



## Précis Paper

### Huang v Owners of Strata Plan No 7632 [2020] NSWCA 488 – Strata Scheme Legislation

A discussion about the case *Huang v Owners of Strata Plan No 7632* [2020] NSWCA 488, including a discussion about strata schemes, cost orders, and the duties and obligations of owners corporations.

#### **Discussion Includes**

- Key Facts
- Procedural History
- Costs and the Decision being Appealed
- Enforcing the Costs
- Relevant Statutes and Cases
- The Owners Corporation's Duties and Obligations
- The Decision
- NCAT Proceedings

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**Huang v Owners of Strata Plan No 7632 [2020]  
NSWCA 488 – Strata Scheme Legislation**

In this edition of BenchTV, Colin Purdy (Barrister, Edmund Barton Chambers, Sydney) and Tara Plumbe (Special Counsel, Vardanega Roberts, Sydney) discuss the case *Huang v Owners of Strata Plan No 7632* [2020] NSWCA 488. They discuss strata schemes, cost orders, and the duties and obligations of owners corporations.

Key Facts

1. The case arose out of a dispute between a lot owner and the strata scheme. The lot owner, Ms Huang, had a residential unit in the apartment block. At some point it became apparent that water was leaking out of the bathroom and into the residence below. That was determined to be due to a problem with the shower screen recess floor which was not properly waterproofed. This was part of the common property of the scheme. Thus, it was the owners corporation's responsibility to resolve.
2. The strata scheme was aware that the lot owner had plans of renovating the unit, including the bathroom. Understandably, it did not wish to expend the scheme members' money on fixing the waterproof membrane in the shower recess if that work was to be immediately pulled up and replaced during the course of Ms Huang's renovations. There was some controversy between the parties about whether the proposed renovation would take place or not. Eventually, the owners corporation accepted that it would not, only to be told by the contractor that they sent in to do the work that Ms Huang did indeed plan to renovate.
3. The contractor had however undertaken some of the rectification work, but in the process had damaged a pipe. The pipe had caused the leak but the water had been turned off. It was necessary for a plumber to fix it, which was arranged by the owners corporation. However, when the plumber arrived, he was turned away by Ms Huang. The owners corporation refused to undertake any more rectification works on Ms Huang's bathroom. Ms Huang commenced proceedings in the local court and she sought damages for the cost of undertaking her own rectification of the defective membrane, and also the cost of fixing the pipe which the contractor had damaged.

Procedural History

4. At some point after proceedings commenced in the Local Court, the Court of Appeal handed down the decision in *The Owners Strata Plan 50276 v Thoo* [2013] NSWCA 270, which made it clear that the owners corporation was not liable in damages for breaches of its obligations to maintain the common property under (what was then) section 62 of the

*Strata Schemes Management Act 1996* (NSW). If the plaintiff was to obtain a remedy in damages, it was necessary for her to sue in common law negligence. Since her loss was largely pure economic loss, it was necessary for her to overcome the problems that confront a litigant seeking to recover damages in negligence for pure economic loss.

5. The case was ultimately determined in November 2016 by Magistrate Richardson in the Local Court. He accepted that the plaintiff could bring an action for damages for negligence, notwithstanding that her claim was for pure economic loss. However, he did not accept that the owners corporation had been negligent. He also dismissed the plaintiff's claim under a specific provision, s 65(6) of the *Strata Schemes Management Act 1996* (NSW), which is a cause of action for damage done by an owners corporation or its contractor while carrying out works in the lot. Having dismissed the claim, he ordered that the plaintiffs should pay the owners corporation's costs.
6. The matter then languished for some time while a bill of costs was being prepared by the owners corporation. The solicitors representing the owners corporation changed. The matter was transferred to the owners corporation's insurance solicitors, Vardanega Roberts. This delayed the preparation of a bill of costs but it was eventually undertaken. It seems only to have been when the plaintiff was threatened with an enforcement of a costs order to the tune of over \$100,000, that she began to look at what remedies she might have had in relation to the decision of the Court of Appeal, namely an appeal.
7. It was almost three years after the magistrate handed down his decision that the plaintiff commenced proceedings in the Supreme Court, by way of an application for leave to appeal. The application was somewhat confused in that it not only sought review of the magistrate's decision, but it also purported to bring an appeal against the decision of the costs assessor and the costs assessment review panel, which had essentially upheld a costs claim by the owners corporation of \$100,000.

#### Costs and the Decision being Appealed

8. The matter came before Walton J in the Supreme Court. His Honour dismissed the appeal. One of the grounds upon which he dismissed the appeal was that Ms Huang's application did not make it specifically clear as to precisely what order made by the magistrate she was seeking to overturn. The application documents appeared to restrict her application to the costs order made by the magistrate rather than the substantive order dismissing the proceedings. In any event, Walton J held that the magistrate's costs decision was beyond reproach, hence dismissing the appeal on that basis.
9. The other matter dealt with by Walton J was the appeal from the costs assessment. This was a more straightforward matter. This is because it was the District Court which had exclusive jurisdiction in relation to appeals from costs assessors, rather than the Supreme Court. There was also a small matter of delay. The time for bringing an application for leave

to appeal from the magistrate's decision is 28 days. This application was brought almost three years afterward and Walton J had to consider the issues that arise when there is an application for leave. This is largely a question of balancing the respective interests of the parties and determining whether the injustice that might result from not granting the leave would exceed the injustice if the court were to do so. His Honour held against Ms Huang on this basis. Ms Huang then made an application for leave to appeal to the Court of Appeal.

10. The Court of Appeal observed that there was some confusion before Walton J about exactly what decision of the magistrate Ms Huang was appealing against, but had little difficulty in holding that the interpretation that His Honour had taken was not correct and it had always been Ms Huang's intention to appeal the entirety of the magistrate's decision. This raised the issue of the merits of the decision of the magistrate in terms of exculpating the owners corporation from liability in negligence. That fed into the leave issue, namely whether it was appropriate to grant leave after all this time for the application to be made.

### Enforcing the Costs

11. Vardanega Roberts was instructed after the Local Court handed down its decision. It was instructed by the insurer for the owners corporation. The insurer had accepted a claim by the owners corporation in relation to the Local Court decision and on that basis, it sought to enforce the costs order that was made against Ms Huang. This is when Vardanega Roberts stepped in and sought to enforce that cost order. They prepared a letter of demand to Ms Huang to enforce the costs order and then went down the usual course of the cost assessment process when that demand was not met. The bill of costs was assessed, which was made somewhat more difficult by the fact that the Vardanega Roberts solicitors were not the solicitors who went through the Local Court matter. Thus, the firm had to get access to the files held by the acting solicitors for the owners corporation.
12. These were then sent off to a third party to have the costs put in an assessable form. This was then submitted for assessment through the Supreme Court. A certificate was issued and that was then appealed to the review panel, which required both parties to prepare further submissions. From there, the review panel issued its decision in relation to the costs. From this came the Supreme Court appeal proceedings brought by Ms Huang after the review panel handed down its decision.

### Relevant Statutes and Cases

13. The magistrate's decision was determined under the *Strata Schemes Management Act 1996* (NSW). This has been replaced by the *Strata Schemes Management Act 2015* (NSW). The provisions of this Act, to a large extent, are very similar to those of the 1996 Act. A particular area of the owners corporation's responsibility for managing the common property has

some material differences. One of the differences comes under section 106, which is the owners corporation's duty to repair and maintain the common property. Specifically under s 106(5) and 106(6), the Act provides that a lot owner can seek damages against an owners corporation for their failure to maintain and repair the common property. This was not a part of the previous legislation so it is now a direct right for a lot owner to claim damages.

14. Vardanega Roberts was involved in one of the leading cases on s 106, being the Court of Appeal's decision in *Vickery v Owners – Strata Plan No 80412* (2020) 103 NSWLR 352, where they represented the owners corporation. It is a highly contested section of legislation at the moment. Prior to *Vickery*, there was a lot of discussion between the owners corporation, strata managers and those within this particular area as to two sections. Firstly, whether or not a tribunal, as opposed to a court, had jurisdiction to award damages. This was a point in the Court of Appeal's decision in *Vickery*, which found against the owners corporation. It was held that the tribunal did in fact have jurisdiction to award damages.
15. Secondly, there was a discussion in relation to section 106(6) of the Act, which provides a two-year limitation, which states that the lot owner must bring a claim for damages within two years of becoming aware of the loss. The issue has not been fully determined yet in relation to the limitation issue, but some very key points were taken from the decision in *Vickery*, both in the Court of Appeal but also when the matter was remitted back down to the appeal panel. The discussion there revolved around whether or not the two-year limitation period was a continuing limitation period for which it essentially restarted every single day that there was a breach of section 106, or whether it was simply for two years after the date the loss first accrued or the lot owner first became aware of the loss. In *Vickery*, the tribunal found that the two-year limitation period must be read in its plain and ordinary meaning and that is two years from the date the loss first accrued.

#### The Owners Corporation's Duties and Obligations

16. In relation to the issue as to whether the owners corporation had been guilty of any negligence, the decision of the magistrate was a difficult one in that it was very clear that the owners corporation had its obligation under section 62 (which was the 1996 provision, which mirrored to a large extent section 106). The owners corporation had its obligation – it was aware that there was a defect in the relevant part of the common property (the shower recess waterproofing), but relevant to the issue as to whether it carried out its obligation under section 62 was its knowledge as to what the lot owner, Ms Huang, proposed to do, which was to immediately undertake renovations which would have replaced the work that the owners corporation had done.
17. The issue of lot property or common property is one that arises regularly in relation to claims between owners corporations and lot owners. Differentiating between what is in fact lot property and common property and who has the onus of rectifying and to what extent,

is something that strata managers and insurers deal with on a regular basis. An owners corporation is the agent of the lot owners as a whole and can only act with funding provided by those lot owners. It must balance the interests of those lot owners against the single lot owner whose lot is affected by the defective common property. In this instance, the owners corporation was acting reasonably in balancing those two interests. The judges took the view that the delay in bringing the application for leave to appeal to the Supreme Court had been too substantial for leave to be given to relitigate those serious issues.

18. Another aspect that was not raised in the Court of Appeal, but arguably should have been, was whether the owners corporation owed Ms Huang any duty having regard to the damage she was claiming was pure economic loss, rather than loss or damage to her own property. This issue has been aired in a number of cases, most notably in *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* [2014] HCA 36. In this case, the magistrate actually found that Ms Huang was sufficiently vulnerable in the circumstances for the owners corporation to owe her the duty in respect of pure economic loss.
19. Arguably, the magistrate may have been in error in finding that a duty existed. This is for the simple reason that the *Strata Schemes Management Act 1996* (NSW), and its more recent 2015 counterpart, provide for quite a matrix of remedies that are available for a lot owner against an owners corporation, and vice versa, in the tribunal. They include mandatory injunctions, which a lot owner can seek against an owners corporation to have defective or damaged common property rectified when the defect or damage is affecting the lot owner's interests. In light of the remedies that were available to Ms Huang, it is difficult to see in retrospect on what basis the magistrate found that Ms Huang was sufficiently vulnerable for a duty of care to arise. Nevertheless, the magistrate did so and it was not raised in the Court of Appeal.

### The Decision

20. The Court of Appeal dismissed the application by Ms Huang and the main ground for that was that the delay in bringing the application for leave had been so substantial that the possibility that the magistrate had been in error in dismissing the claim, and the consequences to Ms Huang of that error, did not outweigh the interests or the prejudice to the administration of justice.
21. It may be argued that the magistrate did not make an error and that the matter was decided in a way that properly balanced the conflicting obligations of the owners corporation to the individual lot owner, Ms Huang, and to the lot owners collectively. However, this was a difficult argument to put forth to the Court of Appeal and White J was the only one of the three judges who dealt with that aspect. His Honour observed that whether the magistrate had decided it correctly or not, the reasoning which the magistrate gave was not

sufficiently clear. Ultimately, as all three judges held, the delay had been simply too substantial and it was not appropriate to grant Ms Huang leave at that point.

#### NCAT Proceedings

22. There was also parallel litigation between Ms Huang and the owners corporation at the NSW Civil and Administrative Tribunal arising out of a similar factual substratum. These were proceedings in which the solicitors who acted for the owners corporation in the local proceedings continued to act for the owners corporation. Ms Huang did go ahead with the renovations to both the bathroom and ensuite within her unit. It was alleged and found that the works that were performed by Ms Huang were substandard and did not include waterproofing membrane. Thus, the owners corporation sought to have the unauthorised works removed from the common property, or at the very least, provide a certificate that the works had been carried out to Australian standards. Ms Huang did not give evidence that the works had been carried out in accordance with Australian standards. The decision was handed in March 2018 by Member Meadows, who found in favour of the owners corporation and essentially required Ms Huang to remove the unauthorised works.
23. Subsequently, in 2019, the owners corporation recommenced proceedings in The Tribunal after Ms Huang failed to comply with earlier orders, where they again sought to enforce the removal of unauthorised works. The tribunal again found in favour of the owners corporation and they awarded costs against Ms Huang. Ms Huang then appealed that decision to the NCAT Appeal Panel. The Appeal Panel agreed with the owners corporation and found against Ms Huang. Thus, the appeal proceedings were dismissed with an order for costs against Ms Huang. Since then, Ms Huang has commenced a further appeal to the Supreme Court of NSW. The proceedings have been heard by the Supreme Court but no decision has been handed down as of this time.
24. Ultimately, Ms Huang owes the owners corporation the costs of the NCAT proceedings on top of the costs of the proceedings before the magistrate, the Supreme Court, the Court of Appeal and also the costs order against her in the Appeal Panel of NCAT. The renovation works that had been the subject of the NCAT proceedings had in fact been undertaken when she was proceeding in the Local Court against the owners corporation. However, she was not claiming the costs of those renovations. Instead, she was seeking to identify what would have been the cost to the owners corporation of fixing the defective membrane had the owners corporation gone ahead and done that work.
25. An aspect of the matter that had been left out in the Court of Appeal's decision was the section 65(6) claim for damage caused by the contractor to the owners corporation while on Ms Huang's premises. It is unclear precisely as to what the reach of that section is, including whether it provides compensation purely for the cost of rectifying the damage done, or whether it goes further and includes consequential damages to the lot owner.

## **BIOGRAPHY**

### Colin Purdy

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Mr Purdy was admitted to the NSW Bar in 2010. His practice focuses on general and life insurance and also personal injury, construction and commercial law. Prior to that he had 20 years of experience as a solicitor specialising in general insurance.

### Tara Plumbe

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Ms Plumbe specialises in Strata Insurance and also practices in public liability, third party property damage, and motor vehicle claims. Prior to joining Vardanega Roberts, she gained experiences in various areas including conveyancing, family law, commercial litigation and costs assessment. Ms Plumbe is also a published author in the area of criminology.

## **BIBLIOGRAPHY**

### Cases

*Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* [2014] HCA 36

*Huang v Owners of Strata Plan No 7632* [2020] NSWCA 488

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*Vickery v Owners – Strata Plan No 80412* (2020) 103 NSWLR 352

### Legislation

*Strata Schemes Management Act 1996* (NSW), ss 62, 65(6)

*Strata Schemes Management Act 2015* (NSW), ss 106(5) and 106(6)