Civil and Administrative Tribunal

New South Wales

Case Name:	The Owners-Strata Plan No 6534 v El Khouri
Medium Neutral Citation:	[2015] NSWCATCD 147
Hearing Date(s):	22 September 2015 and 23 September 2015
Decision Date:	4 December 2015
Jurisdiction:	Consumer and Commercial Division
Before:	J A Ringrose, General Member
Decision:	1. The appeal is dismissed and the orders of the Adjudicator are affirmed. 2. The application for reinstatement of repealed By-law 2 is dismissed. 3. The application for repairs is dismissed. 4. The Tribunal prescribes the making of a By-law in the terms set out as motion 10 in the notice of annual general meeting on 4 December 2013, a copy of which is attached to these orders. The Owners Corporation is forthwith to do all acts and things necessary to register the By-law with the Registrar General. The applicant is to pay and bear all costs of the registration of the By-law.
Catchwords:	Prescription of special By-law – persons entitled to vote at general meetings.
Legislation Cited:	Strata Schemes Management Act 1996 ss 138, 157, 158, 177 & 181
Cases Cited:	Zouk v Owners Corporation Strata Plan 4521 and anor [2005] NSWSC 845 Costa and anor v The Public Trustee of New South Wales [2008] NSWCA 223 Gett v Tabet [2009] NSWCA 76 The Owners SP56911 v Stricke [2012] NSWCTTT 392 The Owners SP 32033 v Mullins [2015] NSWCATD 23 Nolan v Owners Corporation SP 5803 [2013] NSWCTTT 220 Owners Corporation SP 7596 v Risidore and Ors [2003] NSWSC 966 Chen and Ors v Owners Corporation SP 65870 [2010] NSWCTTT 330 Reen v Owners Corporation SP 300 [2008] NSWSC 1105
Category:	Principal judgment
Parties:	The Owners-Strata Plan No 6534 (Applicant) Said El Khouri (Respondent)
Representation:	Counsel: Mr Ireland - respondent Solicitors: Ms J Crittenden (applicant) Bayside Solicitors (respondent)
File Number(s):	SCS 15/07057
Publication Restriction:	Nil

REASONS FOR DECISION

BACKGROUND

1. This is one of two appeals from two separate Adjudicator's decisions in proceedings between Mr Said El Khouri and the Owners Strata Plan 6534.

2. The strata scheme is located at [xxx] Street, Point Piper and the strata plan was registered on 15 February 1973. The respondent herein is the registered proprietor of Lot 11 which is a penthouse apartment located on the 5th and 6th floors of the building.

3. There are 11 residential units in the building and there are 2 units each on the ground floor, first, second, third and fourth floors known as lots 1 to 10. Each of these lots is a two bedroom unit apart from lot 2 which was a one bedroom unit which has recently been converted into a three bedroom unit. The lift in the building travels to levels 1 through to 4 without a security key but access to level 5, being the lower level of lot 11, requires the use of a security key.

4. Common property in the building includes the lift well landings, fire stairs and other stairs throughout the building. It was apparently built in the 1920s and was originally called the Buckingham Hotel.

5. Strata Plan number 6534 was registered on 15 February 1973 and when first registered, the plan comprised 11 lots and common property.

6. On 5 April 1973 the council of the Body Corporate passed a resolution which had the effect of granting exclusive use of parts of the common property to various lot owners. This resolution was not at the time registered as a special use By-law.

7. On 24 August 1992 Mr Rankine, the then owner of lot 11, lodged an application for development approval with the Woollahra Municipal Council which involved works comprising a lean to glass enclosure on the existing flat roof space on the northern side of lot 11. The glass lean to structure was approved by the Council on 8 December 1992.

8. Part of the glass and aluminium structures built in 1992 and a further structure built in 1998 were constructed to rectify and prevent water penetration problems into lots 9, 10 and 11.

9. Special By-law 2 was passed in 2002 giving lot 11 exclusive use rights over common property but the By-law was repealed in May 2005.

10. Mr John Rankine and his wife owned lot 11 until August 2005 when it was purchased by Mr and Mrs Con Mavromatis and in August 2007 it was transferred to its present owner Mr Said El Khouri.

11. In 2010 the Owners Corporation instructed Millachi Corporation Pty Ltd to prepare a scope of works for the purposes of detailing remedial works required to the building. Numerous repairs were documented in that report. Waterproof membrane on balconies and roof areas had deteriorated and works became necessary to rectify water penetration into lots.

12. On 6 March 2012 Mr El Khouri arranged for a dilapidation report to be prepared in respect of his lot and the report noted that urgent repairs were foreshadowed in a report from the Millachi Corporation in 2010 but no action had been taken.

13. It is claimed that on 15 September 2009 the applicant held an extraordinary general meeting where it resolved that the glass roof structures on levels 5 and 6 of the building should be removed by the owner of lot 11. It is claimed by the applicants that from that date to the present time the respondent has failed to comply with the resolution of the Owners Corporation and remove the glass structure which is affixed to the common property.

14. It is claimed that in 2012 the respondent, Mr El Khouri undertook certain works on the balcony on the north-east side of lot 11 which were carried out without the consent of the Owners Corporation or without being the subject of an exclusive use By-law under s 52 of the Act. These works are detailed in a related appeal.

15. On 4 December 2013 Mr El Khouri put a motion before the Annual General Meeting seeking either the reinstatement of the By-law passed in 2002 and revoked in 2005, or in the alternative seeking that the Owners Corporation consent to the passing of a special By-law in the same terms as the By-law which was originally passed in 2002. That motion was defeated and on 18 August 2014 the application for adjudication was lodged by Mr El Khouri as SCS 14/42574.

16. In the application SCS 14/42574 Mr El Khouri sought orders;-

    (a) (a) that the Owners Corporation reinstate special By-law 2.

    (b) (b) if By-law 2 is not reinstated then the granting of a special use By-law to the effect of By-law 8, requested at the AGM on 4 December 2013

    (c) (c) that the Owners Corporation carry out repair work on the common property including waterproofing, repair of handrails, works on the glass structure on the common property, repair and replacement of floor tiles and repair and replacement of a hob supporting the glass structure.

17. On 8 December 2014 Adjudicator Ross dismissed the applications for reinstatement of By-law 2 and for the repairs to be undertaken but prescribed the making of a By-law in terms of the By-law set out in motion 10 in the notice of annual general meeting to be held on 4 December 2013. She also required the Owners Corporation to do all acts and things necessary to register the By-law with the Registrar General and directed that the applicant pay and bear all costs on the registration of the By-law.

APPLICANT'S SUBMISSIONS

18. The application to appeal the Adjudicator's orders was dated 3 February 2015 and signed by the solicitor for the Owners Corporation. Leave has been sought to lodge the application not later than 90 days after the order took effect, on the basis that the orders were not received by the Owners Corporation until 9 December 2014 and the intervention of the Christmas and New Year holiday break resulted in delays which prevented the appeal from being filed not more than 21 days after the orders took effect.

19. No appeal was made in respect of those orders which were dismissed but the applicants claimed that the order 3 made by Adjudicator Ross on 5 December 2014 should be set aside and the respondents application for the making of By-law under s 158 of the Act should be dismissed.

20. Written submissions on behalf of the Owners Corporation make it clear that the only order addressed is order 3 made by Adjudicator Ross.

21. The applicant's points of claim clearly allege that Adjudicator Ross erred in a number of respects including;-

    (i) (i) finding that the Owners Corporation unreasonably refused to make a By-law pursuant to s 52.

    (ii) (ii) failing to take into account that the failure by the owner of lot 11 to offer compensation for the grant of exclusive use.

    (iii) (iii) failing to consider that the respondent had offered to pay the Owners Corporation a sum of $500,000.00 and in July 2012 for the purchase of the common property.

    (iv) (iv) failing to consider that an exclusive use By-law was valuable property for which the respondent obtained a valuation in 2011.

    (v) (v) finding that the Owners Corporation was unreasonable in refusing to make a By-law granting exclusive use of part of the common property to the respondent by permitting a by-law to be made which referred to existing structures.

    (vi) (vi) permitted a By-law which was so vague as to the nature and location of existing structures as to make it impossible for anyone reviewing the By-law to be able to identify the structures over which exclusive use had been granted.

22. The written submissions provided on behalf of the applicant in relation to this adjudication claim that "nowhere in his submission does Mr El Khouri set out why he contends the Owners Corporation acted unreasonably in failing to make the exclusive use By-law". The submission then went on to refer to a reversal of the onus of proof by Adjudicator Ross, arising out of her observation that the Owners Corporation given no reason for the refusal to make the By-law in the terms requested.

23. The applicant submitted that the onus of proof under s. 158 of the Act was for the lot owner, in this instance, to show that the Owners Corporation's refusal to make the By-law was unreasonable.

24. Ms Crittenden, on behalf of the applicant submitted that the Adjudicator erred by failing to consider whether appropriate valuable consideration was offered for the grant of an exclusive use By-law in circumstances where she claimed that there had been a value of the freehold in October 2011 of at least $355,000.00 and that there had been an offer from the respondent in July 2012 to purchase the freehold for $500,000.00.

25. It was further contended that the terms of the grant by the Adjudicator referred to exclusive use of "balconies and structures on the northern aspect of the 5th floor" and "the roof area on the 6th floor and the roof and existing structures on the 6th floor". It was argued that no details were contained in the By-law as to what the structures were and it was pointed out in submissions that during March and April of 2015 the respondent, Mr El Khouri had removed and replaced existing balustrading and glass areas which on the evidence, had been the subject of a dilapidation report prepared as long ago as 2010.

26. It was argued that the By-law as prescribed has left the Owners Corporation in a position of complete uncertainty about the structures that had been built on the common property and as to who is responsible for repairing and replacing them.

27. During the course of the Hearing it was agreed between the parties that all of the glass and metal structures which had previously been erected on the common property since 1992, had all been repaired and maintained by Mr El Khouri at his own cost in the period between the making of the By-law by Adjudicator Ross and the time of the Hearing of the present appeal. Other issues between the parties were addressed in the course of submissions but these matters relate to the related appeal from orders made by Adjudicator Cohen and it is proposed to address those issues and those submissions in separate reasons relating to that appeal being matter number SCS 14/56876.

RESPONDENT'S SUBMISSIONS

28. In addressing the present appeal Mr Ireland of Counsel, for the respondent submitted firstly that the jurisdiction of the Tribunal on appeals, from an Adjudicator's decision is one of re-hearing and not a de novo appeal, although s 181(2) permits fresh evidence to be relied upon. He referred to the decision of the Supreme Court in *Zouk v Owners Corporation Strata Plan 4521 and Anor* [2005] NSWSC 845 and submitted that it was necessary for an error to be demonstrated in the Adjudicator's decision before fresh evidence could be allowed. See also *Costa* and *anor v The Public Trustee of New South Wales [2008] NSWCA 223* and *Gett v Tabet* [2009] NSWCA 76. He noted that decisions of the Tribunal in *The Owners SP56911 v Stricke* [2012] NSWCTTT 392 and *The Owners SP 32033 v Mullins* [2015] NSWCATD 23 had held that the appeal was a hearing de novo, but this was yet to be resolved by a subsequent binding authority. He submitted that Zouk bound the Tribunal at the present time and that there was, from the language of the statute no provision designating the appeal as a "de novo" appeal. He noted that the key difference between a re-hearing and a hearing de novo is that an error in the decision at first instance was required to be demonstrated by a re-hearing. He pointed out that the appellant's points of claim alleged an error in the Adjudicator's decision.

29. Mr Ireland of Counsel referred to the material which was placed before the Adjudicator which included works being undertaken in 1992 to lot 11 by the predecessor in title of the current owner (who purchased in July 2007) which included the installation of a glass roofing structure fixed to the common property adjoining the lot. He pointed out that lot 11 occupied two upper levels namely levels 5 and 6 and that these levels were accessible only by elevator or fire stairs and that access to level 5 and beyond was restricted to the owners of lot 11 or persons entering that area with their authority. He observed that the structures were erected in part to address water penetration problems affecting in particular lots 9 and 10 on level 4.

30. A resolution confirming exclusive use rights was passed in 1973 prior to the commencement of the strata titles (Freehold Development) Act 1974 and in 2002 a special rights By-law was passed, being By-law 20. That By-law gave lot 11 exclusive use of the common property areas in lots 5 and 6 and it also provided for a remuneration based upon a 10% increase in the levies payable by that lot owner and by the owners of all other lots who gain benefits of certain areas of common property which were provided for the benefit of their particular units.

31. By-law 20 was purportedly repealed in 2005 and the respondent claimed that the repeal was invalid as there was no evidence that the required consent of an owner affected by the repeal had been given although documents provided suggest that all lot owners voted in the meeting.

32. The respondent, through his counsel, submitted that the purported revocation of By-law 20 was not valid and without jurisdiction and that the Tribunal should order that it be given effect by registration pursuant to s 209 of the Strata Schemes Management Act.

33. In the alternative it was submitted that the decision of Adjudicator Ross should be upheld save that the Owners Corporation should be required to maintain those rooftop areas which impacted upon lots below where repair or maintenance of waterproofing membrane was necessary as this remained the responsibility of the Owners Corporation under s 62 of the Act.

34. It was argued that the refusal of the Owners Corporation to make the proposed By-law 8 submitted to the Annual General Meeting of 2013 or to confirm By-law 20, passed in 2002, constituted unreasonable conduct. Mr Ireland pointed out that the Owners Corporation made no submissions in relation to the creation of a new By-law before Adjudicator Ross and accordingly the Adjudicator could properly determine that the continuing validity or the express reinstatement of the By-law which would have the effect of authorising the continued existence of works already undertaken on the common property.

35. It was submitted that the respondent has been compelled by the inaction of the Owners Corporation to carry out much of the maintenance to date by himself, including replacement of balustrades which were in a dangerous condition. The Owners Corporation had not implemented its own scope of works based on the Millachi report of 23 April 2010 and had not repaired the common property adjoining Lot 11in accordance with its expert reports or the two delapidation reports obtained by the Respondent. It was submitted further that if By-law 20 was reinstated or a by-law in like terms was not ordered, then the Owners Corporation should be required to carry out the work outlined in the remediation report including repairs required to the hob flashings around the glass and aluminium structure interfacing with the south-west balcony which was identified as an area of concern in the Hall Building Appraisal report in 2012.

36. Mr Ireland sought the opportunity to make separate submissions as to the order of costs in due course.

DECISION

37. Section 177 of the Strata Schemes Management Act 1996 enables an appeal to the Tribunal against an order of an Adjudicator. S 181(2) enables the Tribunal to admit new evidence while subs (3) provides that unless the order appealed against is an interim order, the Tribunal may determine an appeal by an order affirming, amending or revoking the order appealed against or substituting its own order for the order appealed against.

38. Mr Ireland, on behalf of the respondent has submitted that the appeal from an Adjudicator's decision is one of rehearing and not a de novo appeal and he argued that although s 181(2) allowed fresh evidence the reasoning of the Supreme Court *in Zouk v Owners Corporation Strata Plan 4521 and Anor* [2005] NSWSC 845 which was not the subject of criticism in the Court of Appeal which then upheld the decision on appeal required that an error should be demonstrated in the Adjudicators decision. Decisions of the Tribunal in *Owners Corporation SP 32033 v Mullins* [2015] NSWCATD 23 and of the CTTT in *Nolan v Owners Corporation SP 5803* [2013] NSWCTTT 220 should not be preferred to the decision in *Zouk* and the decision of the Supreme Court in *Owners Corporation SP 7596 v Risidore and Ors* [2003] NSWSC 966. I note the matter was also considered by Senior Member Meadows in *Owners SP 56911 v Stricke* [2012] NSWCTTT 392.

39. Section 181(2) incorporates a discretion related to the admission of further evidence and until the competing views of the Tribunal have been clarified by an appellate review, I find that it would be inappropriate to allow additional evidence to determine whether an Adjudicator had erred but if an error was demonstrated evidence could be received, particularly if there had been a change of circumstances between the time when the adjudication was determined and the time of the appeal.

40. The applicant has submitted that Mr El Khouri failed to set out in his submissions, any basis upon which the Owners Corporation had acted unreasonably in failing to make the exclusive use By-law. Ms Crittenden submitted that an unreasonable refusal on the part of the Owners Corporation was a prerequisite for the making of an order under s 158 of the Act. The section 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 appeal, 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 s. 51, or
>
> .....
>
> (2) in considering whether to make an order under the section, an adjudicator must have regard to;
>
> (a) the interests of all owners in the use and enjoyment of their lots and common property.
>
> (b) the rights and reasonable expectations of any owner deriving or anticipating a benefit under a By-law in the kind referred to in s. 51.

41. Ms Crittenden submitted that in a reversal of the onus of proof Adjudicator Ross found that the Owners Corporation had advanced no reasons for the refusal to make a By-law and in fact gave no reasons as to why the Owners Corporation in refusing to make a By-law had acted unreasonably. It was argued that in this respect the Owners Corporation's decision was reasonable.

42. In considering this submission it is appropriate to have regard to the published reasons of Adjudicator Ross who, in balancing up the matters required to be addressed under subs. (2), observed firstly that the Owners Corporation advanced no reasons for the refusal to make the By-law in the terms requested. I do not regard this observation as a reversal of the onus of proof but rather a finding in relation to the lack of evidence and lack of submissions provided by the Owners Corporation concerning this aspect of the adjudication.

43. Adjudicator Ross then went on to note that the applicant and his invitees were the only people physically capable of using and enjoying the common property, the subject of the By-law and that lot 11 had the exclusive use of those areas until By-law 2 was revoked. Adjudicator Ross went further and noted that in coming to her decision she took into account that the making of the By-law was in the interest of all lot owners as it relieved the Owners Corporation of the burden of repairing those structures referred to in the By-law but it did not affect the use and enjoyment of other lot owners of their lots or common property. She also found it to be of benefit to the applicant.

44. The By-law submitted for approval was described as By-law 8 set out in motion 10 to the notice of an annual general meeting of the Owners Corporation held on 4 December 2013. A copy of the proposed By-law was attached to the orders made by Adjudicator Ross and it is appropriate to note that the areas to be the subject of the exclusive By-law were designated by marked up copies of Strata Plan 6534 which were also tendered evidence and thereafter annexed to the Adjudicator's orders.

45. The structures were described as balconies and structure on the northern aspect of the 5th floor designated as A and B in the annexed plan with an upper floor area to a height limited to 3 metres as well as a roof area on the 6th floor with the roof and existing structures on the 6th floor designated D and E in the plan annexed to the closed orders, again limited to a height of 3 metres.

46. The proposed special By-law then went on to require that the owner of lot 11 was to be responsible for the proper maintenance of, and keeping in a state of good and serviceable repair of, the abovementioned structures on the common property. Compensation was designated as an additional10% of the annual levies payable by the owner of lot 11.

47. The terms of special By-law 8 were in identical terms to those of special By-law 20 which was approved and registered in 2002 and purportedly repealed in 2005. It is reasonable to conclude that at the time when the By-law was created in 2002 all of the owners regarded the By-law as an appropriate balance between the interests of all the parties.

48. There is no evidence from either party to suggest a reason for the revocation of the By-law recorded in 2005 but there is nothing in the available material to suggest that the Owners Corporation or the individual lot owners sought at that stage to offer those

parts of the common property which had been initially annexed to the adjoining lot owners for valuable consideration.

49. The applicant is critical of the By-law prescribed by Adjudicator Ross on the basis that it lacks clarity concerning the structures and makes it impossible for people to know exactly what Mr El Khouri was given approval to maintain. The works undertaken by Mr El Khouri and his predecessors in title going back to 1992, have all been the subject of applications for approval submitted to the Council. I am not satisfied that the By-law prescribed by Adjudicator Ross should be set aside on that basis. Mr Ireland, of counsel, for the respondent submitted that the Owners Corporation should continue to be required to maintain those parts of the common property in the rooftop areas which impact, not only on the lower level but on the lot owners below through water percolation as a result of waterproofing membrane which has deteriorated. He submitted on behalf of the respondent that he has been compelled by the inaction of the Owners Corporation to carry out much maintenance to date himself including replacement of balustrades which were in a dangerous and unsafe condition.

50. The applicant was further critical of the By-law claiming that the Adjudicator erred by failing to consider an appropriate valuable consideration for the grant of the special use By-law. During the course of the Hearing Ms Crittenden, on behalf of the applicant, made it clear that the Owners Corporation was prepared and even anxious to permit an exclusive use By-law in favour of the owner of lot 11 although the area of contention related to the amount of money which ought to be payable.

51. Ms Crittenden, on behalf of the applicant, submitted that valuable consideration of the rights required should be ascertained and applied because the inclusion of rights over parts of the common property added value to the unit. She referred to a decision of the Tribunal in *Chen and Ors v Owners Corporation SP 65870* [2010] NSWCTTT 330 and a decision of the Supreme Court in *Reen v Owners Corporation SP 300* [2008] NSWSC 1105.

52. Mr Ireland, on behalf of the respondent submitted that the decisions in both Chen and Reen were distinguishable because they refer to conversion of car spaces which could be described as having a rank value. He argued that there were a number of factors which justified the Adjudicator's failure to reject the By-law on the question of consideration and these were;-

    (a) the previous history of the resolution and By-law which had been passed, giving these rights to the owner of lot 11 for no specific consideration or for minimal consideration.

    (b) the benefit to the Owners Corporation where the owner for the time being of lot 11 took responsibility for the maintenance of structures which had been permitted to be built on the common property.

    (c) the fact that access to the areas of common property the subject of the special By-law was only available through, and with the permission of the owner for the time being of lot 11.

    (d) the fact that no evidence or submissions were provided by the applicant at the time of the adjudication and the evidence

> sought to be adduced, if an error on the part of the Adjudicator was demonstrated, related solely to freehold or leasehold valuations of the property rather than a balancing of the benefits between the parties as required by the Supreme Court in *Reen* .

I am accordingly not satisfied that an error has been demonstrated through the failure of the Adjudicator to simply refer to the issue of valuation of the rights.

53. Offers to purchase the freehold of the common property in 2012 or a valuation in 2011 do not provide a basis upon which the valuation of benefit or interest to the applicant could be assessed for the purposes of a special purposes By-law. There is nothing to suggest on the rejection of the By-law in December 2013 that value of the benefit was discussed by the Owners Corporation at its meeting or that the question of value of rights played any part in the reasons for refusal.

54. Adjudicator Ross refused to make orders requiring the Owners Corporation to carry out repair work in respect of the glass and aluminium structures, the reinstatement of a concrete hob or the rectification of balustrades. These works were set out in the David Hall dilapidation report of 2012 and the implied passing of the obligation to maintain or repair these structures no doubt formed a significant part of the balance of the rights between the parties for the purposes of determining whether either valuable consideration should have been provided apart from the consideration referred to in the By-law itself.

55. In her determination Adjudicator Ross specifically noted that she took into the account that the making of the By-law was in the interest of all owners as it relieved the Owners Corporation of the burden of repairing and maintaining those structures referred to in the By-law and that it had no effect at all on the use and enjoyment by other owners of the lots of the common property but it was of benefit to the applicant.

56. For the reasons set out above the appeal is dismissed and the orders of Adjudicator Ross are affirmed. The By-law provides for the respondent to take responsibility for repair and maintenance of the nominated structures on the common property but the obligation to maintain and repair the common property (including railings) still lies with the Owners Corporation.

57. Both parties will have liberty to make written submissions in relation to the issues of costs within 21 days of the date when the decision is published.

J A Ringrose

General Member

Civil and Administrative Tribunal of New South Wales

4 December 2015

I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.
Registrar