



## Supreme Court

## New South Wales

Medium Neutral Citation:	Colbert v MacDonald & Ors [2016] NSWSC 1291
Hearing dates:	28 July 2016
Decision date:	15 September 2016
Jurisdiction:	Common Law - Administrative Law
Before:	N Adams J
Decision:	(1) Quash the decision made by the third defendant on 28 October 2015. (2) That the parties be heard further as to costs.
Catchwords:	ADMINISTRATIVE LAW – judicial review – where plaintiff claims that he was denied procedural fairness – whether plaintiff received notice of application to Adjudicator – question of fact – unnecessary to consider ground  ADMINISTRATIVE LAW – judicial review of decision of Strata Schemes Adjudicator – whether decision affected by jurisdictional error – whether Adjudicator purported to exercise the wrong power – where Adjudicator did not comply with statutory pre-conditions to exercise of correct power – jurisdictional error made out - relief granted
Legislation Cited:	Civil and Administrative Regulation 2013 (NSW), cl 9(1) <a href="#">Civil and Administrative Tribunal Act 2013 (NSW)</a> , ss 34, 80. <a href="#">Evidence Act 1995 (NSW)</a> , s 69(1). <a href="#">Strata Schemes Management Act 1996 (NSW)</a> , ss 51, 52, 65A, 135, 136, 140, 144, 158, 171, 177, 217, 236. <a href="#">Supreme Court Act 1970 (NSW)</a> , s 69.
Cases Cited:	Annetts v McCann (1990) 170 CLR 596. Bat Advocacy NSW Inc v Minister for Environment Protection, Heritage and the Arts [2011] FCAFC 59. Brown v Bluestone Property Services Pty Ltd [2010] NSWSC 869. Buzrio Pty Limited v Consumer, Trader & Tenancy Tribunal [2009] NSWSC 836. Jarratt v Commissioner of Police (NSW) (2005) 224 CLR 44. Mahenthirarasa v State Rail Authority of New South Wales (2008) 72 NSWLR 273; [2008] NSWCA 201. Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24. Minister for Immigration and Citizenship v Khadgi (2010) 274 ALR 438; [2010] FCAFC 145. Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259; [1996] HCA 6. Minister for Immigration and Multicultural Affairs v Yusuf (2001) 206 CLR 323; [2001] HCA 30. Muin v Refugee Review Tribunal (2002) 76 ALJR 966. Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28.
Category:	Principal judgment
Parties:	Jamey Colbert (Plaintiff) John MacDonald (First Defendant) The Owners – Strata Plan 15005 (Second Defendant) Peter Smith (Third Defendant)
Representation:	Counsel: J E Lazarus with M E Sheldon (Plaintiff) In person (First Defendant)  Solicitors: Kennedys Law Firm (Plaintiff) Chambers Russell Lawyers (Second Defendant) NSW Crown Solicitor (Third Defendant)
File Number(s):	2015/00357448
Publication restriction:	Nil

## Judgment

1. These proceedings for judicial review arise from a dispute among lot owners in an apartment building in Darling Point as to whether one of them should be permitted to build a balcony onto his unit.
2. The plaintiff invokes this Court's supervisory jurisdiction, regulated by s 69 of the [Supreme Court Act 1970 \(NSW\)](#), in respect of a decision made on 28 October 2015 by the third defendant in his capacity as a Strata Schemes Adjudicator and Registrar of the Civil and Administrative Tribunal of NSW ("NCAT"). The plaintiff claims, *inter alia*, declaratory relief as well as relief in the nature of certiorari quashing the determination.
3. The claim for relief is based on an assertion that the plaintiff was denied procedural fairness by reason of the fact that neither the second nor third defendant provided him with any notice of the relevant application. This denied him the opportunity to oppose the application. The first defendant was the applicant in the proceedings before the third defendant.
4. In the course of the hearing, the plaintiff relied upon a second ground of review not previously pleaded in the summons nor included in written submissions. That ground was that the third defendant relied upon a wrong power in purporting to make the decision that he did and thus fell into jurisdictional error.
5. At the hearing before me, Mr Lazarus of counsel appeared with Mr Sheldon for the plaintiff. The second defendant ("the Owners Corporation") and the third defendant ("the Adjudicator") both filed submitting appearances save as for costs. This left the first defendant, who appeared in person, as the only contradictor in the proceedings.

### *Background*

6. The plaintiff is the owner of Lot 3 in Strata Plan 15505 ("the Strata Plan") situated at 3/1 Hampden Avenue, Darling Point NSW. The premises at 1 Hamden Avenue are a freestanding house divided into three separately owned units, with one unit on each floor. The plaintiff owns the unit on the top floor. The first defendant owns the unit on the ground floor (1/2 Hamden Avenue). Mr Jai Jai Yu owns the remaining property situated on the first floor (2/3 Hamden Avenue).
7. The back of the building and garden face onto Rushcutters Bay. The plaintiff's unit has a balcony overlooking the water, but the other two units do not. At some point in 2014, the first defendant and Mr Yu discussed their interest in also adding balconies to their respective units. In late 2014, they communicated this desire to the plaintiff at the Body Corporate Annual General Meeting ("AGM"). The plaintiff raised no objection, so the first defendant engaged an architect to draw up some plans.

8. On 12 April 2015, the first defendant emailed his architectural plans to the plaintiff and Mr Yu. Having received no reply by 19 April 2015, the first defendant sent the plans again with a request that any objection be communicated to him. Having received no reply a week later he engaged a solicitor to draft the necessary by-law for presentation to the plaintiff and Mr Yu.
9. The proposed "Special By-Law 4" granted the first defendant, as the owner of Lot 1, the exclusive use and enjoyment of the "Exclusive Use Area" and a special privilege in respect of the common property to carry out works at his own cost. The "Exclusive Use Area" is defined in the proposed by-law.
10. On 4 June 2015, an extraordinary general meeting ("EGM") was called. The plaintiff registered his veto to the proposed "Special By-Law 4" by proxy vote. Mr Yu did not attend but later explained to the first defendant that this was because he was not aware of the meeting.
11. Following the meeting the first defendant attempted unsuccessfully on a number of occasions to speak with the plaintiff concerning his objection. There was a factual dispute as to the precise nature of that communication.
12. During this time Mr Yu indicated to the first defendant that he did not oppose the application.
13. A general meeting was called for 22 June 2015 to discuss the proposed amendment to the by-law that would permit the balcony to be built. Mr Yu attended and voted in favour of the motion. The plaintiff did not attend and voted by proxy against the motion. In order for a special resolution to be passed, it was necessary that no more than 25% of owners entitled to vote be against the motion. As there were only three lot owners in Strata Plan 15505, in practical terms this meant that a unanimous vote was required to pass special resolutions.
14. On 26 June 2015, the first defendant made an application to NSW Fair Trading to arrange a mediation session. That mediation was scheduled for 28 July 2015.
15. On 15 July 2015, a meeting of the Executive Committee of the Owners Corporation of Strata Plan 15505 was held. The plaintiff again did not attend but voted by proxy not to table and adopt the application for mediation, and not to attend the mediation on 28 July 2015.
16. On 16 July 2015, the first defendant received notice from NSW Fair Trading that the plaintiff had declined the offer to mediate the matter.
17. On 21 July 2015, the first defendant applied to NCAT to have the matter adjudicated by a Strata Schemes Adjudicator appointed under s [217](#) of the [Strata Schemes Management Act 1996 \(NSW\)](#) ("the [SSM Act](#)"). He asked for orders under s [140](#) of the [SSM Act](#) to get consent to build a balcony

and stairs to the garden from his unit and under s [144](#) to use common property to support a balcony and stairs. The reasons given in the application form for requesting those orders were in these terms:

“I believe my special resolution to the Owners Corporation on the 22nd June 2015 for a bylaw to allow the erection of a balcony and stairs from my unit to the commonly owned garden was unreasonably declined. I wish to have the matter re-examined and adjudicated upon.”

18. On 22 August 2015, the first defendant received two identical copies of his application and a covering letter, one from NCAT and another from O'Neill Strata Management. The letter confirmed receipt of the first defendant's application and also informed him that he had until 15 September 2015 to lodge any submissions in support of it.
19. On 10 September 2015, the first defendant lodged a written submission supporting his application for orders under ss [140](#) and [144](#) of the [SSM Act](#).
20. On 28 October 2015, the decision-maker ordered the Owners Corporation under s [140](#) of the [SSM Act](#) to consent to “Special By-Law 4” for alterations to common property directly affecting the applicant owner's lot.

#### *The relevant legislation*

#### *By-laws conferring certain rights or privileges*

21. At the relevant time, the [SSM Act](#) governed the management of strata schemes in New South Wales. The legislative framework included provision for the making, amendment and repeal of by-laws in strata schemes.
22. The first defendant sought to introduce the relevant by-law at two EGMs under ss [51](#), [52](#) and [65A](#) of the [SSM Act](#). Sections [51](#) and [52](#) are found in Division 4 of Chapter 2 – Special privileges for by-laws conferring certain rights or privileges. Section [51](#) is particularly important:

#### **“51 Application of Division**

(i) 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.”

23. Section [52\(1\)](#) of the [SSM Act](#) provides:

**“52 How does an owners corporation make, amend or repeal by-laws conferring certain rights or privileges?**

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.”

24. Section 65A(1) is found in Part [2](#) of Chapter 3 of the [SSM Act](#) – Maintenance, repairs, alteration and use of common property and fire safety inspections. It provides, relevantly:

**“65A Owners corporation may make or authorise changes to common property**

(1) For the purpose of improving or enhancing the common property, an owners corporation or an owner of a lot may take any of the following action, but only if a special resolution has first been passed at a general meeting of the owners corporation that specifically authorises the taking of the particular action proposed:

- (a) add to the common property,
- (b) alter the common property,
- (c) erect a new structure on the common property.”

#### *Dispute resolution*

25. Chapter [5](#) of the [SSM Act](#) governs the resolution of disputes in relation to strata schemes. Part 4 of Chapter [5](#) provides certain powers to Adjudicators to make orders to settle disputes concerning the operation and management of strata schemes. Part 5 of that Chapter sets out the matters that are within the jurisdiction of NCAT and the orders that NCAT may make. An appeal lies to NCAT from orders made by an Adjudicator under s [177](#); however, the right to appeal is limited to certain classes of persons.

26. The first defendant’s application to the Adjudicator was expressed to be under ss [140\(1\)](#) and [144](#). Section [140\(1\)](#) provides:

**“140 Order relating to alterations and repairs to common property and other property**

(1) An Adjudicator may order an owners corporation to consent to work proposed to be carried out by an owner if the Adjudicator considers that the owners corporation has unreasonably refused its consent and the work relates to any of the following:

- (a) alterations to common property directly affecting the owner's lot,
- (b) carrying out repairs to common property or any other property of the owners corporation directly affecting the owner's lot."

27. Section [144](#) of the [SSM Act](#) provides:

**"144 Order granting certain licences**

- (1) An Adjudicator may order that the applicant for the order, and any occupier of the lot of which the applicant is the owner, may use specified common property in the manner, for the purposes, and on the terms and conditions (if any), that are specified in the order.
- (2) An Adjudicator must not make an order under this section unless satisfied:
  - (a) that the lot of which the applicant is owner would otherwise be incapable of reasonable use and enjoyment by the current owner or occupier of the lot or generally by an owner or occupier of the lot, and
  - (b) that the owners corporation has refused to grant a licence to use common property in a manner, for purposes, and on terms and conditions as would enable the current owner or occupier, or generally any owner or occupier, reasonably to use and enjoy that lot, and
  - (c) in the case of a leasehold strata scheme, that the lessor of the scheme has, before the making of the order, been given an opportunity to make representations to the Adjudicator with respect to the application for the order.
- (3) An order under this section, when recorded under section 209, has effect as if its terms were a by-law (but subject to any relevant order made by a superior court).
- (4) An application for an order under this section may be made only by an owner."

28. Section [158](#) of the [SSM Act](#) provides:

**"158 Order with respect to by-laws conferring exclusive rights or privileges over common property**

- (1) An Adjudicator may make an order prescribing the making, amendment or repeal, in terms of the order, of a by-law if the Adjudicator finds:
  - (a) on application made by an owner, that the owners corporation has unreasonably refused to make a by-law of the kind referred to in section [51](#), or
  - (b) on application made by an owner or owners corporation, that an owner of a lot, or the lessor of a leasehold strata scheme, has unreasonably refused to consent to the terms of a proposed by-law of that kind, or to the proposed amendment or repeal of such a by-law, or
  - (c) on application made by any interested person, that the conditions of such a by-law relating to the maintenance or upkeep of any common property are unjust.

(2) In considering whether to make an order under this section, an Adjudicator must have regard to:

(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](#).

(3) An Adjudicator must not determine an application referred to in subsection (1) (a) by an order prescribing the making of a by-law in terms to which the applicant or, in the case of a leasehold strata scheme, the lessor of the scheme is not prepared to consent.

(4) For the purposes of subsection (1), an Adjudicator may determine that an owner has unreasonably refused consent even though the owner already has the exclusive use or privileges that are the subject of the proposed by-law.

(5) An order under this section, when recorded under section 209, has effect as if its terms were a by-law (but subject to any relevant order of a superior court)."

#### *Notice requirements*

29. Where an application is made to an Adjudicator, the [SSM Act](#) imposes certain notice requirements on the Owners Corporation and on the principal registrar of NCAT.

30. Section [135](#) of the [SSM Act](#) relevantly provides:

##### **"135 Notice of application to be given**

(1) The principal registrar must give a copy of an application for an order under this Chapter to the owners corporation for the strata scheme to which the application relates and to any other person, not being the applicant, who, in the principal registrar's opinion, would be affected if the order sought were made.

(2) The copy of the application must be accompanied by a notice stating that the person to whom the notice is given may make a written submission to the principal registrar within a time specified in the notice, or within a longer time specified in any further notice given by the principal registrar.

(3) The principal registrar must give a notice to the applicant for the order stating that the applicant may make further written submissions to the principal registrar within a time specified in the notice, or within a longer time specified in any further notice given by the principal registrar."

31. Section [136](#) of the [SSM Act](#) relevantly provides:

##### **"136 Owners corporation to display and give certain notices**



(i) An owners corporation given a copy of an application for an order under this Chapter accompanied by the relevant notice must:

(a) immediately cause the application and notice or a copy of the application and notice to be prominently displayed on any notice board required to be maintained by or under the by-laws on some part of the common property, and

(b) keep the application and notice so displayed until the expiration of the time specified in the notice for the making of submissions, and

(c) immediately serve a copy of the application and notice on each person whose name appears on its strata roll.

(2) This section does not apply to an application for an order under Part 6 (Enforcement of orders of Adjudicators and Tribunal and certain notices)."

32. Section [236](#) of the [SSM Act](#) relevantly provides:

**" 236 Service of documents by owners corporation and others**

**(1) Application of section**

This section applies to service of a notice or other document required or authorised by this Act or the by-laws to be served by the Director-General, an Adjudicator, the Tribunal, an owners corporation, the lessor of a leasehold strata scheme, an executive committee or the secretary of an executive committee and is subject to the other provisions of this Act.

**(2) Service on occupier of lot**

A notice or other document may be served on the occupier of a lot:

(a) by post at that address, or

(b) by leaving it at the address of the lot with some person apparently of or above the age of 16 years.

**(3) Service where address is included in strata roll**

If an address for the service of notices on a person is recorded in the strata roll, a document may be served on the person:

(a) by post at that address, or

(b) by leaving it at that address with some person apparently of or above the age of 16 years.

**(4) Service on owner of lot**

A document may be served on the owner of a lot:

(a) personally, or

(b) by post at the address of the lot, or

- (c) by leaving it on a part of the lot that is the owner's place of residence or business (otherwise than on a part of the lot provided for the accommodation of a vehicle or as a storeroom), or
- (d) by leaving it in a place provided on the parcel for receiving mail posted to the lot, or
- (e) in any manner authorised by the by-laws for the service of notices on owners."

*The reasons of the Adjudicator*

33. The application was considered by the Adjudicator on 28 October 2015. The Adjudicator's reasons for decision are short. In their entirety they are as follows:

"1. The applicant seeks orders as follows:

Section [140](#) To get consent to build a balcony and stairs to garden

Section [144](#) To use common property to support balcony.

2. In support of the application the applicant provides:

Written submission

Photographs

Copy of development application to Council

Copy of proposed by-law

Copy of Extraordinary General Meeting of Owners Corporation SP 15005 of 4 June 2015

3. No submissions have been received from the respondent or any other lot owner.

4. The material provided by the applicant provides a comprehensive chronology of events and specific details of the proposal.

5. The by-law addresses the proposed structure, particulars of the construction and an obligation of the applicant to maintain the structures and any common property affected by the construction.

6. On 4 June, 2015 the Owners Corporation considered a resolution pursuant to Strata Schemes Management Act S [51](#), [52](#) and [65A](#) for the construction of a balcony and stairs. The resolution was not passed by the meeting.

7. The applicant submits that the Owners Corporation were unreasonable in their consideration of the proposed by-law at the extraordinary meeting.

8. The respondent has not provided any particulars of the matters that the Owners Corporation took into account in consideration of the proposed by-law or any reasons for the refusal.

9. On the material provided and in the absence of any submissions to the contrary the Adjudicator is satisfied that it is appropriate for consent to be granted to the proposed special by-law.

10. Orders are made accordingly

P.R Smith

Strata Schemes Adjudicator

28 October 2015

Registrar, Civil and Administrative Tribunal of NSW”

### *Threshold discretionary issue*

34. The first defendant asserted that the plaintiff has inappropriately elected to commence proceedings in the Supreme Court instead of lodging an appeal with NCAT.
35. Section [34](#) of the [Civil and Administrative Tribunal Act 2013 \(NSW\)](#) (“the [CAT” Act](#) ) relevantly provides:

#### **“34 Interrelationship between Tribunal and Supreme Court**

(1) The Supreme Court may:

(a) refuse to conduct a judicial review of an administratively reviewable decision if it is satisfied that, in all the circumstances, adequate provision is made for an internal review of the decision or an administrative review of the decision by the Tribunal under the [Administrative Decisions Review Act 1997](#) , or

(b) refuse to conduct a judicial review of a decision of an external decision-maker if it is satisfied that, in all the circumstances, adequate provision is made for the review of the decision by the Tribunal by way of an external appeal, or

(c) refuse to conduct a judicial review of a decision of the Tribunal if an internal appeal or an appeal to a court could be, or has been, lodged against the decision.

(2) This section:

(a) permits, but does not require, the Supreme Court to refuse to conduct a judicial review of a decision on a ground referred to in subsection (1), and

(b) does not limit any power that the Supreme Court has, apart from this section, to refuse to conduct a judicial review of a decision.”

36. Mr Lazarus on behalf of the plaintiff accepted, both as a matter of discretion and by virtue of the express terms of s 34 of the CAT Act, that if a right of appeal is available to the plaintiff this Court may decline to grant the relief sought. He submitted, however, that there is no statutory right of appeal available to the plaintiff.

37. Section [171](#) of the [SSM Act](#) provides:

**“171 Variation or revocation of order by Adjudicator**

(1) Unless specifically provided by this Act, an order made by an Adjudicator is not capable of being varied or revoked by the Adjudicator but this subsection does not prevent a subsequent order being made by the Adjudicator under this Part on a fresh application.

(2) This section does not operate to prevent an Adjudicator from varying an order, whether or not on application, for the purpose of correcting or clarifying it or extending a time and the order as so varied is taken to be the order instead of the original order.

(3) An application under this section may be made by any of the following persons:

(a) the owners corporation,

(b) the lessor of a leasehold strata scheme,

(c) the applicant for the original order,

(d) any person who made a written submission on the application for the original order,

(e) any other person who is required by the original order to do or refrain from doing a specified act.”

38. Section [177](#) of the [SSM Act](#) relevantly provides:

**“177 Appeal against order of Adjudicator**

(1) Each of the following persons may appeal against an order made by an Adjudicator under this Part:

(a) the applicant for the order,

(b) a person who made a written submission on the application for the order,

(c) a person required by the order to do or refrain from doing a specified act,

(d) in the case of a leasehold strata scheme, the lessor of the strata scheme.

Note. An appeal under this section is an external appeal to the Tribunal for the purposes of the [Civil and Administrative Tribunal Act 2013](#).

- (2) The only ground of appeal against the granting of an interim order is that the Adjudicator acted unreasonably in making the order.
- (3) An appeal must be lodged:
  - (a) in the case of an appeal against an order dismissing an application—not later than 21 days after the order takes effect, or
  - (b) in the case of an appeal against any other order:
    - (i) not later than 21 days after the order takes effect, or
    - (ii) by leave of the Tribunal (given on sufficient cause being shown why the notice was not lodged within the time limited by paragraph (a))—not later than 90 days after the order takes effect.
- (4) Section 41 of the Civil and Administrative Tribunal Act 2013 does not apply in relation to the periods referred to in subsection (3).”

39. Section 80 of the CAT Act provides:

**“80 Making of internal appeal**

- (1) An appeal against an internally appealable decision may be made to an Appeal Panel by a party to the proceedings in which the decision is made.

Note. Internal appeals are required to be heard by the Tribunal constituted as an Appeal Panel. See section 27 (1).

- (2) Any internal appeal may be made:
  - (a) in the case of an interlocutory decision of the Tribunal at first instance—with the leave of the Appeal Panel, and
  - (b) in the case of any other kind of decision (including an ancillary decision) of the Tribunal at first instance—as of right on any question of law, or with the leave of the Appeal Panel, on any other grounds.
- (3) The Appeal Panel may:
  - (a) decide to deal with the internal appeal by way of a new hearing if it considers that the grounds for the appeal warrant a new hearing, and
  - (b) permit such fresh evidence, or evidence in addition to or in substitution for the evidence received by the Tribunal at first instance, to be given in the new hearing as it considers appropriate in the circumstances.”

40. Clause 9(1) of the *Civil and Administrative Regulation 2013* (NSW) (“CAT Regulation”) provides:

**“ 9 Additional power to set aside or vary decision determining proceedings**

(i) In addition to any power that is expressly conferred on the Tribunal by the Act or enabling legislation to set aside or vary its decisions, the Tribunal may order that a decision it has made that determines proceedings be set aside or varied in either of the following circumstances:

(a) if all of the parties to the proceedings have consented to the making of the order to set aside or vary the decision,

(b) if the decision was made in the absence of a party and the Tribunal is satisfied that the party's absence has resulted in the party's case not being adequately put to the Tribunal."

41. "Tribunal" is defined in s 4 of the CAT Act. The definition does not include an Adjudicator such as the third defendant. The provisions relating to appeals from the Adjudicator do not extend to the plaintiff as he is not a party to the decision and also because the adjudicator is not "the Tribunal."
42. Had the plaintiff put in a submission in relation to the application, he would have fallen within the relevant appeal provisions. However, I am satisfied that, because he did not do so, he has no appeal right within NCAT itself. Accordingly, s 34 does not stand as a discretionary barrier to the relief sought.
43. I am satisfied that it is appropriate that this Court deal with this matter in its supervisory jurisdiction.

#### *The hearing*

44. In support of his application, the plaintiff read three affidavits sworn by him on 4 December 2015, 28 January 2016 and 25 July 2016 respectively. There was no objection to those affidavits. The first defendant also filed and read two affidavits, with annexures, affirmed by him on 14 January 2016 and 4 February 2016 respectively.
45. The evidence adduced at the hearing of this matter concerned the first of the two grounds of review; namely, that the plaintiff was denied procedural fairness because he did not receive notice of the first defendant's application to the Adjudicator.
46. The plaintiff gave evidence that he usually receives letters or notices in relation to strata matters in the mailbox at the front of the unit block or by email. He stated that he did not receive notification by email of the first defendant's application.
47. In cross-examination, the plaintiff said that he did not check the body corporate mailbox. He stated in re-examination that he has checked the body corporate mailbox twice in the last four years, the time during which he has lived in the building. He checked the mailbox on those occasions because he noticed flyers falling out of it. He agreed that it had not been suggested to him that it was his responsibility to check the body corporate mailbox.

48. The plaintiff said that he did not take up the first defendant's invitation to air his objections to the balcony plans because he "wanted the three owners to sit down and discuss the matter." He said that he accepted the first defendant's offer to mediate the matter with Fair Trading.
49. Mr Lazarus objected to an annexure to the affidavit of the first defendant affirmed 14 January 2016. The document to which the plaintiff objected is in the form of a computer printout of a table with columns variously headed "ID", "Date", "Strata Plan", "Recipient", "Suburb", "Details", "Envelopes" and "Stamps". The ninth row of the table contains the following details "24145", "21/08/2015", "15005", "ALL OWNERS", "VARIOUS", "LETTER FROM NCAT", "3", "3".
50. The first defendant called John O'Neill in his case in order to establish a basis for the admissibility of the table under s 69(1) of [Evidence Act 1995 \(NSW\)](#) for "business records". Mr O'Neill is the licensee in charge of O'Neill Strata Management. He gave evidence that he had instructed his staff to forward a copy of the relevant notice to the owners at 1 Hampden Avenue. He said that the table was an extract from the electronic mailing system of O'Neill Strata Management. It indicates that, on 21 August 2015, there was a letter from NCAT mailed to all owners of Strata Plan 15005.
51. I was satisfied that the table described at [49] above fell within the exception to the hearsay rule contained in s 69(1) of the *Evidence Act*.
52. Mr O'Neill gave evidence that he last visited the premises about 12 years ago and that there was no noticeboard in the foyer at that time. He was not aware whether the by-laws required that there be a noticeboard.
53. Mr O'Neill agreed with Mr Lazarus in cross-examination that he did not affix stamps to letters to lot owners, nor did he physically post letters. He did not make the data entry extracted at [49] above in relation to mail sent to lot owners at 1 Hampden Avenue on 21 August 2015.

#### *The plaintiff's submissions*

#### *Procedural fairness*

54. The plaintiff submitted that the relevant principles with respect to procedural fairness are well established and uncontroversial. If a person's rights will be adversely affected by a determination made by an administrative decision-maker, such as the third defendant, then that person should be informed of the application in order to be afforded the opportunity to be heard in relation to it: [Annetts v McCann](#) (1990) 170 CLR 596 at 598; [Muin v Refugee Review Tribunal](#) (2002) 76 ALJR 966 at 989. This general principle is only excluded in circumstances where the relevant statute conferring power on the administrative decision-maker provides otherwise by plain words of necessary intendment: [Annetts v McCann](#) at 598 per Mason CJ, Deane and McHugh JJ; [Jarratt v Commissioner of Police \(NSW\)](#) (2005) 224 CLR 44 at 56 per Gleeson CJ.

55. The plaintiff submitted that there is nothing in the SSM Act that would oust the operation of the principles of procedural fairness by plain words of necessary intendment. Indeed, the SSM Act explicitly imposes notice obligations. Both ss 135 and 136 of the SSM Act required that he be given notice of the first defendant's application and accompanying notice. Section 135 imposes an obligation on the principal registrar of NCAT to give a copy of the relevant application and notice to the Owners Corporation and to any person who, in the registrar's opinion, would be affected by the order sought. Section 136 imposes an obligation on Owners Corporation, having received copies of the application and notice from the principal registrar, to display them on a noticeboard and to serve copies on each person whose name appears on the strata roll.

56. In this respect, the plaintiff relied on the decision of Rothman J in Buzrio Pty Limited v Consumer, Trader & Tenancy Tribunal [2009] NSWSC 836, in which his Honour rejected a submission to the effect that the SSM Act ousted the requirements of procedural fairness. His Honour held at [34] and [36]:

"The clear purpose of the provisions of ss 135 and 136 of the SSM Act is to ensure that lot owners (assuming their name appears on the strata roll) are given the opportunity to make submissions in relation to any application for an order in relation to their property...

...

The Act requires the service on lot owners, not only of the application, but the notice informing them of the time in which they may make submissions. The Act requires the Registrar to inform those that the Registrar considers have an interest, other than lot owners, and requires the Owners Corporation to serve the lot owners."

57. The plaintiff's submission is that he did not receive notice of the first defendant's application in any of the ways for which ss 135 and 136 provide and was therefore denied procedural fairness. This is largely a question of fact.

58. Mr Lazarus submitted that the evidence in the first defendant's case, even assuming that it is admissible, is not sufficient to prove the "core and indispensable matters" identified by Barrett J in Brown v Bluestone Property Services Pty Ltd [2010] NSWSC 869 at [13] to prove service by post:

"In order to prove service by post, it is necessary that the evidence of one or more witnesses establish a number of core and indispensable matters: that the document said to have been served by posting of it to a given address was placed inside an envelope, that the envelope had that address written or typed on its face, that a postage stamp or franking of the necessary amount was affixed to the envelope and that the envelope so addressed and stamped or franked was physically deposited in the post either at a post office or by being dropped into a post box for the reception of mail articles."

59. Mr Lazarus accepted that, in this statutory context, the plaintiff bears the onus of proving on the balance of probabilities that he did not receive the application and notice. He submitted that the plaintiff had, by his evidence, discharged his onus. The evidential burden then shifted to the first defendant. Mr Lazarus submitted that the evidence adduced in the first defendant's case



would not persuade the Court that the plaintiff has failed to discharge his onus to the usual civil standard.

60. The plaintiff submitted that, if he establishes on the balance of probabilities that he did not receive notice, then he was denied procedural fairness and is entitled to the relief sought.

#### *Relevant power*

61. During the hearing of the appeal, Mr Lazarus on behalf of the plaintiff relied upon a second ground in support of his application for review that had not previously been raised in either the summons or the written submissions. The second ground of review is that the Adjudicator fell into jurisdictional error by purporting to make an order under s [140](#) of the [SSM Act](#), when the appropriate power lay in s [158](#).
62. The first defendant's application to the Adjudicator was said to be brought pursuant to "Section 140 – Order relating to alterations and repairs to common property and other property". Section [140](#) provides that an Adjudicator may order an owners corporation to consent to work proposed to be carried out on the common property. The plaintiff submitted that this was never an application for consent to the carrying out of work on the common property. Nor did the order made satisfy the statutory description of an order that the owners corporation consent to work. The order was that the owners corporation consent to a by-law.
63. If s [140](#) of the [SSM Act](#) was irrelevant then, it was submitted, s [144](#) was even more irrelevant. The Adjudicator ultimately did not rely on s [144](#).
64. "Special By-Law 4" was to be made pursuant to ss [51](#), [52](#) and [65A](#) of the [SSM Act](#). It concerned a grant of exclusive use and enjoyment of a part of the common property to one lot owner, the first defendant. It was squarely within the terms of s [51](#) of the [SSM Act](#).
65. Section [158](#) confers a power on Adjudicators to make orders with respect to by-laws conferring exclusive rights or privileges. Mr Lazarus acknowledged that purporting to exercise the wrong power would not invalidate a decision by itself if an administrative decision-maker otherwise had the power to do what he or she did, subject to compliance with any statutory requirements as were preconditions to the exercise of the correct power.
66. In the plaintiff's submission, the Adjudicator did have a power under s [158\(1\)](#) to make the order that he purported to make. However, the exercise of the power in s [158\(1\)](#) is conditioned by the obligation to have regard to "the interests of all owners in the use and enjoyment of their lots and common property"; s [158\(2\)\(a\)](#). The Adjudicator's reasons do not reveal that he had regard to the interests of the owners of Lots 2 and 3 in Strata Plan 15005. The plaintiff therefore submitted that the decision-maker failed to take into account a mandatory consideration.

67. The plaintiff relied upon the decision of the Full Court of the Federal Court in Minister for Immigration and Citizenship v Khadgi (2010) 274 ALR 438; [2010] FCAFC 145 (“*Khadgi*”) at [57]-[59] in support of a submission that the Adjudicator was required actively and genuinely to engage with the consideration in s 158(3)(a) :

“Section 109(1)(c) of the Act obliges the Tribunal to “have regard to” the prescribed circumstances set out in reg 2.41. The consideration of those prescribed circumstances is thus a jurisdictional prerequisite to the exercise of the Ministerial discretion to cancel a visa under s 109. In order to comply with that prerequisite, the decision-maker must engage in what has been described as “an active intellectual process” in which each of the prescribed circumstances receives his or her “genuine” consideration: Tickner at 462 (per Black CJ) and Minister for Immigration and Multicultural Affairs v Jia Legeng (2001) 205 CLR 507 at [105] (per Gleeson CJ and Gummow J).

...

“Similarly, a decision-maker does not take into account a consideration that he or she must take into account if he or she simply dismisses it as irrelevant.”

68. The plaintiff submitted that, in any event, the Adjudicator could not have had regard to the matter in s 158(2)(a) as no material or insufficient material was put before him with respect to it.
69. The plaintiff’s ultimate submission was that the Adjudicator diverted himself from the proper statutory power by applying the wrong provision. Mr Lazarus submitted that the Adjudicator’s misdirection as to the relevant provision is as clear a jurisdictional error as one could hope to find.

#### *The first defendant’s submissions*

##### *Procedural fairness*

70. Various portions of the first defendant’s affidavits were in the nature of submissions and I take them into account on that basis. The first defendant submitted that it is a “mystery” why the plaintiff never received a copy of his application and accompanying notice. He submitted that the table to which I refer at [49] above shows that O’Neill Strata Management sent the relevant notification on 21 August 2015.
71. The first defendant also submitted that he and Mr Yu both received copies of the application and notice. He suggested that the plaintiff’s being overseas from 20 August 2015 to 23 August 2015 may have played a part in his failure to receive notice of the Adjudication. He submitted that he has pursued the appropriate avenues in order to build his balcony lawfully. In particular, he has sought to include the plaintiff in mediation. He should not be prejudiced by the failure of the plaintiff to receive the application and notice in circumstances where it was not his responsibility to ensure that he did so.

##### *Relevant power*

72. The first defendant was afforded the opportunity to file supplementary submissions on the second ground of review. He indicated that he did not wish to adopt that course as he had followed the argument in Court and had nothing further to add.

### *Consideration*

73. I propose to deal with the second ground of review first. That ground concerns whether the Adjudicator fell into jurisdictional error by purporting to exercise his power under the wrong statutory provision. It is convenient to commence consideration of that ground by having regard to some general principles regarding the exercise of statutory power by administrative decision-makers.
74. When a statute confers a power upon a person or body on certain terms, a failure to exercise the decision-making power in accordance with the terms on which jurisdiction was conferred can constitute jurisdictional error: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28 at [91] (“*Project Blue Sky*”). However, it will not always be the case that failure to comply with a statutory pre-condition to the exercise of a decision-making power will invalidate the decision. The High Court (McHugh, Gummow, Kirby and Hayne JJ) stated in *Project Blue Sky* at [91]:

“An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition.”

75. A statute may prescribe pre-conditions to the exercise of a power that are in the nature of mandatory considerations. The Full Court of the Federal Court of Australia in *Khadqi* at [58]-[60], considered the question of what is required of an administrative decision-maker with respect to factors that must be taken into account. Citing Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 41, the Court stated at [58] that the weight to be given to a particular factor is generally a matter for the decision-maker.
76. The Full Court of the Federal stated in *Bat Advocacy NSW Inc v Minister for Environment Protection, Heritage and the Arts* [2011] FCAFC 59 (“*Bat Advocacy*”) at [44]:

“The obligation of a decision-maker to consider mandatory relevant matters requires a decision-maker to engage in an **active intellectual process**, in which each relevant matter receives his or her **genuine consideration** (see *Tickner v Chapman* (1995) 57 FCR 451 at 462 and *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507 at [105]).” [emphasis added]

77. Failure to give any weight to a factor “may support an inference that the decision-maker did not have regard to that factor at all”: *Khadqi* at [58]-[60]. Where the reasons of a decision-maker do not mention whether regard was had to a mandatory pre-condition to the exercise of a power, it might be inferred that no consideration was in fact given to it: *Bat Advocacy* at [44]. However, that fact is not determinative: see *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323; [2001] HCA 30 at [5] per Gleeson CJ; at [35] per Gaudron J; at [69] per McHugh, Gummow and Hayne JJ. Whether such an inference should be drawn will depend on the circumstances of the particular case: *Khadqi* at [59]; *Bat Advocacy* at [44].
78. The issue for determination before the Adjudicator was whether a by-law granting exclusive law and special privileges should be made. At [9] of his reasons, the Adjudicator stated that he was “...satisfied that it is appropriate for consent to be granted to the proposed special by-law.” The reasons disclose that the Adjudicator had a copy of the proposed by-law before him in making his decision. He noted at [6] that the by-law was to be made by way of special resolution pursuant to ss 51, 52 and 65A of the *SSM Act*.
79. Despite this, the first defendant in his handwritten application to the Adjudicator expressed that he sought orders pursuant to ss 140 and 144 of the *SSM Act*. The Adjudicator’s reasons state that the power that he purported to exercise was that conferred under s 140 of the *SSM Act*. That section confers upon an Adjudicator the power to order an Owners Corporation to consent to work proposed to be carried out by an owner. The power is conferred subject to the Adjudicator being satisfied of two matters. First, he or she must consider that the Owners Corporation has unreasonably refused consent for the relevant work. Second, the relevant work must pertain to either alterations to common property directly affecting the owner’s lot or to the carrying out of repairs to common property or any other property directly affecting the owner’s lot. Section 140 does not confer upon the Adjudicator the power to order that the Owners Corporation consent to the passage of a by-law.
80. Section 144 pertains to the granting of a licence over specified common property. The material before the Adjudicator did not disclose that the first defendant in fact made such an application, beyond merely citing the provision. Section 144(2) provides that, in order to make an order under s 144(1), the Adjudicator must first be satisfied both that the owner/applicant’s lot would otherwise be incapable of reasonable use and enjoyment and also that the owners corporation has refused to grant a licence to use common property on terms that would enable the owner or occupier to reasonably use and enjoy that lot. There was no mention of these considerations in the reasons, no doubt because the subject matter of the Adjudicator’s decision clearly did not concern s 144.
81. In those circumstances, the Adjudicator ought to have realised that ss 140 and 144 were not sources of power to do that which he purported to do. Section 140 could not have provided the basis for the Adjudicator’s power as the substance of the orders sought went beyond consent to alter common property. Nor was s 144 relevant to the Adjudicator’s exercise of power. Indeed, the Adjudicator did not engage with s 144 at all, despite expressly stating at the outset of his reasons that the first defendant invoked s 144.

82. I am satisfied that the decision maker failed to have regard to what power he was exercising when he made the orders he did. That is not the end of the matter, however, because the Adjudicator did have the power to order that the by-law be made under s [158](#) of the [SSM Act](#). If I were satisfied that the decision-maker complied with the statutory pre-conditions set out in s [158\(2\)](#), then the decision would not necessarily be infected by jurisdictional error. The relevant issue is therefore whether the Adjudicator complied with the pre-conditions to the exercise of his power under s [158\(1\)](#) of the [SSM Act](#).
83. Section 158 of the SMM Act confers upon an Adjudicator the power to make an order prescribing the making, amendment or repeal of a by-law conferring exclusive rights or privileges over common property. That power is to be exercised subject to being satisfied of a number of matters. First s [158\(1\)](#) relevantly provides that the Adjudicator “must” be satisfied that the owners corporation has unreasonably refused to make a by-law of the kind referred to in s [51](#). Significantly, s [158\(2\)](#) sets out two further considerations to which the Adjudicator “must” have regard; namely, the interests of all owners in the use and enjoyment of their lots and common property, and the rights and reasonable expectations of any owner deriving or anticipating a benefit under a by-law of the kind referred to in s [51](#). Given the language of s [158](#), I am satisfied that a breach of these requirements would constitute jurisdictional error.
84. The reasons do not disclose that the Adjudicator had any regard to the specific statutory obligation in s [158\(2\)](#) to take into account the interests of *all* owners in the use and enjoyment of their lots in common property. It was a precondition to the exercise of power that he do so. The reasons note that the Adjudicator had before him a comprehensive chronology of the relevant events, as well as specific details of “Special By-Law 4”. He noted the contents of the relevant by-law, the fact that the special resolution was pursuant to ss [51](#), [52](#) and [65A](#) of the [SSM Act](#), and the first defendant’s submission that the Owners Corporation was unreasonable in its consideration of the proposed by-law at the EGM. The reasons note that the Adjudicator had no particulars of the matters that the Owners Corporation took into account in considering the proposed by-law or any reasons for the refusal. The reasons also state that there were no submissions contrary to the application before him.
85. I am satisfied that the Adjudicator did not engage in any active intellectual process or give genuine consideration to the question of whether the decision of the Owners Corporation was unreasonable nor was there any consideration at all of the interests of *all* owners in the use and enjoyment of their lots and the common property.
86. Overall, I am satisfied that the Adjudicator applied an incorrect statutory provision in making his decision in this matter. By having regard to the wrong section, the Adjudicator diverted himself from his statutory task, and in failing to apply the correct power, the Adjudicator fell into jurisdictional error. It could not be concluded that the Adjudicator exercised his power under s [158](#) to prescribe the relevant by-law, as he did not comply with the statutory pre-conditions required by that section.

87. As I have found that the Adjudicator did not exercise his power according to his statutory remit, there is no need for me to go on to consider whether there was also a denial of procedural fairness.

#### *Other discretionary considerations*

88. Jurisdictional error is established. I am satisfied that the plaintiff's interests are adversely affected by the decision and that there are no alternative avenues of appeal or review available to him. His only available remedy was to seek judicial review in this Court. These proceedings were brought in a timely manner. There is no discretionary basis upon which I would refuse to grant the relief sought.
89. I inquired of Mr Lazarus as to whether there would be any point in granting the declaratory relief in the event that I granted the other relief sought. He conceded that there was not. In those circumstances I do not propose to make the declarations sought.

#### *The question of costs*

90. During the hearing of the appeal, I raised the question of costs with counsel for the plaintiff. Mr Lazarus properly conceded that if I were to find jurisdictional error upon the second of the two bases upon which the plaintiff relied, the first defendant should not be liable for any costs incurred as he was not put on notice of that ground until the hearing. Mr Lazarus did, however, raise the question of whether the second or third defendants who had filed submitting appearances save as for costs should be given notice and required to attend Court in relation to the appropriate costs order. He requested that I reserve my decision on the issue of costs. I note that the second defendant is the Owners Corporation, of which the plaintiff is one of the three members.
91. Although it is not the case that costs would ordinarily be awarded against an administrative decision-maker who has filed a submitting appearance, it is not without precedent: see [\*Mahenthirarasa v State Rail Authority of New South Wales\*](#) (2008) 72 NSWLR 273; [2008] NSWCA 201 per Basten JA at [21]. I propose to defer the questions of costs to a future date in order to give the second and third defendants an opportunity to be heard in relation to this issue.

#### *ORders*

92. The orders which I make are as follows:
1. Quash the decision made by the third defendant on 28 October 2015.
  2. That the parties be heard further as to costs.

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