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## Daily Construction A Daily Bulletin listing Decisions of Superior Courts of Australia

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### Executive Summary (One Minute Read)

**Owners Corporation SP6534 v Elkhouri (NSWCA)** - Supreme Court had power to declare that a precondition to the exercise of a power given only to NCAT was met, although it erred in finding that the precondition was met

# Benchmark

## Summaries With Link (Five Minute Read)

### **Owners Corporation SP6534 v Elkhouri [2024] NSWCA 279**

Court of Appeal of New South Wales

Ward P, McHugh JA, & Griffiths AJA

Powers of courts - Elkhouri and an owners corporation settled a dispute on terms requiring the owners corporation to pass a new by-law - the owners corporation passed a by-law granting the owner of Elkhouri's lot rights of exclusive use of certain parts of common property, to cease on a certain date unless Elkhouri's did certain repairs - Supreme Court proceedings were commenced between Elkhouri's executors and the owners corporation regarding whether the required repairs had been completed in time, and for certain costs and liabilities the owners corporations said were owing under the by-law - the mortgagee in possession of Elkhouri's apartment then sued the owners corporation in the NSW Civil and Administrative Tribunal, contending the paragraph of the by-law making the exclusive use rights conditional on the repairs was unjust and should be amended under s149(1)(c) of the *Strata Schemes Management Act 2015* (NSW) - the Tribunal transferred its proceedings to the Supreme Court - the primary judge found Elkhouri had not completed the repairs in time, upheld the owners corporation's costs and liabilities claim, declared the relevant by-law paragraph was unjust within the meaning of s149(1)(c), and remitted the matter to NCAT to make orders arising from this declaration - the owners corporation appealed, including on the ground that the Supreme Court had no power to make the declaration - the mortgagee and executors cross-appealed - held: NCAT's transfer order did not enlarge the Supreme Court's jurisdiction, and did not give the Supreme Court the power that s149(1)(c) gave NCAT - the owners corporation's basic proposition (where a statute confers power on a tribunal to apply a statutory test, the Supreme Court has no power to hear or decide questions which involve applying that statutory test unless the statute specifically authorises the Court to do so) stood the proper approach to Supreme Court jurisdiction on its head - the Supreme Court's power where a declaration is sought is very wide - provided a matter is not hypothetical or otherwise lacking in utility, the Court can declare whether a certain set of rights and obligations, or a certain state of affairs, or some combination of the two, meets a statutory description - the correct approach is not to ask whether a given statute confers power to apply a statutory test on some other tribunal, but to ask whether the statute clearly withdraws the determination of that question from the Supreme Court - the Supreme Court's power is not to be read down by implications or limitations not found in the express words of a statute - the primary judge had power to make the declaration - however, he had erred in deciding the paragraph was unjust - there is nothing intrinsically unjust about granting a rights only upon satisfaction of reasonable conditions - neither did extrinsic circumstances make the paragraph unjust - primary judge's declaration set aside - primary judge had also erred in upholding the owners corporation's costs and liabilities claim without making the necessary findings, including identifying defects and then connecting them with particular costs or liabilities - these claims should be referred to a referee.

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# Benchmark

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