By-Law, Damages and Legal Costs Levies Stoush

Early this year, the Supreme Court of New South Wales (the "**Court**") published its decision of *Perpetual Corporate Trust Ltd v Owners Corporation SP6534; El Khouri v Owners Corporation SP6534* [2024] NSWSC 173 (the "**El Khouri Decision**"). The El Khouri Decision is important as it addresses the three significant elements of strata law, including:

1. The removal of an unjust term from a special by-law for the exclusive use of common property that required certain works to be carried out to *"final completion"* and if not completed by a certain date, the right of exclusive use would be lost;

2. The loss of a damages claim for $6,505,070.83 against an owners corporation for a lot owner's failure to comply with the terms of a special by-law; and

3. The invalidation of a special levy raised by an owners corporation for its legal fees incurred during proceedings against a lot owner on the basis that it was unreasonable for the lot owner to *"fund litigation against themselves"* where the litigation was complex and prolonged.

This case will have implications for NCAT proceedings due to its precedent value.

Detailed Breakdown of the Case

The El Khouri Decision concerned an exclusive use by-law (the "**Exclusive Use By-Law**") of an apartment building (the "**Property**") which granted the owner of a penthouse lot (the "**Lot**") the exclusive use of two balconies and a rooftop terrace attached to the Lot if certain works were carried out before a specified date. The Property is located in the Sydney suburb of Point Piper, with the rooftop terrace and balconies providing "*spectacular*" and panoramic view of Sydney Harbour.[1]

The El Khouri Decision marks the first time that the Court has made a decision on a claim brought against an owners corporation pursuant to section 149(1)(c) of the *Strata Schemes Management Act 2015 (NSW)* (the "**SSMA**"). For convenience, please see section 149(1)(c) of the SSMA extracted below:

[1] *Perpetual Corporate Trust Ltd v Owners Corporation SP6534; El Khouri v Owners Corporation SP6534* [2024] NSWSC 173 [3].

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"149 Order with respect to common property rights by-laws

(1) The Tribunal may make an order prescribing a change to a by-law if the Tribunal finds—

…

(c) on application made by any interested person, that the conditions of a common property rights by-law relating to the maintenance or upkeep of any common property are unjust.

…"

Background

On 23 May 2017, the Exclusive Use By-Law was registered. The Exclusive Use By-Law contained a sunset period of 12 months. This meant that the exclusive use given to the owner of the Lot would expire unless works were carried out before 23 May 2018 (the "**Sunset Date**"). [2]

On 8 March 2017, the Exclusive Use By-Law was adopted by a unanimous resolution of the owners corporation.[3]

The Exclusive Use By-Law: The Sunset Clause

The Exclusive Use By-Law grants exclusive use of the common property areas (including the two balconies and rooftop terrace) to the owner of the Lot, pursuant to clause 30.5:

> *"Subject to this by-law 30 (including without limitation paragraph 30.3), the owner of Lot 11 is granted rights in relation to the common property, by reference to the survey plan annexed and marked Annexure "A" (the "Plan")."*[4]

The Exclusive Use By-Law shifts the obligation for the repair and maintenance of the common property areas to the owner of the Lot, pursuant to clauses 30.5.2 and 30.6.[5]

The Current By-Law grants the exclusive use rights of the common property areas on the condition that the owner of the Lot carried out certain tasks before the Sunset Date, pursuant to clause 30.3 (the "**Sunset Clause**"):

> *"The Granted Rights cease on the day after the Sunset Date, unless the owner of Lot 11 has fully complied before that time with the Critical Obligations. For this purpose time is of the essence."*[6]

[2] Ibid [29].
[3] Ibid [30].
[4] Ibid [97].
[5] Ibid [98].
[6] Ibid [100].

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The executors of El Kouri's estate (the "**Executors**") and Perpetual Corporate Trust Ltd ("**Perpetual**") sought that the Sunset Clause be removed, so that the Exclusive Use By-Law continued to grant the right of exclusive use of the areas of the common property to the owner of the Lot.[7]

The Exclusive Use By-Law: Works Carried Out

The Executors submitted that the necessary works to common property were carried out prior to the Sunset Date, whereas the owners corporation submitted that has not sufficiently been carried out. El Khouri had arranged for works to be carried out, with the contractor who completed these works providing a certificate of completion, which was tendered into evidence. The basis of the owners corporation rejecting this submission was that the works had not been completed to the standard required by the Current Special By-Law, namely that they had not been "*fully completed.*"[8]

The Court held that the level of completion that was required was "*final completion*" and that the clause requiring these works prior to the Sunset Date was of "*little consequence.*" The Court provided that this provision was unfair on the basis that further defects or damage were discovered after the owner of the Lot had carried out the works, it would have also "*triggered the sunset clause.*"[9]

The Sunset Clause: Section 149 of the SSMA

The Court had held that several of the critical obligations of the Current By-Law had not been carried out by Mr El Khouri before the Sunset Date.[10] The Executors sought declarations under sections 139 and 149 of the SSMA to remove the Sunset Clause from the Current By-Law so that the owner of the Lot maintained the exclusive use.[11] If the Sunset Clause was valid, the owner of the Lot's exclusive use of the rooftop and the two balconies had ceased on 23 May 2018.[12]

The owners corporation submitted that section 149 did not apply on the basis that Mr El Khouri had consented to the making of the Exclusive Use By-Law.[13] The Court cited *Cooper v The Owners – Strata Plan No 58068 [2020]* NSWCA 250 ("**Cooper**") in rejecting this submission, specifically paragraph 94 of this decision of the Tribunal:

> *"…The oppressive character of a by-law, inherent from the time of its adoption, unanimous or not, may come to be felt by a person who acquires a lot at a later date."*[14]

The owners corporation submitted that the Exclusive Use By-Law was not merely for the "*maintenance or upkeep*" of common property, as a result of the Sunset Clause. The presence of the Sunset Clause, the owners corporation submitted, meant that beyond the Sunset Date, the exclusive use rights would cease, meaning that the relief of section 149 of the SSMA was not available to the

[7] Ibid [151].
[8] Ibid [124].
[9] Ibid [130].
[10] Ibid [150].
[11] Ibid [151].
[12] Ibid [150].
[13] Ibid [159].
[14] Ibid.

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Executors.[15]

The Court disagreed with this submission, providing that the very nature of section 149 of the SSMA is aimed at common property rights by-laws such as the Current By-Law. Further, the Court considered the "*intrinsic characteristic*" of the exclusive use of the two balconies and the rooftop to the ownership of the Lot.[16] Access to the balconies and the rooftop is only possible throughout the unit of the Lot and it was "*unthinkable*" that any other owner or occupant of the Property would be able to access these areas.[17]

The Court considered the value of the Lot with and without the exclusive use of the two balconies and the rooftop, being:

1. With the exclusive rights, $10,000,000; and

2. Without the exclusive rights, $7,750,000.[18]

The Court considered the approximate $2,250,000 difference in value based entirely on the exclusive use of the rooftop and the two balconies in determining whether the Exclusive Use By-Law was reasonable.[19] Further, the Court considered the implication that the enduring responsibility of the owner of the Lot to repair and maintain the common property areas if the works were not carried out before the Sunset Date, while not being permitted exclusive use of these areas.[20]

However, the Court provided that the repair and maintenance obligations imposed on the owner of the Lot were to remain and the absence of the exclusive rights would "*make no practical difference to the enjoyment by the balance of the owners of their respective units.*" The Court provided that the owner of the Lot is not getting "*something for nothing*".[21] The obligations on the owner of the Lot would be no different were it not for the Sunset Clause.

The Court remitted the decision of whether the owner of the Lot would maintain the exclusive use of the common property areas to the NSW Civil and Administrative Tribunal (the "**Tribunal**"), as requested by the Executors.[22] However, the Court made clear that the owner of the Lot was still responsible for the repair and maintenance of the common property areas.[23]

Damages Claimed by the Executors

In a novel claim, the Executors claimed an amount of $6,505,070.83 from the owners corporation. The Executors claimed that this figure represented the "*incurred interest and other costs in relation to the home loan*" secured against the Lot, which would have been discharged had the sale contract

[15] Ibid [160].
[16] Ibid [163].
[17] Ibid.
[18] Ibid [164].
[19] Ibid [165].
[20] Ibid [168].
[21] Ibid.
[22] Ibid [169].
[23] Ibid [170].

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of the Lot been completed.[24] This amount was calculated in the following way:

1. On 21 September 2017, the balance of the loan for the Lot was $4,995,899.15;

2. A sale of the lot did not proceed because this sale was conditional on the Critical Obligations being completed and the owners corporation providing a certificate to the proposed purchaser; and

3. On 6 February 2024, the amount outstanding on the loan was $11,162,981.

The Court concluded that because the critical obligations under the Exclusive Use By-Law had not been met, namely that the necessary works had not been carried out, that the Executors' claim for damages failed.[25]

Damages Claimed by the Owners Corporation

The owners corporation claimed the following amounts:

1. $779,250.72 for building costs;

2. $75,000 for GST;

3. $354,541.53 for associated claims by lot owners; and

4. Legal costs.

Upon considering the evidence of the Executors, the Court determined that much of the building costs claimed by the owners corporation were unreasonable, that the clause of the Exclusive By-Law requiring the owner of the Lot to pay GST was unjust and that many of the associated claims by lot owners were to be discounted.

Levies Raised for Legal Fees

An important aspect of the Court's decision was the owners corporation's claim for unpaid levies by the owner of the Lot raised on 8 November 2021 and 27 April 2023. The total amount claimed against the owner of the Lot was $249,951.92. The special levy raised in 2021 included an amount of $200,000.00 for legal fees and the 2023 special levy raised $375,000.00 for legal fees. With the Lot possessing a unit entitlement of 21.11%, the total unpaid contribution was $121,382.50.[26]

The Court determined that these levies were unreasonable as these levies were raised against the Lot for the owners corporation to commence a cross claim against the owner of the Lot. The Court provided that it would be unreasonable and unjust for the owner of a lot to be effectively required to

[24] Ibid [243].
[25] Ibid [246].
[26] Ibid [226].

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fund complex and prolonged litigation against themselves by paying the amounts levied against them. For convenience, please see paragraph 236 of the El Khouri Decision extracted below:

> *"236 I think the levy is unreasonable and unjust. It requires the owner of Lot 11 to fund litigation against themselves. As in this case the litigation is complex and prolonged. It has been defended by Lot 11. It is an extraordinary result that Lot 11 could be funding the opposing party to the proceedings, namely the Owners Corporation."*[27]

The Court accepted the submissions of the Executors and Perpetual that pursuant to section 87 of the SSMA that the levy contributions against the Lot should be amended on the basis that the owner of the Lot contributing toward the legal fees for proceedings filed against them was unreasonable. For convenience, please see section 87 of the SSMA extracted below:

*"**87 Orders varying contributions or payment methods***

(1) The Tribunal may, on application, make either or both of the following orders if the Tribunal considers that any amount levied or proposed to be levied by way of contributions is inadequate or excessive or that the manner of payment of contributions is unreasonable—

(a) an order for payment of contributions of a different amount,

(b) an order for payment of contributions in a different manner.

(2) An application for an order may be made by the lessor of a leasehold strata scheme, an owners corporation, an owner or a mortgagee in possession."

Perpetual and the Executors relied on the 2013 Tribunal decision of *Cleggatt v OC SP 35541* [2013] NSWTTT 359 ("**Cleggat**"), wherein ongoing legal proceedings against a lot owner and an owners corporation had been in the District Court.[28] In Cleggat, the Tribunal found that it would be "*quite unjust*" if the lot owners were obliged to asses in part to the payment of the owners corporation's legal costs.[29] The Court accepted this position and held that the Lot's contribution to the claim for $249,951.92 should be reduced by $121,382.50, leaving $128,569.42 owing in respect of the two unpaid levies from 2021 and 2023.[30]

However, the Court rejected Perpetual and the Executors' submission that the 2021 special levy including an amount of $100,000.00 for the installation of a stairway to the rooftop area of the Lot was unreasonable. The Court provided that although the construction of the stairway may not proceed and that the funds could be directed elsewhere, the owner of the Lot would be entitled to take part to consider a resolution as to the allocation of the funds. This included the return of these fund to the lot owners that had paid or a credit to lot owners had not paid.[31] On this basis, the Court held that the raising of the amount of $100,000 for the construction of the stairway was

[27] Ibid [236].
[28] Ibid [232].
[29] Ibid [233].
[30] Ibid [237].
[31] Ibid [238].

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reasonable.[32]

Orders

The Court declared the following:

1. That the Sunset Clause was unjust; and

2. That the levies raised by the owners corporation against the owner of the Lot on 8 November 2021 and 27 April 2023 were unreasonable. [33]

The Court held that the Executors were to pay the owners corporation the following amounts:

1. $283,585.39 for the building costs incurred by the owners corporation; and

2. $166,783.98 for damages payable to the owners corporation.

The El Khouri Decision highlights the importance of drafting exclusive use and other special by-laws in an appropriate and enforceable manner.

The Court's decision that the levies raised against the owner of the Lot for the owners corporation's legal fees were unreasonable is a big move that may affect the funding of strata litigation in future proceedings. The El Khouri Decision is an authority for lot owners to challenge levies raised against them for legal fees in proceedings between a lot owner and an owners corporation.

Bannermans has ample experience in relation to strata disputes. If you need any assistance please reach out to one of our specialists at enquiries@bannermans.com.au.

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[32] Ibid [239].
[33] Ibid [249].

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