



Précis Paper

Managing Common Property Repair Claims for Strata Properties

This presentation provides a thorough overview of the legislative scheme governing the maintenance and repair of common property.

Discussion Includes

- Transitional and savings provisions of the new strata schemes legislation
- Key differences between the 2015 and 1996 legislation
- The owners corporation's obligation to repair
- Can an owners corporation delay or defer repairs?
- Options for a lot owner if the owners corporation fails to undertake work
- Practice and procedure before NCAT
- What forms part of the common property?

Précis Paper

Managing Common Property Repair Claims for Strata Properties

1. In this edition of BenchTV, Carlos Mobellan (Barrister, 3 St James Hall Chambers, Sydney) and Paul Jurdeczka (Partner, Mills Oakley, Sydney) discuss the regime for repairing common property under the *Strata Schemes Management Act 2015* (NSW).

The *Strata Schemes Management Act 2015* (NSW)

2. The *Strata Schemes Management Act 2015* (NSW) ("2015 Act") was recently introduced in NSW, replacing the *Strata Schemes Management Act 1996* (NSW) ("1996 Act"). The main group of amendments commenced on 30 November 2016. The amendments in Part XI were due to commence on 30 July 2017 but the starting date has been delayed.
3. The repeal of the 1996 Act and the introduction of the 2015 Act gave rise to a number of transitional issues. Any causes of action that arose before 30 November 2016 are now causes of action under the 2015 Act, however any unfinished proceedings fall within the provisions of the 1996 Act. The recent decision of *Wrigley v Owners Corporation SP 53413* [2017] NSWCATAP 100 indicated that appeals from adjudications received prior to 30 November 2016 had to be brought under the 1996 Act.
4. Under the 1996 Act, s 62(1) created an obligation to maintain or repair common property. Section 62(2) also created an obligation to renew or replace common property, and the Owners Corporation retained a power to not undertake repairs in certain circumstances under s 62(3).
5. Under the 2015 Act, these provisions are now found in s 106 and are unchanged in form or substance. The 2015 Act also recognises the right of a lot owner to bring a claim for breach of a statutory duty under s 106(5). The 2015 Act also introduces the right of deferral, giving the Owners Corporation the power to defer doing work in certain circumstances under s 106(4). It is likely that the authorities and principles that were applied under the 1996 Act will continue to be applied in interpreting the 2015 Act.

The Owners Corporation's Obligation to Repair

6. The Owners Corporation's obligation to keep the common property in good maintenance and repair is to keep the common property operational and to repair anything that is defective. The Owners Corporation also has an obligation to renew or replace common property that is not in good repair, an obligation that will usually only operate in circumstances where repair would be ineffective. The Owners Corporation can decide not

to do repairs or maintenance where it does not present a safety risk or does not affect the amenity or appearance of the property (see s 106(3)). Repairs will not be required if the owners corporation determines by special resolution that: (a) it is inappropriate to maintain, renew, replace or repair the property, and (b) its decision will not affect the safety of any building, structure or common property in the strata scheme or detract from the appearance of any property in the strata scheme.

7. The Court of Appeal considered this issue in *Owners Strata Plan 50276 v Thoo* [2013] NSWCA 270. The Court held that an Owners Corporation is not required to obtain an expert's evaluation of whether or not something would affect the safety or appearance of the building. Moreover, an owner cannot challenge a resolution under s 106(3) on the basis that the members who had voted for it were not otherwise across all of the issues and did not properly evaluate the matter.
8. The ability to defer repairs under s 106(4) is only available in limited circumstances. Repairs may only be deferred if the Owners Corporation has taken action against an owner or another person in respect of damage to the common property. The repairs can be deferred until the completion of the action. This will often arise in circumstances where the Owners Corporation is bringing an action against the builder who built the original strata scheme where defects have arisen in the building.
9. The wording of s 106(4) relates to an "action", not a proceedings, and on one view, it may be broader than simply referring to actions in court. However, the presenters noted that a recent case of NCAT indicated that a complaint to Fair Trading was not an "action" for the purposes of bringing a claim under the statutory warranties provisions of the *Home Building Act*.
10. Often, when a claim for repairs is brought against the Owners Corporation, it is met by a response from the owners corporation that they are in the process of doing something, including negotiating with the builder to return to site and complete works or rectify the default. This raises an interesting issue under s 48MA, *Home Building Act 1989* (NSW), pursuant to which the preferred outcome is for the builder to come back and rectify the work. An Owners Corporation can therefore be placed in a difficult situation where it might have to expend its own funds to do work pursuant to its obligations under the strata schemes legislation, but its claim against a builder or developer might have to allow the builder or developer to come back and do the work.

Options for a Lot Owner if the Owners Corporation Fails to Undertake Work

11. There are two potential consequences if an Owners Corporation fails to take action: first, the lot owner could bring a claim for breach of statutory duty; and second, the lot owner could bring a claim to force the owners corporation to undertake the work.
12. The breach of statutory duty claim arises under s 106(5) of the 2015 Act. There are a number of important considerations:
 - Standing: Only a lot owner can bring a claim, and not a tenant or other occupant of the property.
 - Forum: Previously, the Tribunal did not have jurisdiction to make awards of damages. At present, the situation is unclear, but the presenters consider that the Tribunal still probably does not have jurisdiction to deal with breach of statutory duty claims.
 - Content of the duty: The content of the duty will be based upon cases brought under the 1996 Act.
 - Limitation period: The claim must be brought within two years of the date of awareness of the loss. The presenters considered that this would probably extend to when a person had constructive knowledge of the loss.
 - Damages: The range of damages is not included in the legislation, but previously it included loss of use damages, loss of opportunity damages, diminution of value damages and loss of amenity damages.
13. There has been judicial disagreement as to whether an action for breach of statutory duty was available under the 1996 Act. A longstanding line of authority existed that indicated that Owners Corporations which were guilty of not repairing or maintaining common property were in breach of a statutory duty, giving rise to claims for damages by the lot owner. However, in *Ridis v Strata Plan 10308* [2005] NSWCA 246, McColl JA expressed the view in obiter that there was not a claim for a breach of statutory duty by reason of non-compliance with s 62 of the 1996 Act. Subsequently, in *Owners Strata Plan 50276 v Thoo* [2013] NSWCA 270, McColl JA's reasoning in *Ridis* was followed, finding that no claim for breach of statutory duty arose under s 62 of the 1996 Act.
14. An Owners Corporation may also face a strata application in NCAT. The Tribunal is given specific jurisdiction to settle disputes that arise under the Act: s 232. The Tribunal has the power to make orders that things be done or not be done in order to settle a dispute about the operation of a strata scheme. Adjudication is no longer part of the strata regime; unlike under the 1996 Act, applications are brought directly to the Tribunal. Appeals are brought to an Appeal Panel.

What Forms Part of the Common Property?

15. A question that frequently arises is what forms part of the lot versus the common property, and who is therefore responsible for it. The formal definition of common property was not contained in the 1996 Act. There is a definition of common property in the 2015 Act, which refers to the *Strata Schemes Development Act 2015* (NSW). That Act defines common property as "any part of a parcel that is not comprised in a lot (including any common infrastructure that is not part of a lot)".
16. The default position is to refer to the floor plan. If the floor plan does not provide an appropriate answer, the vertical boundary is the inner surface of the wall and the horizontal boundary is the upper surface of the floor and undersurface of the ceiling. The decision of *Seiwa v Owners SP 35042* [2006] NSWSC 1157 makes clear that the relevant floor plan is the floor plan at the time of registration of the strata scheme.
17. The Owners Corporation can change the responsibility for the care and management of the common property in a number of ways. First, if lot owners undertake repairs that affect the common property, there will usually be a bylaw that makes them responsible for the maintenance and repair of that part of the common property (see s 142 of the 2015 Act). Second, under s 107, there is also a provision to allow the Owners Corporation to adopt a common property memorandum, a document that specifically identifies areas that are the responsibility of the Owners Corporation and areas that are the responsibility of the lot owner. Third, under s 108, the Owners Corporation may determine that an owner has the power to use some part of the common property and also has responsibility for its maintenance and repair.
18. Where there is a defect in the common property that is causing damage to the lot owner, this will fall under consequential damage.

Practice and Procedure before NCAT

19. Under the provisions of the *Civil and Administrative Tribunal Act 2013* (NSW), there is no right to legal representation in these matters before the Tribunal. If it is a matter that may end up before the Appeal Panel or the Supreme Court on appeal, it may be important to have lawyers involved in the Tribunal proceedings in order to lay the groundwork for the later proceedings.
20. The usual rule is that each party bear its own costs unless there are special circumstances.
21. When bringing a strata application in NCAT, a lot owner should consider providing as part of the application:

- The precise powers that the Act provides;
- Expert reports;
- Photos;
- Dispute documents, such as correspondence between the owner and the Owners Corporation about the repair;
- Floor plan or any other document indicating what forms part of the common property.

22. Mediation is compulsory, however the Tribunal can still accept an application where a party has refused to mediate. A failure to participate in mediation may be a factor raised in a costs application. The presenters reminded viewers that sometimes matters can unexpectedly settle, and that it is ultimately in the interests of all of the parties that common property be repaired.

BIOGRAPHY

Carlos Mobellan

Barrister, 3 St James Hall Chambers, Sydney

Carlos is a barrister on Third Floor St James Hall Chambers and specialises in building cases with an emphasis on matters arising under the *Home Building Act 1989*, the *Building and Construction Industry Security of Payment Act 1999* and the *Strata Schemes Management Act 2015*. Carlos was admitted as a solicitor in 1997 and was called to the Bar in 2004 where he was awarded the Bar Practice Course prize. Carlos has appeared for and against home owners, Owners Corporations, builders, government agencies and property development companies.

Paul Jurdeczka

Partner, Mills Oakley, Sydney

Paul holds a Bachelor of Arts and a Bachelor of Laws from Macquarie University, and was admitted as a solicitor in New South Wales in 1999. He practises primarily in insurance, construction and strata law, specialising in home warranty insurance, contract works insurance, residential construction disputes and defects claims, as well as strata advice and disputes.

BIBLIOGRAPHY

Cases

Wrigley v Owners Corporation SP 53413 [2017] NSWCATAP 100
Owners Strata Plan 50276 v Thoo [2013] NSWCA 270
Ridis v Strata Plan 10308 [2005] NSWCA 246
Seiwa v Owners SP 35042 [2006] NSWSC 1157

Legislation

Strata Schemes Management Act 2015 (NSW)
Home Building Act 1989 (NSW)
Civil and Administrative Tribunal Act 2013 (NSW)
Strata Schemes Development Act 2015 (NSW)