



An Owners Corporation's duty to renew or replace common property

The NSW Court of Appeal recently considered the limits of an Owners Corporation's statutory duty to renew or replace fixtures or fittings on common property in *The Owners Strata Plan 50276 v Thoo* [2013] NSWCA 270.

The duty is located in section 62 of the Strata Schemes Management Act 1996 (NSW). In short, section 62(1) provides that an owners corporation must properly maintain and keep the common property in a state of good and serviceable repair and section 62(2) provides that the Owners Corporation must renew or replace any fixtures or fittings in the common property.

The relevant facts are outlined below.

Thoo purchased Lot 17 in the Hunter Connection building in the Sydney CBD. Thoo then submitted plans of subdivision to the City of Sydney Council to subdivide Lot 17 into three separate shops with separate retail tenancies as he intended to use the three shops for commercial cooking and

sale of hot food. The Council approved the plans on the condition that before Thoo or an occupant could use the shops for that purpose, the shops would need to be serviced by an adequate exhaust ventilation system.

Thoo applied to the Owners Corporation to connect Lot 17 to the building's existing mechanical exhaust ventilation system ("MEVS") which was part of the building's common property. The Owners Corporation accepted that Lot 17 could be connected to the MEVS but decided that the lots which were already connected to the MEVS were utilising it to its capacity. On the basis of a ventilation expert's advice that installing a supplementary ventilation system and connecting Lot 17 to it would be an expensive and difficult operation which would interfere with the retail operations of the occupants of other lots, the Owners Corporation declined to connect Lot 17 to the MEVS.

The Court unanimously agreed that the Owners Corporation was not under a duty pursuant to section 62(2) to provide a reasonable level of exhaust ventilation to Lot 17 and as such it had not breached its duty under section 62(2). The Court also held:

1. The Owners Corporation is obliged to keep any fixtures or fittings in the common

property in a state of good and serviceable repair.

2. If the first obligation cannot be achieved then the defective fixture or fitting must be replaced subject to section 62(3) which provides that an Owners Corporation can decide by special resolution that it is inappropriate to maintain, renew, replace or repair the property so long as the safety and appearance of the strata and common property is unaffected.

3. The Owners Corporation is not obliged to keep the common property operating efficiently enough so that all lot owners can use and enjoy the common property. The relevant Owners Corporation was not required to redesign the common property so that all lot occupants could utilise the MEVS if they decided to cook and sell hot food at an indefinite point in the future.

Prospective purchasers of strata title, especially in retail developments, should examine the building's existing common property infrastructure and carefully consider whether it will accommodate their proposed use of the lot in question. If you wish to discuss the implications of this decision for your current or future strata properties, please contact Esplins.

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*Merry Christmas
& Happy New Year*

Work, Health and Safety in the Workplace

The Commonwealth Government's Work Health and Safety Act 2011 ("WHS Act") commenced on 1 January 2012 and replaced the occupational health and safety laws in NSW.

The Work Health Safety Regulations 2001 ("WHS Regulations") expands on the requirements of the WHS Act by providing further details on how to comply with the WHS Act.

The WHS Act and WHS Regulations set out the legal obligations so as to provide for the health and safety of workers and expressly provides for the duties and rights of officers, workers and "persons conducting a business or undertaking" ("PCBU").

PCBU is a new term introduced under the WHS Act and refers to a person who conducts a business or undertaking:

- whether that person conducts the business or undertaking alone or with others, and
- whether or not the business or undertaking is conducted for profit or gain.

The meaning of a PCBU includes employers and applies to individuals and organisations, including public and private companies, partnerships and self-employed people.

The term "worker" has also been given a

broad meaning under the WHS Act. It includes any person who performs work in any capacity for a business or undertaking (e.g. employee, trainee, volunteer, apprentice, employee of a contractor or subcontractor, etc.).

These broader definitions mean that every person conducting a business or undertaking must fulfil its health and safety duties to anyone who may be affected by its operations, including volunteers.

PCBUs have a primary duty of care to ensure workers and others are not exposed to a risk to their health and safety. This includes, so far as it is reasonably practicable, providing a safe and healthy workplace by ensuring:

- a safe work environment,
- safe use of plant, structures and substances,
- facilities for the welfare of workers are adequate,
- notification and recording of workplace incidents,
- adequate information, training, instruction and supervision is given,
- compliance with the requirements under the WHS Regulations, and
- effective systems are in place for monitoring the health of workers and workplace conditions.

Officers, which include company directors, are also expressly identified under the WHS Act and are given high-level obligations for work health and safety. Officers have a duty

to exercise, among other things, due diligence to ensure their business or undertaking fulfils its health and safety obligations under the WHS Act and the WHS Regulations. The essential elements of due diligence requires an officer to:

- acquire and keep up-to-date knowledge of work health and safety matters,
- gain an understanding of the operations of the business and the hazards and risks involved,
- ensure appropriate resources and processes are provided to enable hazards to be identified and risks to be eliminated or minimised,
- ensure information regarding incidents, hazards and risks is received and the information is responded to in a timely way,
- ensure the PCBU has, and implements, processes for complying with any legal duty or obligation, and
- ensure processes are verified, monitored and reviewed.

There are numerous other duties for PCBUs, officers and workers prescribed under the WHS Act and WHS Regulations from those set out above. You can seek our assistance if you need further advice on your rights and obligations or on how the WHS Act and the WHS Regulations apply to, and affect, your particular circumstances.

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Lot owner held a vexatious litigant

In *Singh v The Owners – Strata Plan 11723 & Ors* [2013] NSWSC 1595 the NSW Supreme Court made an order pursuant to section 8 of the Vexatious Proceedings Act 2008 (NSW) prohibiting Singh from instituting proceedings in NSW without the leave of the Court against the Owners Corporation of his previous apartment complex and his trustee in bankruptcy, Van Der Velde. Singh was originally sued by the Owners Corporation which was seeking

to recover \$1,893.26 in unpaid levies plus costs and interest. After achieving a default judgment, the Owners Corporation commenced bankruptcy proceedings and the Court appointed Van Der Velde as Singh's trustee in bankruptcy who then took steps to possess and sell Singh's apartment. Between 23 August 2011 and 26 June 2013 Singh commenced 15 proceedings across 5 federal and state courts seeking orders to set aside the default judgment, annul Van Der Velde's appointment as his trustee in bankruptcy and prevent Van Der Velde from selling the apartment.

The Court held that Singh's conduct showed an inability or refusal to accept finality in litigation and was satisfied Mr Singh had commenced and conducted vexatious proceedings frequently. Mr Singh joins a list of only 14 other vexatious litigants pursuant to this section. This case shows the Court is hesitant to make such an order but will do so if the circumstances require it.

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