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# ARE WE GETTING IT WRONG?

UNAUTHORISED WORKS: WHO IS RESPONSIBLE FOR REPAIRING THEM?

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## UNAUTHORISED WORKS: WHO IS RESPONSIBLE FOR REPAIRING THEM?

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Who is responsible for repairing unauthorised work done by an owner to common property that is defective? The answer (and the reason for that answer) might surprise you.

### Introduction

An owners corporation must in general properly maintain and keep in good repair all common property in its strata scheme. But what happens when an owner makes alterations or additions to the common property without the consent of the owners corporation? Who is responsible for maintaining and repairing those unauthorised alterations and additions: the owner responsible for them (who may have sold his unit long ago), the current owner or the owners corporation?

### An Example

Take the classic case of an owner who decides to renovate his bathroom without the consent of the owners corporation. During the renovation, the owner re-waterproofs his shower tray. Several years later, after the owner has sold his unit, the shower tray allows water to leak into the unit below because it was not re-waterproofed correctly. Who is responsible for fixing the defective shower tray?

### A Typical Approach

In the case of the defective shower tray, many owners corporations will assume that because the shower tray is common property, they are responsible for repairing it even though they did not install it. On the other hand, some owners corporations will take the view that because the shower tray was installed without their consent, the owner responsible for installing the shower tray, or the current owner, must fix it. Which is the correct approach?

### The Duty to Maintain Common Property

The NSW Courts have over many years considered the nature and scope of the duty of an owners corporation to maintain and repair common property. The Courts have concluded that this duty:

- is compulsory: see *Seiwa Pty Ltd –v- Owners Strata Plan 35042* [2006] NSWSC 1157;
- is absolute and is not a duty to reasonable care to maintain and repair common property or to take reasonable steps to do so but a strict duty to maintain and keep in repair: *Seiwa*;
- extends to require the maintenance and repair of common property which could not be for the benefit of the owners as a whole or even a majority of them (such as the repair of a common property air conditioning system that only services one lot): see *Proprietors Strata Plan 159 -v- Blake* (1986) CCH Strata Titles Cases ¶ 30-068;
- must still be fulfilled even if the owners corporation did not cause the damage to the common property which needs to be repaired: see *Lubrano -v- Proprietors Strata Plan No. 4038* (1993) 6 BPR 13,308;
- extends to require remediation of defects in the original construction of the common property even if the original builder or developer are responsible for those defects: see *The Proprietors of Strata Plan No. 6522 -v- Furney & Anor* (1976) 1 NSWLR 412.

### A Duty to Maintain Unauthorised Alterations to Common Property?

However the position is different in relation to the maintenance and repair of alterations or additions to common property which have been undertaken by an owner without the consent of an owners corporation. This is because the Courts have held that the duty of the owners corporation to maintain and repair common property:

- involves consideration of the attributes of the *original* common property *at the time the strata plan is registered* in order to determine whether or not a specific part of the common property is in need of maintenance, repair or replacement: see *The Owners Strata Plan 50276 –v- Thoo* [2013] NSWCA 270;
- must only take into consideration any alteration or addition that is made to the common property *in accordance with the strata legislation* when determining whether or not any common property that has been altered or added to requires maintenance, repair or replacement: *Thoo*;
- centres on the preservation of the *original* fabric of the building as constructed: see *The Owners – Strata Plan 21702 -v- Krimbogiannis* [2014] NSWCA 411;
- focuses on preserving the *original* fabric on the common property by not removing, replacing or destroying the original common property (without proper authority): *Krimbogiannis*;
- requires the owners corporation to restore to its original condition any common property which has been altered, replaced or destroyed (without proper authority): *Krimbogiannis*;
- therefore, does not require the owners corporation to repair common property that has been added to the building without its consent: *Krimbogiannis*.

In other words, in order to determine if some part of the common property must be repaired or replaced, one must look backwards and compare what currently exists with what existed at the time the strata plan was registered (which allows one to ignore unauthorised changes to the common property), and if the common property is operating as it was originally intended to, then there is generally no need to repair or replace that common property: *Thoo*.

### Krimbogiannis

The *Krimbogiannis* case explains why an owners corporation is not responsible for repairing an item of common property which was installed without the consent of an owners corporation and has become defective.

This case involved the Connaught building in Sydney. Long after the strata plan for the Connaught was registered, the owner or tenant of lot 6 removed a glass panel from an external common property wall of the building and replaced it with a glass sliding door (**door**). This work was done without the consent of the owners corporation. The glass sliding door allowed the operator of the cafe which traded from lot 6 to accept deliveries through the door.

The door was kept in good repair. However, the owners corporation wanted the external wall to be returned to its original condition. The tenant of lot 6 refused to do so. The owners corporation applied to an Adjudicator and then the Consumer, Trader and Tenancy Tribunal for an order for

access to lot 6 to enable it to remove the door and reinstate the external wall to its original condition. The owners corporation's application for the access order was rejected and an appeal to the District

Court was unsuccessful. The owners corporation sought judicial review of the District Court's decision in the NSW Court of Appeal.

The Court of Appeal concluded that in order to be entitled to an access order, the owners corporation had to show that it needed to gain access to lot 6 to properly maintain or keep in good repair the common property. The Court concluded that the duty of the owners corporation to maintain the common property centred on preserving the original fabric of the common property. This meant the owners corporation had a duty to reinstate the external wall to its original condition by removing the door that had been installed without its consent. For that reason, the Court concluded that the owners corporation was entitled to an order to give access to lot 6 to restore the external wall to its original condition.

### **The Wash Up**

The decision in *Krimbogiannis* means that an owners corporation cannot be responsible for the repair of a defective item of common property that was added to its building without its consent. This is because imposing on the owners corporation a responsibility to repair that defective item would be incompatible with the duty the owners corporation owes to remove the item and restore the common property to its original condition.

### **What does this all mean?**

The position is generally as follows:

- an owners corporation is not responsible for repairing defects in alterations or additions to the common property that have been made by an owner without its approval;
- instead, the owners corporation is responsible for removing any alterations or additions to the common property that have been made by an owner without its approval and restoring the common property to its previous condition;
- if an owner or his or her predecessor wants to retain unauthorised alterations or additions to the common property, a by-law needs to be made to permit the owner to keep those works and that by-law should impose on the owner the obligation to maintain and repair the works.

### **The Result**

This analysis leads to some surprising results. To take our earlier example of the bathroom renovation done by an owner without owners corporation approval, the owners corporation is not responsible for repairing the defective waterproofing in the shower recess. If the owners corporation wants to force the owner to repair the defective waterproofing this should be done by either:

- a by-law being made which permits the bathroom renovations to remain on certain conditions including the condition that the owner is responsible for the ongoing maintenance and repair of the renovations including the waterproofing; or
- an order being obtained from NCAT to require the owner to repair the defective waterproofing.

### **Conclusion**

An owners corporation is generally not responsible for repairing defects in works that have been done to the common property without its consent. If the owners corporation is prepared to allow the

unauthorised works to remain, a by-law should be made, with the consent of the relevant owner, to permit the works to be kept on certain conditions. Those conditions should include a condition requiring the owner to maintain and repair the works.

If the owners corporation is not content to allow the unauthorised works to remain, then an application should be made to obtain an order by NCAT to require the occupier of the lot to give the owners corporation access to allow it to reinstate the common property to its previous condition or to require the owner responsible for the works to remove the unauthorised works and reinstate the common property to its previous condition.

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