-law.
>
> …
>
> We are instructed to advise that unless (the executive committee of) the Owners Corporation –
>
> forthwith removes/causes to be removed any visitor parking signs from the carpark, and
>
> forthwith ceases to encourage and/or cause vehicles to be parked in the carpark or otherwise continues to interfere with our clients' (and hence the tenant's) right to the exclusive use and enjoyment of the carpark then our clients will make immediate application for the appropriate declarations, injunctions and other appropriate orders (including for damages and costs) without further notice.

17 Questions concerning the effectiveness of the purported repeal of the special by-law remained alive for some time, into at least early 2001, but it seems that the issues were not resolved. No proceedings were taken to challenge the validity of the special resolution of 14 December 1999, or establish that the special by-law remained in effect.

18 In November 2001 the Owners Corporation lodged a Change of By-Laws form at the Land Titles Office. An historical title search indicates that the Change of By-Laws form (dealing number 8143795) was recorded in the folio in respect of the common property on 23 November 2001, and a new edition of the Certificate of Title was issued.

19 The Change of By-Laws form includes the following:

> The Owners-Strata Plan No 53457 certify that pursuant to a resolution passed on 14/12/1999 and in accordance with the provisions of –
>
> section 47 and 52 of the Strata Schemes Management Act 1996
>
> the by-laws are changed as follows –
>
> Repealed by-law No All By-Laws
>
> Added by-law No By-Laws 1 to 32 (inclusive)
>
> As fully set out below:
>
> See annexure hereto

The annexure to the form includes 32 by-laws.

20 As noted earlier, I infer from the content of the Change of By-Laws form that the 32 by-laws were the By-laws and Additional By-laws that were attached to the agenda for the Annual General Meeting of 14 December 1999, and hence the subject of the special resolution passed on 14 December 1999. I note that they include by-laws in addition to those set forth in Schedule 1 to the Act.

21 The 32 by-laws set out in the annexure to the form include "By-law 2 – Vehicles" which is in the following terms:

> An owner or occupier of a lot must not park or stand any motor or other vehicle on common property except with the prior written approval of the Owners Corporation.

The terms of this by-law are plainly inconsistent with the earlier special by-law.

22 In the period from 2002 to 2017 a number of further Change of By-Laws forms were lodged and recorded in the folio in respect of the common property. "By-law 2 – Vehicles" has remained in the same form throughout.

Determination

23 The special by-law was a by-law in force for the strata scheme when the Act came into operation on 1 July 1997 (see s 42(2) of the Act). It was a by-law that had been registered for the strata scheme in accordance with Division 1 of Part 4 [ss 54-70] of the *Strata Schemes (Freehold Development) Act 1973* (NSW) as in force immediately before its repeal.

24 The plaintiff submitted, correctly in my opinion, that following the commencement of operation of the Act the special by-law could only be repealed in accordance with the requirements of s 52(1) of the Act. This is because the special by-law was a by-law to which Division 4 of Part 5 of Chapter 2 to the Act applied.

25 Section 51(1) of the Act (which appeared in Division 4 of Part 5 of Chapter 2) provided:

> (1) This Division applies to a by-law conferring on the owner of a lot specified in the by-law, or the owners of several lots so specified:
>
> (a) a right of exclusive use and enjoyment of the whole or any specified part of the common property, or

> (b) special privileges in respect of the whole or any specified part of the common property (including, for example, a licence to use the whole or any specified part of the common property in a particular manner or for particular purposes),
>
> and to a by-law that amends or repeals such a by-law.

26 The special by-law conferred rights of a type falling within s 51(1)(a). Accordingly, Division 4 applied to the special by-law, and also to "a by-law that amends or repeals such a by-law".

27 As I have said, I am satisfied that the written consent of the owners of the lots concerned was not obtained prior to the passing of the special resolution on 14 December 1999 which purported to repeal the existing by-laws. However, s 52(3) of the Act provides:

> After 2 years from the making, or purported making, of a by-law to which this Division applies, it is conclusively presumed that all conditions and preliminary steps precedent to the making of the by-law were complied with and performed.

28 This provision was raised with Counsel in the course of the hearing. An opportunity to deal with the issue by way of further written submissions was sought and granted. The further submissions provided on 15 February 2019 largely concern the construction and effect of s 52(3).

29 The plaintiff stated that no "informative direct authority" concerning s 52(3) could be found. Reference was however made to the observations of Ball J in *James v The Owners Strata Plan No 11478 (No 4)* [2012] NSWSC 590 at [94]-[95].

30 Ball J there said:

> Section 52 of the SSM Act provides that the owners corporation may "make" a by-law under that section "but only" with the written consent of the owner or owners of the lot or lots concerned. The by-law is made by the owners corporation, but a pre-condition to making the by-law is the required consent. In my opinion, the owners corporation "makes" a by-law when it passes a valid resolution adopting the by-law in accordance with the relevant requirements of the SSM Act. That conclusion is supported by s 52(3) which provides for a conclusive presumption that "all conditions and preliminary steps precedent to the making of the by-law" were complied with after two years. Section 52(3) draws a distinction between the making of the by-law and the conditions and preliminary steps precedent to the making of the by-law. The use of the words "preliminary" and "precedent" indicate that those steps are steps to be taken before the making of the by-law. One such step must be the obtaining of written consent. Section 52(3) is saying (among other things) that that

> condition or preliminary step precedent is conclusively presumed to have taken place if no challenge is made to the by-law within two years.
>
> In my opinion, there is also a practical reason for interpreting s 52 as requiring written consent before a resolution is passed. That reason is that lot owners may well want to know whether written consent is forthcoming before voting on the resolution. The powers conferred by s 52 cannot operate any differently because they are being exercised by Mr Anderson under s 162 rather than by the owners corporation.

31 Ball J made those observations in the context of his determination of a different question, namely, whether a strata scheme manager appointed under s 162 of the Act could give the requisite consents of lot owners for the purposes of s 52(1)(a). However, his Honour clearly states that the required consent is a pre-condition to the making of a by-law to which s 52 applies, and further that the obtaining of the required consent is a condition or preliminary step precedent for the purposes of s 52(3). Accordingly, his Honour said, "that condition or preliminary step precedent is conclusively presumed to have taken place if no challenge is made to the by-law within two years".

32 I agree that obtaining the required consent is a condition or preliminary step precedent to the making of a by-law to which Division 4 applies. On that basis, s 52(3) seems to me to provide that after two years from the making or purported making of a by-law to which Division 4 applies, it is conclusively presumed that the consent requirement under s 52(1)(a) has been complied with. That construction appears to me to accord with the plain meaning of the words of the statute, viewed as part of the Act as a whole.

33 In the circumstances of the present case, s 52(3) appears to operate so that after two years from the passing of the special resolution on 14 December 1999 (a purported making of a by-law to which Division 4 applies), it is conclusively presumed that the consent requirement under s 52(1)(a) has been complied with.

34 The plaintiff seeks to avoid this result by submitting that s 52(3) does not prescribe the manner in which a "challenge" to a disputed by-law must occur, and by suggesting that the letter sent by Mr Rowlandson on 1 September 2000 could constitute such a "challenge". I do not accept that argument.

35 I would firstly observe that Ball J's paraphrasing of s 52(3), which refers to a lack of challenge within the two year period, imports language not found in s 52(3) itself. As the plaintiff suggests, the provision is not concerned with the manner in which an attack on the validity or effectiveness of a by-law may be made. This is dealt with elsewhere. The Act itself provides a means of attack in Chapter 5 (see Division 8 of Part 4 of Chapter 5). The institution of proceedings in a court of competent jurisdiction to seek declaratory relief is another possible means of attack. Secondly, and in any event, the mere writing of a letter of complaint which cannot itself affect the validity or effectiveness of a by-law, or initiate a process that might lead to such an affect, cannot be considered to constitute a "challenge" to a by-law, let alone a challenge that in some way prevents the conclusive presumption arising under s 52(3).

36 The plaintiff also submitted that s 52(3) was concerned only with the making or purported making of by-laws, not with the amendment or repeal of a by-law as in the present case. This submission seems to largely rest upon a comparison between the language of s 52(3) and the language of the predecessor provision, namely, s 58(7A) of the *Strata Titles Act 1973* (NSW), subsequently re-named as the *Strata Schemes (Freehold Development) Act*. Section 58(7A) provided:

> After the expiration of the period of 2 years that next succeeds the making, or purported making, of a by-law referred to in subsection (7) (including a by-law so referred to that amends, adds to or repeals another by-law), it shall be conclusively presumed that all conditions and preliminary steps precedent to the making of the by-law have been complied with and performed.

37 The plaintiff noted that the words in parentheses ("including a by-law…") are not included within s 52(3), and further noted that s 52(1) makes express reference to the amendment or repeal of by-laws. The plaintiff submitted that had s 52(3) been intended to encompass the amendment or repeal of a by-law, similar express references would have been included.

38 The difficulty with this submission is that it appears to overlook s 51(1), which provides that Division 4 (including s 52) applies not only to a by-law that confers rights of exclusive use and enjoyment of parts of the common property, but also to "a by-law that amends or repeals such a by-law". It follows that s

52(3) applies to the making of a by-law that amends or repeals an exclusive use by-law.

39 In my opinion, by adopting the new set of by-laws and repealing the existing by-laws (including the special by-law) the special resolution passed on 14 December 1999 involved the making of by-laws that repealed the special by-law. It follows that s 52(3) is applicable to the making, or purported making, of those by-laws.

40 Accordingly, after two years from 14 December 1999 it is conclusively presumed that all conditions and preliminary steps precedent to the making of the by-laws were complied with and performed. As those conditions and preliminary steps precedent include the consent requirement under s 51(1)(a), that requirement is now conclusively presumed to have been complied with. It is therefore not open to the plaintiff to now assert that the repeal of the special by-law was ineffective by reason of a failure to obtain consent as required by s 51(1)(a).

41 It should be noted for completeness that the changes to the by-laws effected by the special resolution passed on 14 December 1999 were recorded in the folio in respect of the common property on 23 November 2001. That was within the two year period provided for in s 48(2) of the Act. The new edition of the certificate of title that was issued on 23 November 2001 is not in evidence. However, any search of the register from that time would have revealed the Change of By-Laws form that clearly shows, inter alia, that by the special resolution of 14 December 1999 all by-laws had been repealed and new by-laws 1 to 32 had been added.

42 I should also record that the plaintiff, by reference to edition 11 of the certificate of title (issued on 22 February 2014), suggested that the certificate of title nonetheless continued to record the existence of the special by-law. Item 4 in the Second Schedule to that certificate of title reads:

> Attention is directed to the Strata Scheme by-laws filed with the Strata Plan.

43 The terms of the special by-law were filed when the strata plan was lodged for registration. However, I doubt that Item 4 is intended as a reference only to any by-laws that were filed at the time the strata plan was lodged for registration. It

is more likely intended as a general reference to all the by-laws that have been lodged and recorded in the register. Item 4 is immediately followed by Items 5 to 12, each of which refers to a Change of By-Laws. Item 5 refers to the Change of By-Laws that was recorded on 23 November 2001. I note further that, unlike the certificate of title in existence at the time the plaintiff and his wife purchased Lot 9, edition 11 of the certificate of title does not include the notation:

> By-law pursuant to section 58(7B) of the *Strata Titles Act, 1973*.

44 In these circumstances, I am unable to accept the plaintiff's submission that until a Consolidation/Change of By-Laws was recorded on 31 May 2017, the register continued to show the special by-law as in existence. On the contrary, the Change of By-Laws recorded on the folio would indicate to a reader that the special by-law had been repealed on 14 December 1999, and that since that time "By-law 2 – Vehicles" has provided that an owner or occupier of a lot must not park any vehicle on common property except with the prior written approval of the Owners Corporation.

45 For the above reasons, the Court declines to give the declaratory relief sought by the plaintiff to the effect that the special by-law remains in full force and effect. The Summons will be dismissed, with no order as to costs.

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