



## Civil and Administrative Tribunal New South Wales

<b>Medium Neutral Citation:</b>	<b>The Owners - Strata Plan No 51033 v Kumar and Srivastava [2015] NSWCATCD 137</b>
<b>Hearing dates:</b>	24 September 2015
<b>Decision date:</b>	20 October 2015
<b>Jurisdiction:</b>	Consumer and Commercial Division
<b>Before:</b>	S Corley, General Member
<b>Decision:</b>	The appeal SCS 15/41207 is allowed.  The following matters are dismissed, SCS 15/47320, SCS 15/47978, SCS 15/11809
<b>Catchwords:</b>	Res judicata
<b>Legislation Cited:</b>	Strata Schemes Management Act 1996 ('SSMA') Civil and Administrative Tribunal Act 2013
<b>Cases Cited:</b>	Schrader v Owners Strata Plan No 12449 [2008] NSWSC 117, The Owners Plan 432 v Seddon [2015] NSWLEC 69
<b>Category:</b>	Principal judgment
<b>Parties:</b>	Owners Corporation SP 51033 (appellant) Pralhad Kumar and Neera Srivastava (respondents)
<b>Representation:</b>	Solicitors: J.S. Mueller & Co, Solicitors (Appellant)
<b>File Number(s):</b>	SCS 15/41207SCS 15/47320SCS 15/47978SCS 15/11809
<b>Publication restriction:</b>	Unrestricted

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## REASONS FOR DECISION

### BACKGROUND

- 1 Matter SCS 15/41207 is an appeal brought by the Owners Corporation SP 51033 against an order of an Adjudicator transferring matter SCS 15/11809 to the Tribunal for determination. The Adjudicator's order was made pursuant to s 164 SSMA after rejecting the submission by the Owners Corporation that the matters raised in SCS 15/11809 had previously been determined in strata adjudication SCS 14/27886.

- 2 I note that following registration of SCS 15/41207 two additional files have been registered SCS 15/47320 and 15/47978 which also deal with the same matter. These files are obsolete and will be dismissed. The appeal will be dealt with on the basis of SCS 15/41207 being the first in time.
- 3 The basis of the appeal is that the Adjudicator erred in transferring the matter to the Tribunal and that the matter should have been dismissed on the principle of *res judicata*. In considering whether *res judicata* does arise, that is, whether the issues have been determined, it is necessary to understand what has gone before.
- 4 The background to this matter can be summarised briefly as follows.
- 5 The respondents to this appeal are the owners of Lot 5 in this five lot strata plan (“the Lot Owners / respondents”). They purchased Lot 5 described as a “Garden Villa” in November 2012. This action was precipitated by the fact that in 2010, Mr Prahlad Kumar had suffered a stroke. His resulting disability led the couple to move from their free standing home into this villa style accommodation. Lot 5 has two garages. The Lot Owners submit that although they have only one motor vehicle they were keen to have the two garages as they expected frequent visits from their son who is a doctor and understandably takes an interest in the health of his father.
- 6 The two garages which are part of Lot 5 are at the end of a common property driveway that runs from the street to Lot 5. The driveway is adjacent to the other 4 lots. That is, a vehicle entering the complex and driving towards the garage of Lot 5 would also pass the entrance of the other lots. Three of the lots in the strata plan have two garages (Lots, 1, 3 and 5). Lots 2 and 4 owned by Mr Purkiss and Ms Hume, respectively, have one garage.
- 7 In March 2013, some months after the Lot Owners purchased Lot 5, a motion was put at an annual general meeting seeking approval to pass a special by-law to control use of the common property driveway (By-law 11). By-law 11 provides:
- “An owner or occupier of a lot must not permit visiting persons to bring a motor or other vehicle upon common property for any purpose other than: “
- 8 By-law 11 then sets out certain exceptions including for tradespersons, delivery persons and for a person dropping off or collecting an owner from their premises.
- 9 By-law 11 was agreed by four of the five owners. The respondents rejected the motion. The Owners Corporation submits that By-law 11 was motivated by safety concerns. The concern is that a vehicle driving into or reversing along the driveway could endanger occupants who are walking on the driveway or who suddenly enter the driveway from their lot. This is of particular concern to Mr Purkiss who has two children.
- 10 The Lot Owners rejected this by-law which would prevent their son from using the common driveway in order to access their second garage. The Lot Owners filed an application for adjudication (SCS 14/27886) seeking repeal of the special by-law (s 157 SSMA) or invalidation of the by-law on the basis that the Owners Corporation did not have the power to make the by-law (S 159 SSMA).
- 11 The application was decided by Adjudicator P Smith, on 17 September 2014, on the

papers, as is the normal process. It is clear that Adjudicator Smith did not believe the special by-law was meant to prevent the Lot Owners' visitors, such as their son, from driving his vehicle along the common driveway and parking his vehicle in his parents' garage.

12 At paragraph 13 the Adjudicator says:

"However, the issue of having their son, a doctor, visit the premises, pass through the common property and park within their lot in the garage and provide medical services to an invalid parent would not appear to breach the by-laws or the special by-law or be contrary to the spirit of the special by-law."

13 He says more generally at paragraph 8:

"It (By-law 11) does not serve to disallow a vehicle to "pass through" the common property for the purpose of exercising access to the lot."

14 It appears the Adjudicator sought to give By-law 11 a contextual, logical and fair interpretation. I expect he approached this exercise with an understanding that strata by-laws are often drafted by a small committee of volunteers who are not legally trained or skilled in legal drafting. It is clear from the Adjudicator's decision that he did not believe By-law 11 had the effect of preventing the Lot Owners' visitors, including their son, from driving a vehicle along the common driveway in order to access their garage. In my view the findings made by the Adjudicator as to the meaning of By-law 11 are fundamental to his reasoning process and to his ultimate determination that By-law 11 should not be repealed or ruled invalid.

15 Adjudicator Smith's decision was delivered on 17 September 2014. The decision was then mailed to the parties. On 17 October 2014 the Lot Owners lodged an appeal against the decision.

16 The appeal was lodged just outside the time limit of 21 days prescribed by the SSMA. On 28 January 2015 the Tribunal dismissed the appeal on the basis that the Tribunal lacked jurisdiction to hear the appeal as it was lodged out of time. On 29 May 2015 the Tribunal ordered the Lot Owners to pay the Owners Corporation's legal costs in the amount of \$1,670.90.

17 On 3 March 2015 the Lot Owners lodged a fresh application (SCS 15/11809) by which they sought the same orders to repeal By-law 11 or to declare it invalid. They also sought orders that By-law 11 should be declared repugnant to section 23C of the *Disability Discrimination Act 1992* and that the special by-law is inconsistent with Development Consent by City of Ryde Council for the use of the common driveway as a common driveway.

18 This new adjudication application was considered by Adjudicator de Jersey. She gave the matter serious consideration and determined that the matter should be transferred to the Tribunal pursuant to s 164 SSMA for determination of the substantive matters.

19 On 30 June 2015, the Owners Corporation lodged this appeal (SCS 15/41207) against the Adjudicator's decision to transfer the application to the Tribunal for consideration.

20 At the hearing today the Owners Corporation clarified that the purpose of By-law 11 was indeed to prevent a visitor such as the Lot Owners' son from driving on the

common driveway in order to access their garage. The Owners Corporation believes the Lot Owners' son can park his vehicle on the street and should not expect to use the Lot Owners' second garage, even for an overnight stay. In the course of the hearing it was suggested that the Lot Owner could meet their visitor outside the property and drive the visitor's vehicle along the common property driveway in order to park the vehicle in their second garage. The appellant's solicitor thought the wording of the By-law would allow this, however, Mr Purkiss objected and said this was not intended.

- 21 The real difficulty with this dispute is that both parties disagree with the Adjudicator's interpretation of By-law 11. Despite this the Owners Corporation seeks to uphold the Adjudicator's decision and has brought this appeal with the aim of preventing the matter from being reviewed.

## DECISION

- 22 Mr Moir, the solicitor for the Owners Corporation has argued persuasively that the principle of *res judicata* or issue estoppel applies to the decision of a strata Adjudicator and that in this case the matter has been determined by the decision of Adjudicator Smith (SCS 14/27886). The Owners Corporation has referred to the case of *Schrader v Owners Strata Plan No 12449* [2008] NSWSC 117 in which Harrison AJ stated that "it is common ground that *res judicata* applies to the Tribunal" [paragraph 19] and more relevantly to the recent case of *The Owners Plan 432 v Seddon* [2015] NSWLEC 69 which specifically considered the issue of whether a strata Adjudicator's decision could constitute a basis for a *res judicata* defence. In that case Sheahan J stated that "I conclude that a decision of a Strata Adjudicator can create an issue estoppel".
- 23 To my knowledge *The Owners Plan 432 v Seddon* [2015] NSWLEC 69 is the first decision of a higher court to find that a strata Adjudicator's decision under the SSMA, as distinct from a Tribunal decision, may be the basis of a *res judicata* or issue estoppel defence.
- 24 The SSMA provides a scheme for the determination of strata disputes. The first step is generally adjudication by a strata Adjudicator which is performed on the basis of written submissions invited from the parties to the dispute as well as other interested parties. Adjudication on the basis of written submissions is not a perfect method for obtaining the facts of a dispute. However, the SSMA also provides an appeal mechanism that allows the matter to be reviewed by the Tribunal and which permits admission of new evidence (s 181(2) SSMA). The appeal can be seen as another link or progression of the same matter.
- 25 The process laid out in the SSMA thus allows for the final determination of a strata dispute. If an order made by a strata Adjudicator is not appealed it will be treated as a final decision made on the merits of the evidence submitted. The decision is legally binding upon the parties. Failure to abide by an Adjudicator's decision may enliven penalty provisions of the SSMA (s 202 SSMA).
- 26 In the matter before me now, the dispute was the subject of an Adjudicator's order. The

- appeal process was initiated however the appeal application was made out of time and was dismissed without consideration of the merits of the case. The result is that the Adjudicator's decision remains a final and legal binding decision.
- 27 The parties in matter SCS 15/11809 and matter SCS 14/27886 decided by Adjudicator Smith are the same and the subject matter is identical. In both, the subject matter is a special by-law passed by the Owners Corporation in March 2013. The Applicants argue that the by-law should not have been passed or is invalid. This is the crux of the dispute which remains the same since the determination made by Adjudicator Smith. This is not a matter where circumstances have changed in some material way that would change the factual matrix pertinent to the dispute. The fact that the Lot Owners have added two other grounds or arguments for the repeal of By-law 11 does not constitute a change to the factual matrix.
- 28 The Lot Owners have not presented submissions regarding *res judicata* or issue estoppel. The Lot Owners are not lawyers. However, they say that the original adjudication should be reviewed given that the decision of Adjudicator Smith relies on assumptions regarding the meaning and intent of the special by-law which is contrary to the interpretation intended by the Owners Corporation.
- 29 I agree with the Lot Owners that the situation is not ideal. However, I am of the view that the matter has been legally determined by the decision of Adjudicator Smith in SCS 14/27886. Accordingly, *res judicata* can be raised as a defence to SCS 15/11809.
- 30 If Adjudicator Smith's decision is to be upheld then the findings on which his determination is based should also be upheld. As such it is clear that the Lot Owners' son and visitors may drive on the common property driveway in order to access the Lot Owners' second garage. This seems both logical and fair.
- 31 The Lot Owners have refrained from engaging in the behaviour allowed under the prevailing interpretation of By-law 11. I can understand that they do not wish to cause disharmony by going against the wishes of the Owners Corporation. However, they should not feel constrained in allowing their visitors to drive on the common driveway in order to access their garage. I expect a frequent visitor will have a more acute appreciation of safety issues when accessing the driveway than a delivery person or tradesperson who may only enter the complex on a single occasion.
- 32 If the Owners Corporation does wish to change the use of the common property driveway it will need to consider an amendment to By-law 11. At the hearing, this was canvassed with the parties and I believe a suitable compromise may be achievable.
- 33 This is not a matter in which I think it would be appropriate to order costs against the respondents. The general presumption regarding costs is set out in s 60 *Civil and Administrative Tribunal Act 2013* which provides that the parties are to pay their own costs unless there are special circumstances warranting an award of costs. The Lot Owners have in my view acted in good conscience pursuing this issue through legal avenues rather than simply relying on the interpretation of By-law 11 provided by the Adjudicator in SCS 14/27886 which allows them to use the common property driveway

in the manner they wish. They have sought clarity rather than engaging in behaviour which although legitimate may not be appreciated by the other owners. They have done so at considerable cost to themselves. In my view the circumstances do not warrant a cost order being made against them in relation to this appeal.

- 34 I will allow the appeal on the basis that the principle of *res judicata* prevents the relitigation of the matter determined in SCS 14/27886. It follows that adjudication application SCS 15/11809 should also be dismissed. The parties are to bear their own costs.

**S Corley**

**General Member**

**Civil and Administrative Tribunal of New South Wales**

**20 October 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

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Decision last updated: 08 January 2016