Thomson Playford

A Wake Up Call For Owners Corporations in NSW

> "The decision highlights the onerous duty imposed on Owners Corporations under s62 of the *NSW Strata Schemes Management Act 1996*, to maintain their common property in a state of good and serviceable repair."

On 6 November 2006, Justice Brereton of the NSW Supreme Court delivered judgment in *Seiwa Pty Ltd v Owners Strata Plan 35042 [2006] NSWSC 1157*.

His Honour gave judgment in favour of Seiwa, the owner of an apartment in the Strata scheme, that the Owners Corporation pay $150,000 damages for loss of use of the balcony of the apartment and, dependent on whether the Owners Corporation complied with his mandatory injunction that the balcony be rectified within 3 months, awarded a further $250,000 in respect of a reduction in value if repairs were not completed in that time.

There can be significant resistance by an Owners Corporation to repair defects in common property. This often happens when there are few owner occupiers, or where the defects are limited in impact to a minority of lots, particularly where there is significant or disproportionate cost involved in the repairs.

The judgment is a salutary warning of the danger for Owners Corporations which neglect maintenance and repairs to common property.

The Case

The defective common property comprised rectangular steel uprights providing the framework enclosing a balcony which formed part of Seiwa's apartment and the balcony membrane.

Drawing upon on a series of earlier decisions, his Honour explained that as soon as something in the common property is no longer operating effectively, or has fallen into disrepair, there has been a breach of the duty under s62.

His Honour distinguished the principle from that in the 2005 Court of Appeal decision in *Ridis v Strata Plan 10308 [2005] NSWCA 246*. The Owners Corporation is obliged not only to attend to cases where there is a malfunction, but also to take preventative measures to ensure that the malfunction does not occur.

In Ridis, the Court of Appeal had held that s62 did not oblige an Owners Corporation to obtain an expert assessment of every possible source of danger in the common property and did not effectively impose on the Owners Corporation rigorous duties of inspection.

His Honour pointed out that the duty of an Owners Corporation under s62 is owed to each lot owner, and each breach gives rise to a private cause of action under which damages may be awarded to a lot owner for a breach of a statutory duty. This had been the position under the repealed Strata Titles Act 1973, but there was debate as to whether the principle applied under the current Strata Schemes Management Act 1996.

The Steelwork

Seiwa had complained about the defective steelwork in the balcony, as early as March 2003 which was finally repaired in August 2005, a few weeks after the proceedings had commenced. A breach of the s62 duty was established from March 2003 until August 2005.

The Membrane

There was a secondary defect in the failure of the balcony waterproof membrane, which remained unrepaired at the date of the Trial in October 2006.

Reasonable Steps

The Owners Corporation argued that it had taken all reasonable steps to perform its s62 duty and that Seiwa was guilty of contributory negligence. Significantly, his Honour held that both issues were irrelevant because of the strict nature of the Owners Corporation's duty. Contributory negligence is no defence to an action for breach of statutory duty.

Because of the strict nature of the s62 duty, it was unnecessary to resolve whether the Owners Corporation had attended to the defects with due diligence and expedition. Nevertheless, his Honour was unable to accept that a two and a half year period to repair the obviously seriously defective and dangerous steel uprights was reasonable.

Was the Supreme Court the Proper Tribunal?

The Owners Corporation argued that the matter should have been brought in the Consumer, Trader and Tenancy Tribunal (CTTT) and not the Supreme Court. His Honour rejected that argument, finding that the CTTT had no exclusive jurisdiction. In any event, there was a real and urgent issue of safety relating to the steel uprights which justified the remedy of an interlocutory mandatory injunction. In this case Seiwa wished to maintain a claim for damages, however the CTTT had no power to award damages under section 138(3)(d) of the Strata Schemes Management Act.

Assessment of Damages

The Court considered at length the issue of the loss of value of the apartment having regard to the presence of the defects. In this case, without the defects, there was evidence that the apartment was worth $1.55million, whereas while the corroded steel uprights and water penetration remained, it was worth only $1.1million. Once the steelwork had been rectified but the water penetration problem remained, the apartment was worth $1.3million.

Seiwa was a company and the occupier of the apartment was in fact an officer of that company. There was a less than arms length relationship between Seiwa and the occupier and no written lease. Nevertheless his Honour held that this did not disentitle Seiwa to damages.

His Honour granted a mandatory injunction for rectification of the membrane and loss of use damages of $150,000 between March 2003 and August 2005, with additional damages in lieu of the injunction, of $250,000 if the repairs to the membrane required by the injunction were not performed within 3 months.

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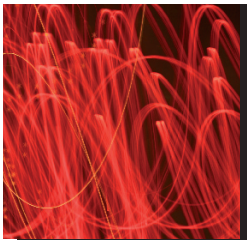

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