Civil and Administrative Tribunal

New South Wales

Case Name:	The Owners Strata Plan No 6534 v El Khouri
Medium Neutral Citation:	[2015] NSWCATCD 145
Hearing Date(s):	22 & 23 September 2015
Decision Date:	4 December 2015
Jurisdiction:	Consumer and Commercial Division
Before:	J A Ringrose, General Member
Decision:	1. The appeal is upheld in part and the order of the Adjudicator is amended. 2. The respondent is to provide the Owners Corporation and its authorised agents and contractors with access to lot 11 to inspect, carry out invasive investigations if necessary and carry out such repairs to the common property including the common property roof of the building (accessible through lot 11) to enable the Owners Corporation to determine causes of water ingress to the units below and to carry out works to prevent further water ingress into the units below. 3. The appeal is otherwise dismissed.
Catchwords:	Failure to comply with By-laws, implied duty to cooperate, estoppel, waiver.
Legislation Cited:	Strata Schemes Management Act 1996 ss. 138 .
Cases Cited:	Motorgroup Australia Pty Ltd v Owners Corporation Strata Plan 64622 [2004] NSWSC 633 The Owners – Strata Plan Number 32735 v Heather Lesley-Swan [2012] NSWSC 383 Stolfa v Owners Strata Plan 4366 and Ors [2009] NSWSC 589 Pollack v Owners Corporation SP 54298 [2013] NSWCTTT 334 Stolfa v Hempton [2010] NSWCA 218 Lee v NSW Crime Commission [2013] 251CLR 196 Clissold v Perry [1904] HCA 12 Planning Commission (WA) v Tenwood Holdings Pty Ltd [2004] HCA 63 Walton's Stalls (Interstate) Ltd v Maher [1988] 164 CLR 387 Moratic Pty Ltd v Gordon [2007] NSWSC 5 Zouk v Owners Corporation Strata Plan 4521 Anor [2005] NSWSC 845 Owners Corporation Strata Plan 7596 v Risidore and ORS [2003] NSWSC 966 Owners SP56911 v Stricke [2012] NSWCTTT 392 Commonwealth v Verwayen [1990] 170 CLR 394 Eventang Development (Pyrmont) Pty Ltd v The Owners Strata Plan 51573 [2001] NSWSC 452
Category:	Principal judgment
Parties:	The Owners Strata Plan No 6534 (Applicant) Said El Khouri (Respondent)
Representation:	Counsel: Mr C Ireland Solicitors: Bayside Solicitors, for the respondent Ms J Crittenden, for the applicant
File Number(s):	SCS 14/56876
Publication Restriction:	Nil

REASONS FOR DECISION

BACKGROUND

1. This is an appeal from Adjudicator M Cohen being one of two appeals from separate Adjudicator's decisions in proceedings between Mr Said El Khouri and The Owners Strata Plan 6534. The related appeal number SCS 15/07057 has been dealt with and the reasons and decision have been published in a separate determination.

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

3. There are 11 residential units in the building with 2 units being situated on each floor from the ground floor to the 4th floor. Access to levels 5 and 6 which comprise lot 11 is restricted to security key access from the lifts.

4. When the strata plan was registered the common property in the building included the lift wells, landings, fire stairs and other stairs throughout the building. The building was constructed in the 1920s as the Buckingham Hotel.

5. Strata Plan Number 6534 was registered on 15 February 1973 comprising 11 lots and common property. A strata plan of sub-division of part of the common property in Strata Plan 6534 was registered on 23 May 1979 by which lot 12 was created as a parking space now owned by the registered proprietor of lot 10. Lot 12 had previously been common property, namely an oil burner room on the garage level of the property.

6. At a meeting of the council of the proprietors of SP 6534 on 5 April 1973 a special resolution was passed giving lot 11 and other lots exclusive use rights over common property in the following terms;-

> "bearing in mind that the directors of Point Piper Properties Pty Ltd, in proceeding to obtain strata titles for the various units in "Buckingham", sought to follow the general principal of maintaining, as far as possible, for each shareholder the same rights and duties in relation to the use and enjoyment of the property under strata title as applied under company title, therefore in pursuance of this principal it is resolved that the registered proprietors for the time being of each of the lots specified hereunder shall be entitled to the exclusive use and enjoyment of the respective areas forming part of the common property specified hereunder and noted on the photostat copies of the Strata Plan Number 6534 which forms part of these minutes namely;-
>
> > Lot 11 - balconies on northern aspect of 5th floor (designated B and C on plan), balcony on the southern aspect of the 5th floor (designated D on plan) and the roof area on the 6th floor (designated E on the plan).

That resolution was passed in 1973 prior to the commencement of the Strata Titles (Freehold Development) Act in 1974.

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 lean to glass structure was approved by the Council on 8 December 1992.

8. At an executive committee meeting of the strata plan held on 4 February 1998, it was resolved that approval be given to the registered proprietor of lot 11 to enclose the roof area adjacent to the room encompassing the hot water boiler, in glass, with metal framed glass walls subject to consent first being obtained from the Woollahra Municipal Council. The erection of these structures in 1992 and 1998 were partly designed to rectify and prevent water penetration problems into lots 9, 10 and 11.

9. At an extraordinary general meeting of the Owners Corporation Strata Plan 6534 held on 7 May 2002 an exclusive use By-law numbered 20 was passed with the consent of all owners excluding lot 7 which had the effect of providing balconies and other areas for the exclusive use of the lots adjoining them.

10. By-law 20.2 provided that the Owners Corporation continued to be responsible for proper maintenance and keeping in proper repair of common property whilst 20.3 provided that in consideration of the giving of written consent of all owners of all lots and the passing of the resolution, the registered proprietor of lot 11 agreed to increase his proportion of contribution to ordinary levies by an amount of 10% of what would otherwise have been the ordinary levy contribution payable by lot 11. The change of By-law was duly registered as dealing number 8592061U on the Certificate of Title of the common property of the strata plan. A document giving effect to a correction to a By-law dated 28 October 2004 was filed in the Office of the Registrar General as dealing AB55230V.

11. At the Annual General Meeting held on 10 November 2005 a special resolution rescinding Special By-law 2 (otherwise known as By-law 20), was passed.

12. In August 2005 Mr John Rankine and his wife sold lot 11 to Mr and Mrs Mavramatis and in August 2007 that lot was purchased by the present respondent, Mr Said El Khouri.

13. At an Extraordinary General Meeting of the Owners Corporation held on 15 September 2009 the Owners Corporation resolved that the glass roof structures on levels 5 and 6 of the building should be removed by the owner of lot 11. On 23 April 2010 the Owners Corporation instructed Millachi Corporation Pty Ltd to prepare a scope of works detailing remedial works required to the building. The report was procured and paid for by the respondent and numerous repairs were documented in that report which effected lot 11.

14. Approval was granted to enable the respondent, pursuant to s. 52 of the Act, to carry out certain works within lot 11 in accordance with the approval of the local council. It is claimed that the application to Council also sought approval to extend works on to a common property balcony and that works were undertaken by the respondent as a result of these approvals.

15. In 2012 it was claimed that Mr El Khouri had carried out certain works which contravened the approval earlier obtained.

16. On 4 December 2013 Mr El Khouri put forward a motion to the Annual General Meeting seeking either reinstatement of the By-law passed in 2002 or, if that By-law could not be reinstated the consent of the Owners Corporation to the passing of a Special By-law in the same terms as that which was originally passed in 2002.

17. In April 2012 the respondent made a complaint to the strata managers concerning the need for repairs and the fact that water damage was being caused to his units. He attached a copy of the dilapidation report of David Hall Building Appraisals Pty Ltd dated 6 March 2012.

18. The Annual General Meeting of the Owners Corporation in December 2013 did not approve or pass the motions proposed by Mr El Khouri and he filed an application seeking orders for the reinstatement of a Special Use By-law and for certain repair works to be undertaken.

19. On 24 June 2014 the applicant herein filed an application for Adjudication seeking the following orders;-

    (1) that the respondent comply with By-laws which apply to Strata Plan Number 6534 by removing works constructed on the common property on levels 5 and 6 of the building without approval of the Owners Corporation.

    (2) that the respondent remove from common property those areas of living of lot 11 which have been built on to the common property balcony on the south western side, without approval of the Owners Corporation.

    (3) that the respondent remove tiles from the living areas of lot 11 and lay wall to wall carpet with underlay on floors of the living areas within lot 11.

    (4) that the respondent comply with By-law 14 by treating floors so as to prevent sound transmission which disturbs the peaceful and enjoyment of the other owners and occupiers.

    (5) that the respondent provide the Owners Corporation and its authorised contractors with access to lot 11 to inspect, carry out invasive investigations, carry out repairs to the common property including the property roof of the building to enable the Owners Corporation to determine causes of water ingress to units below and to carry out works to prevent further ingress into the units below.

20. On 4 November 2014 Adjudicator M J Cohen made orders generally in accordance with paragraph 5 of the applicant's application but he imposed a term that the applicant provide to the respondent security in the amount of $100,000.00 in such larger amount that the respondent may reasonably demonstrate would be required to ensure any or all damage to the respondent's lot arising from their works could be immediately rectified. Other orders sought in the application were refused.

APPLICANT'S SUBMISSIONS

21. In the present appeal the applicant has sought an order that the orders of Adjudicator M Cohen made on 4 November 2014 be set aside and that the following orders be made pursuant to ss 138 and 145 of the Strata Schemes Management Act 1996 .

    (1) that the respondent comply with the By-laws which apply to Strata Plan Number 6534 by removing works constructed on the common property on levels 5 and 6 of the building without approval by the Owners Corporation of a By-law under s. 52 of the Act.

(2) that the respondent remove from the common property those areas of the living area of lot 11 which have been built on to the common property on the south western side of lot 11 without approval of the Owners Corporation of a By-law under s. 52 of the Act and that all damage caused by removing those works be made good.

(3) that the respondent remove tiles from living areas of lot 11 and lay wall to wall carpet with underlay on the floors of living areas within lot 11 where the applicants authorised the respondent to lay carpet.

(4) the respondent comply with By-law 14 by treating floors so as to prevent sound transmission which disturbs the peaceful enjoyment of other owners and occupiers of their lots.

(5) the respondent provide the Owners Corporation and its authorised agents and contractors with access to lot 11 to inspect, carry out invasive investigations and carry out repairs to common property including the common property roof of the building (accessible through lot 11) and to lot 11 itself to enable the Owners Corporation to determine causes of water ingress to units below and carry out works to prevent further water ingress into units below.

The appeal then set out some 16 areas in respect of which the applicant alleged that Adjudicator Cohen had erred in findings he had made, conclusions he had drawn, and an order that he had made requiring the payment of a bond for compensation to ensure that damage arising from access to the respondent's unit could be rectified. The applicants further alleged that the Adjudicator lacked jurisdiction to make orders for payment money and an allowance to cover damage which might be suffered.

22. The applicant, through Ms Crittenden detailed a background history in respect of matters relevant to the issues and items of background have been referred to by both parties with relevant documents annexed by each of them. My findings in relation to the background history of the strata complex relevant to these issues are detailed in the background referred to above.

23. The applicant alleged that the respondent had carried out certain works on the common property adjacent to lot 11 in 2012 without the approval of the Owners Corporation. Works were undertaken at the same time as other works which had been approved by the Owners Corporation. The alleged unauthorised works included;-

(a) extending an ensuite on level 5 onto to the common property balcony on the north eastern side of the lot.

(b) extension of a walk-in wardrobe on level 6 of the building onto areas of the common property adjacent to lift well.

(c) installation of tiles in the living area of lot 11 above the living areas of lot 9 where tiles were not regarded as suitable flooring due to inferior acoustic qualities when compared with carpet and underlay.

24. In relation to each of the foregoing matters the applicant's submissions include the following assertion;-

> "the applicant does not say that it would not be willing to transfer or grant exclusive use of the relevant area of common property to the respondent. Rather, it says that if it is going to do so, the respondent must pay a fair market value for taking exclusive possession of part of the common property and incorporating it into his lot."

25. In relation to the alleged encroachments on to common property by works performed by the respondent, Ms Crittenden, on behalf of the applicant alleged that such works would amount to trespass and she referred to the decision of the Supreme Court (Bergen J) in *Motorgroup Australia Pty Ltd v Owners Corporation Strata Plan 64622* [2004] NSWSC 633.

26. It was pointed out that the motion for a By-law to approve works to lot 11 was considered at the general meeting of the Owners Corporation held on 26 July 2011 and it was resolved to amend the motion to require an inspection of a carpet to be laid in lot 11 above the living areas of lot 9. When the plans were provided to the Council for approval, the respondent had proposed that certain areas on level 5 be tiled where, it is claimed, the whole of lot 9 was below tiled areas in lot 11. The s 96 application for approval by the Council dated 2 March 2012 sought approval to lay tiles instead of carpet in areas where the Owners Corporation had required carpet.

27. It was claimed that in laying tiles in areas of the living room of lot 6 where carpet had been required, the respondent was in breach of Special By-law 6 made on 26 July 2011. A copy of Special By-law 6 has been provided with the applicants material and although the By-law itself relates to works being undertaken by a lot owner generally the relevant part of the By-law refers to laying of floor tiles to the lot and requires the owner to provide the Owners Corporation with the requisite approval of the local council and in relation to soundproofing to all floors to provide a certification of an acoustic engineer on completion of the works at the expense of the lot owners.

28. The applicant also claims that the respondent has laid tiles which are in breach of By-law 14 in the following terms;-

> **Floor coverings**
>
> (i) an owner of a lot must ensure that all floor space within the lot is covered or otherwise treated to an extent sufficient to prevent the transmission from the floor space of noise likely to disturb the peaceful enjoyment of the owner or occupier of another lot.
>
> (ii) this By-law does not apply to floor space comprising a kitchen, laundry, lavatory or bathroom.

29. In relation to the order sought for access to the lot it was claimed that since renovation works were carried out by the owner of lot 11 in 2012 water ingress had been occurring in lots 9 and 10 below. There does not appear to be any evidence to support this particular assertion in the timeline as the history of the building suggests there had continuously been water ingress problems and it is clear that the waterproofing membrane was aged and had deteriorated significantly. A report of Mr Robert

Macdonald dated 13 March 2013 was provided as part of the evidence for the applicant and access has been repeatedly sought from the respondent but it is claimed that he has been unwilling to grant access and has proposed the engagement of contractors of his own choosing.

30. Ms Crittenden, on behalf of the applicant referred to a decision of Justice Hall in *The Owners – Strata Plan Number 32735 v Heather Lesley-Swan* [2012] NSWSC 383 where His Honour held that a lot owner was not entitled to carry out work to common property and then recover cost of that work.

31. Ms Crittenden addressed the finding of Adjudicator Cohen that the owner of the lot appeared to have an "operative estoppel" and argued that when ss 51 and 52 of the Strata Schemes Management Act apply, an Owners Corporation would not be estopped from complaining about or taking action to remove unauthorised works from the common property which were affixed without complying with the requirements to the Acts. She referred to a decision of *Stolfa v Owners Strata Plan 4366 and Ors* [2009] NSWSC 589 where Brereton J held that the requirements of the Act could not be overcome by estoppel.

32. Reference was also made to a decision of Acting Senior Member Thode in *Pollack v Owners Corporation SP 54298* [2013] NSWCTTT 334 where the member applied the decision of Justice Brereton in Stolfa as affirmed on appeal in *Stolfa v Hempton* [2010] NSWCA 218 to the effect that works which alter, add to, or erect a new structure on common property may be carried out "only if" the voting requirements in s. 65A are satisfied.

33. For the same reasons Ms Crittenden submitted that Adjudicator Cohen was in error when he found that "a right in rem" had been ceded to the owner of lot 11.

34. In relation to the issue of sound transmission from lot 11 to lot 9 below, the applicant submitted that Adjudicator Cohen had erred in dismissing the request for orders that Mr El Khouri lay wall to wall carpet relying on an Acoustic Logic report dated 13 June 2012 which referred to the laying of a vibramat beneath the tiled flooring system and carpeted areas. It was submitted that this report could not enable the respondent to lay tiles in living areas and bedrooms of lot 11.

RESPONDENT'S SUBMISSIONS

35. Mr Ireland of counsel, on behalf of the respondent submitted that the Adjudicator's decision did not disclose error and was an orthodox and well reasoned decision supportable on additional legal grounds. He referred to a history of the works and a chronology of events contained in the respondent's bundle of evidence and noted that lot 11 was the largest unit in the building and occupied two levels being levels 5 and 6 which were accessible only by elevator (or fire stairs). Access to the lower level of the unit on level 5 was not available to other unit holders. The common property on which the structures were erected were also only accessible by other unit holders entering onto and moving through lot 11 with the permission of the owners of lot 11.

36. It was submitted that the structures were erected in part to address water penetration problems and the present structures have the effect of preventing water from entering substantial parts of the common property. It was submitted further that the structures

were also needed because the floor levels of the exterior balconies on level 5 were higher than the internal floor level of lot 11.

37. It was pointed out that the structures had been constructed with council approval and that development consent on DA91/1365 was granted by the Woollahra Council in 1992 under the Environmental Planning and Assessment Act 1979 , together with a subsequent Building Approval under the then Local Government Act 1919 .

38. Adjudicator Cohen correctly reasoned that by operation of the Owners Corporation having, as early as 1992, given its express consent to the carrying out and construction of these works, they were constructed with the consent of the Owners Corporation. It was argued that the Adjudicator had correctly reasoned that the conduct of the Owners Corporation/Appellant was unreasonable and unconscionable.

39. In relation to the works carried out in 2012 which extended into the common property from the ensuite bathroom and the walk-in robe, Mr Ireland suggested that this was a discreet and relatively minor issue that could be set aside.

40. In addressing the provisions of ss. 51 and 52 of the Strata Schemes Management Act 1996 Mr Ireland pointed out that they necessarily would have no retrospective application to works constructed in about 1992 which included the glass roofing structure affixed to the common property. He submitted that there is a presumption against retrospectivity of legislation due to the principal of legality or clear statement which requires clear and unambiguous language by parliament before property rights are affected or divested by legislation. See *Lee v NSW Crime Commission* [2013] 251 CLR 196, *Clissold v Perry* [1904] HCA 12 and *Planning Commission (WA) v Tenwood Holdings Pty Ltd* [2004] HCA 63.

41. In addressing the initial validity of By-law 20 it was pointed out that as the resolution varying exclusive rights was passed in 1973, prior to the commencement of the Strata Titles (Freehold Development) Act 1973, the saving and transitional provisions of the Titles Act are important and Schedule 4 cl 15 of that Act remained in force and provided that where immediately before the appointed day a proprietor of a former lot was, pursuant to a resolution of a Body Corporate, under the former Act, or pursuant to a former By-law entitled to a right of exclusive use and enjoyment or special privileges in respect of any former common property the proprietor of a lot which corresponds to that former lot may at any time after the day of service of notice on the Body Corporate required it to make a By-law in terms of the notice confirming the right of those special privileges.

42. As there was no time limit placed on the ability of a subsequent proprietor to request the Owners Corporation to make a By-law confirming the rights and special privileges conferred by the 1973 resolution, and the relevant request was made in this case which led to the Owners Corporation making By-law 20 in 2002.

43. Mr Ireland then argued that By-law 20 had never been validly repealed, notwithstanding the purported repeal in 2005 as there was no evidence of any written consent being provided by the then owners of lot 11, Mr and Mrs Mavromatis as required by s 52(1) of the Strata Schemes Management Act 1996 . He argued that the dealing lodged with the Registrar General had not been endorsed with the written consent of Mr and Mrs Mavromatis and it was therefore appropriate to draw an

inference that the absence of a signature identifying consent on the dealing indicated that no written consent was required. It is appropriate to note however that Mr and Mrs Mavromatis apparently voted in favour of the resolution to repeal the By-law.

44. In relation to the finding by the Adjudicator of an estoppel, attention was drawn to his reasoning that due to the long history of the acquiescence or non-complaint by the Owners Corporation about the works, it was evident that the Owners Corporation was acting unreasonably and indeed should be subject to an estoppel in relation to the works on the common property. The Adjudicator relied on promissory estoppel as established in *Walton's Stalls (Interstate) Ltd v Maher* [1988] 164 CLR 387 but that Mr Ireland suggested that, in addition, the principals of conventional estoppel would also apply on the basis the Owners Corporation could not unilaterally depart from a common understanding that the works were there with Owners Corporation consent and would not be the subject of an objection (see *Moratic Pty Ltd v Gordon* [2007] NSWSC 5).

45. Mr Ireland pointed to the 1973 resolution, the Development Application and consent in 1992 and the 2002, making of By-law 20 which he submitted represented a 30 year history evidencing in common understanding between the parties.

46. In response to the applicant's argument that estoppel could not apply in the present circumstances by reason of the decision of the Supreme Court in *Stolfa v Owners Strata Plan 4366 and ORS [2009] NSWSC 589* it was submitted that the decision was not authority for the proposition advocated by the applicants. In that decision Brereton J merely noted in obiter remarks that he was "content to accept" that the requirements of s. 65A of the Strata Schemes Management Act could not be overcome by estoppel.

47. It is noted that s. 65A has only been in the Management Act since 2004 and there was no suggestion that a special resolution was required in 1992 to authorise the construction of the glass and aluminium structures on the common property and the affixing of the seal on the DA was sufficient to indicate consent to that construction by the Owners Corporation. Reference was further made to the observation of Brereton J at par 98 that the grant of any relief was discretionally even if no estoppel arose against the operation of a particular statutory provision in any particular case. In such circumstances it was appropriate for the Tribunal to exercise discretion and refuse to grant the relief sought by the applicant as to do otherwise would constitute a manifestly unreasonable exercise of the Tribunal's discretion.

48. Mr Ireland of Counsel also sought to distinguish the reasons of Acting Senior Member Thode in *Pollack v Owners Corporation SP 54298 (supra).*

49. The respondent submitted that the reasoning of Adjudicator Cohen in determining that the owner of lot 11 had a "right in rem" did not disclose an error and should be upheld by the Tribunal relying not only on the reasons given by the Adjudicator but by the additional reasons set out in submissions. In regard to this submission the resolution dated 5 April 1973 which conferred on the owner of lot 11 the right and exclusive use and enjoyment of the common property being the balconies on the northern aspect of level 5 and the balcony on the southern aspect of level 5 as well as the roof area of level 6. The conferral of rights prior to the commencement of the Strata Titles Act in July 1974 gave rise to a situation where nothing in the Strata Titles Act 1974 or any later legislation contained clear language divesting the owner of lot 11 and the

other lot owners of these property rights. The structures on the common property were erected with the consent of the Owners Corporation in 1992 and that, it was submitted, gave rise to either an independent conferral of property rights in those structures or a confirmation of the rights conferred by the resolution in 1973.

50. In addressing the issues relating to tiling and noise transmission, Mr Ireland noted the complaint that the respondent had, on one level of the lot, laid tiles in contravention of By-law 6 and the approval given on 26 July 2011. He argued that there were good reasons for the removal of the previous carpet because it was affected by mould and because the external balcony floor levels were higher than internal room levels, resulting in the ingress of water from the balcony on to the carpet. He stated that Mr El Khouri relied in relation to the laying of tiles, on his acoustic consultant's report dated 2 April 2012 where 10mm vibromat acoustic underlay was used. He referred also to a report of Mr Renzo Tonin which had been provided to the Owners Corporation and which had confirmed that Mr El Khouri had done all that was necessary to protect the acoustic amenity of lots below. An area of carpet had also been laid as a semi-permanent mat over the tiles in the level 5 living room area. He argued that By-law 14 had been complied with and in relation to the terms of By-law 6 the resolution of the Owners Corporation authorised both laying of floor tiles and laying of carpet and it was claimed that there was no specification in the By-laws as to the location of tiles or carpet respectively.

51. In relation to the tiling and the acoustic issue Mr Ireland suggested that the main criticism appeared to be that carpet was not laid on the material provided for in the Acoustic Logic Report was not in fact provided. He submitted that the acoustic evidence provided confirmed compliance of the internal works to lot 11 with By-law 14 which required that the owner of a lot ensure that all floor space within the lot was covered or otherwise treated to an extent necessary to prevent the transmission from the floor space of noise likely to disturb the peaceful enjoyment of an owner or occupier of another lot.

52. In relation to the order for access which has been sought it was submitted that the respondent had in fact requested the Owners Corporation to access the lot and carry out certain remediation works. The reports detailing the extent of such works were available from 2012 and a request was made at the AGM on 3 December 2013, yet it is claimed there has been no activity by the Owners Corporation. It was claimed that the Owners Corporation had not implemented its own scope of works in the Millachi report of 23 April 2010 and had not prepared the common property adjoining lot 11 in accordance with any expert reports or the two dilapidation reports prepared and provided by the respondent.

53. Mr Ireland argued that the Owners Corporation has an obligation to properly maintain and keep the common property in a state of serviceable and good repair and that the power conferred on the Adjudicator by s 145 enabled him to make an access order in general terms. He argued that the order requiring a bond of $100,000.00 as security did not constitute an order for payment of damages and was therefore something which could be considered as being available to the Adjudicator having regard to the provisions of s 169 of the Act.

54. It was submitted in the alternative that if the bond was found to be ultra vires the Owners Corporation should nevertheless be directed to access and maintain the

common property and to reinstate the respondent's glass and aluminium structures on them within a period of 6 months.

DECISION

55. Section 181 of the Strata Schemes Management Act 1996 addresses matters relating to the determination of an appeal from the order of an Adjudicator. Subsection (3) provides that 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. The parties have provided submissions as to the interpretation of s. 181(2) which enables the Tribunal to admit new evidence.

Nature of Appeal

56. Mr Ireland, on behalf of the respondent, has submitted that the appeal from the Adjudicator's decision is one of re-hearing and not a de novo appeal notwithstanding that fresh evidence can in circumstances be adduced. In *Zouk v Owners Corporation Strata Plan 4521 and Anor* [2005] NSWSC 845 the Court held that an appeal requires an error to be demonstrated in the Adjudicator's decision before fresh evidence should be allowed. This is consistent with a further decision of the Supreme Court in *Owners Corporation Strata Plan 7596 v Risidore and Ors* [2003] NSWSC 966. I note that Senior Member Meadows expressed a contrary view in *Owners SP56911 v Stricke* [2012] NSWCTTT 392 but I am satisfied until competing views of the Tribunal have been clarified under an appellate review, it would be inappropriate to allow additional evidence to determine the issue as to whether an Adjudicator had erred but where that conclusion is arrived at, further evidence can be received. If an appeal from an Adjudicator's decision was a complete appeal de novo then there would be no need to set the grounds of any appeal and the appellant would simply lodge the appropriate form and pay the requisite fee.

Adjudicator's Findings

57. Having considered the whole of the evidence relating to the history of this matter I confirm that matters set out in the part of my decision relating to background, are findings upon which I have considered and determined the balance of the issues raised in this appeal.

58. The applicant's solicitor is critical of a finding by Adjudicator Cohen in relation to an estoppel. The factual basis of that finding is challenged with an assertion that he failed to take into account a resolution passed at an extraordinary general meeting of the Owners Corporation held on 15 September 2009 at which it was resolved that the proprietors of lot 11 be required to remove at their own expense, and in a safe and workmanlike manner, all unapproved and unauthorised structures erected on the common property by them or their predecessors. It seems to me that the difficulty in that proposition arises from the use of the words "unapproved and unauthorised structures", notwithstanding that the resolution also refers to glass structures on levels 5 and 6.

59. Ms Crittenden made reference to the provisions of s 51 of the Act and the need for a special resolution to make, amend or appeal By-laws conferring certain rights or privileges as referred to in s 52 . Mr Ireland, on behalf of the respondent, argued that ss

51 and 52 only deal with the making of By-laws conferring exclusive use or special privileges in relation to the common property. They are provisions of the 1996 Management Act and necessarily have no retrospective application to the works constructed in or about 1992 being the glass roofing structure affixed to the common property. He argued that this is due to the presumption against retrospectivity of legislation and due to the principal of legality or clear statement which requires an unambiguous language by the parliament before property rights are effected or divested by legislation (see *Lee v NSW Crime Commission* [2013] 251 CLR *196* and *Planning Commission (WA) v Tenwood Holdings Pty Ltd* [2004] HCA 63).

60. He argued that the resolution conferring exclusive rights was passed in 1973 prior to the commencement of the Strata Titles (Freehold Development) Act 1973 and the transitional provisions in Schedule 4 cl 15 preserve such rights as may have been created pursuant to a resolution of the body corporate under a former Act or pursuant to a former By-law to a right of exclusive use and enjoyment or special privileges in respect of any former common property. He pointed out there was no time limit placed on the ability of a subsequent proprietor to request the making of a By-law confirming rights and special privileges conferred by the 1973 resolution and this is the basis upon which By-law 20 was made in 2002.

61. The Adjudicator appears to have relied upon promissory estoppel as established in *Commonwealth v Verwayen* [1990] 170CLR 394 but it was suggested that principals of conventional estoppel would also apply and support the Adjudicators decision. He argued that an Owners Corporation could not unilaterally depart from a common understanding (see *Moratic Pty Ltd v Gordon* [2007] NSWSC 5) and submitted that the Owners Corporation in 1992 and its subsequent conduct amounted to representations on which the present owner of the land had relied and it would be unconscionable in the relevant sense for the Owners Corporation to depart from the effects of those representations.

Estoppel

62. Ms Crittenden submitted that the decision of Brereton J in *Stolfa v Owners Strata Plan 4366 and Ors* [2009] NSWSC 589 provided that the requirements of the Act could not be overcome by estoppel. She referred further to a decision of Sully J in *Eventaq Development (Pyrmont) Pty Ltd v The Owners Strata Plan 51573* [2001] NSWSC 452 where his Honour noted that where legislation expressly required a lot owner to do something before the lot owner was given exclusive use of common property or special privilege to build on common property, an estoppel was unlikely to arise. Reference was also made to a decision of Acting Senior Member Thode *in Pollack v Owners Corporation SP 54298* [2013] NSWCTTT 334.

63. Mr Ireland of Counsel argued that the decision of Brereton J in Stolfa was merely obiter remarks that he was "content to accept" that the requirement of s 65A of the Strata Schemes Management Act could not be overcome by estoppel. It was pointed out that s 65A had only been in the Management Act since 2004 when it was inserted by the 2004 amendment Act. There was no suggestion that a special resolution was required in 1992 to authorise the construction of the glass aluminium structures on the common property and the affixing of the seal to the Development Application was sufficient to indicate consent to that construction by the Owners Corporation. Mr Ireland further submitted that the case of *Pollack v Owners Corporation SP 54298 (supra)*,

did not relate to the present facts where structures had been authorised and exclusive use had been authorised for many years prior to the introduction of s 65A. In *Stolfa v Owners Strata Plan 4366 and ORS (supra)* Brereton J noted that he was content to accept that the requirements of s 65A could not be overcome by estoppel and he observed that the provision was essentially prohibitory in that it precluded any other method of authorising the carrying out of works and thus precluded estoppel. He went on to say;-

> "98 however, the grant of injunctive relief remains discretionary and in the exercise of that discretion he declined to grant injunctive relief in that case".

The Court of Appeal dealt with the decision in *Stolfa v Hempton [2010]NSWCA 218* when Allsop P with whom Basten and Young JJA agreed, stated that no criticism had been made by the respondents of His Honour's conclusion as to the unavailability of estoppel but that the appellants had criticised His Honour's refusal to grant an injunction. He continued:-

> "37 secondly it was asserted that there was no discretion to withhold the injunction. I am not prepared to accept that submission. There was no direct statutory right invested in Stolfa's if work was to be done without precise resolution in accordance with s. 65A that did not give an accrued right".

64. I am satisfied that on a proper construction of the legislation and the decisions referred to, the operation of s. 65A may operate to preclude a defence of estoppel, however the rights which I find were created along with the long history of acquiescence by the Owners Corporation commencing in 1992 with the authorisation of construction and continuing through to a failure to take any action until 2009 thereafter failing to follow through, represents a long history of acquiescence by the Owners Corporation in relation to the exclusive use of both the structures and the common property. The relief sought by the Owners Corporation initially and in the present appeal is a relief afforded by s 138 of the Act which in itself is discretionary relief. I accept the submission of Mr Ireland that it would be a manifestly unreasonable exercise of the Tribunal's discretion for the relief sought by the Owners Corporation to be granted having regard to the history of the matter and I decline to do so.

65. I note in addition that under orders I have now made in the related appeal (matter SCS 15/07057) Mr El Khouri now has the benefit of a By-law which confers exclusive rights or privileges over the common property adjoining his lot. This provides yet a further basis upon which the relief sought by the Owners Corporation should be refused.

66. It is appropriate to note further that in the period between the making of orders by Adjudicator Ross in the related matter and the present time when the appeal has finally been dealt with, Mr El Khouri has undertaken necessary repairs in accordance with the dilapidation reports obtained in 2012 to restore and preserve not only the structures erected on the common property for which he is responsible to maintain under the By-law, but also balustrades which were significantly deteriorated. The Owners Corporation failed to obtain any interim orders to prevent this work being carried out.

Encroachment of works into common property

67. The next order sought by the applicant relates to the removal by the respondent from common property areas of those parts of the living area of lot 11 which have been built on to the common property balcony on the south western side. It is claimed that work was undertaken in 2012 when works which had been approved by the Owners Corporation were extended into common property areas. In addressing these alleged encroachments in the submissions, Ms Crittenden, on behalf of the Owners Corporation noted;-

> "the applicant does not say that it would not be willing to transfer or grant exclusive use of the relevant area of common property to the respondent. Rather it says that, if it is going to do so, the respondent must pay a fair market value for taking exclusive possession of the part of the common property and incorporating it into his lot."

68. The objection clearly relates to compensation and not to the use of common property by Mr El Khouri. The discretionary nature of the relief sought, having regard to the full history of the matter, and the fact that the only persons who can physically benefit from the use of the common property are the respondent, Mr El Khouri and his invitees. The relief sought should be refused. It is appropriate to note further that the orders seeking removal of the encroachments on the common property as a result of works undertaken in 2012 would be inappropriate in the light of the grant of the special use By-law ordered initially by the Adjudicator and affirmed in the related appeal matter SCS 15/07057.

Tiling and noise transmission

69. The applicant alleged that the respondent lodged a section 96 Application with the Council on 2 March 2012 in respect of certain internal works which had been approved by the Owners Corporation. It is claimed that the respondent amended the application before lodgement with the Council seeking approval to extend the works on to the common property and to lay tiles instead of carpet in areas where the Owners Corporation had only approved carpet. It was claimed further that in breach of special By-law 6, the respondent had installed tiles in living room areas of lot 11 and that the laying of tiles also involved breaches of By-law 14.

70. In his submissions Mr Ireland of Counsel noted that the areas of carpet were removed and replaced with tiles to overcome the situation where the external balcony floor levels were higher than the internal room levels. This resulted in the internal carpet becoming continually wet and mouldy. In laying tiles Mr El Khouri relied on advice from an acoustic consultant in a report dated 2 April 2012 as a result of which he installed 10mm vibromat acoustic underlay. It is claimed that he produced a report to the Owners Corporation prepared by Renzo Tonin which confirmed that he had done all that was necessary to protect the acoustic amenity of the units below, thereby complying with the sound transmission requirements of By-law 14.

71. Special By-law 6 which was passed at an extraordinary general meeting on 26 July 2011 required that the party seeking to undertake works of this nature should provide the Owners Corporation with a copy of the requisite approval from the local Council and provide soundproofing to floors and other relevant areas if appropriate, with work to be certified by an acoustic engineer on completion at the expense to be met by the lot

owner seeking to carry out the work. The By-law required further that the inspection of a replacement floor covering is to be undertaken by an independent acoustic engineer nominated by a representative of lots 9 and 10 with the lot owner to meet the cost of that inspection.

72. There is no evidence presently available to satisfy me that the tiling which has been laid is incapable of complying with By-law 14 and with special By-law 6. In the circumstances it is appropriate to decline the relief sought by the applicant but if, after appropriate testing and evaluation, there is a non-compliance issue based upon an acoustic engineer's report then the matter can be revisited, if necessary under a further application.

Access by the Owners Corporation to lot 11

73. It is clear that the Owners Corporation requires access to lot 11 for the purposes of investigation and repair. The order made by Adjudicator Cohen is not opposed, except that it is claimed that the Adjudicator has no power under the Act to order a bond.

74. I am satisfied that the respondent cannot insist that the work be carried out by a contractor of his choice. Justice Hall in the *Owners Strata Plan 32735 v Heather Lesley-Swan* [2012] NSWSC 383 held;-

> "181 the statutory obligation of an Owners Corporation to repair common property or replace fixtures at CTC may be discharged by the corporation engaging contractors pursuant to s. 13 of the Act. Where that occurs in forcible contractual rights against the contractor operate in an Owners Corporation's favour should a contractor fail to meet relevant standards. In that event the Owners Corporation may have the basis for seeking indemnity against the contractor. However where work is performed by a contractor on behalf of an individual lot owner on common property, an Owners Corporation is obviously without such contractual indemnities and rights".

Where work is carried out by or on behalf of an Owners Corporation in fulfilling its obligations under s 62 of the Act there is a collateral obligation to repair any damage caused to the property entered by the Owners Corporation or its contractors. That obligation does not require and in my view does not permit the ordering of a bond to ensure performance.

75. It follows that the order for access made by Adjudicator Cohen should be appropriately amended to delete any requirement for a bond.

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