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SPREADING THE CHRISTMAS CHEER – OWNERS CORPORATIONS’ RIGHTS VINDICATED

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Last week the NSW Court of Appeal delivered two victories for owners corporations and in the process clarified the operation of important areas of the strata legislation.

Introduction

On 5 December 2014 the most senior court in NSW, the Court of Appeal, confirmed that an owners corporation has the right to obtain an access order from an Adjudicator to enter a lot to rectify unauthorised works carried out to the common property by the lot owner or occupier. In a separate case decided on the same day, the Court of Appeal also confirmed that an owners corporation can start legal action without first passing a resolution at a general meeting, and not have the legal action dismissed if the owners corporation subsequently approves the legal action at a general meeting. These decisions clarify important rights of owners corporations and will be welcomed by the broader strata community.

Access Rights Confirmed – The Connaught Case

The Facts

The Connaught is a large mixed use strata title building in Sydney. Mr and Mrs Krimbogiannis were tenants who operated a food business from the ground floor of the building. At some point before the Krimbogiannis family began operating their business, the previous owner or tenant of their premises modified the common property without the approval of the owners corporation. These modifications involved removing the glass panel forming part of the external wall of the building and replacing it with a glass sliding door.

In 2010, the owners corporation wrote to the Krimbogiannis's seeking access to their premises to carry out works necessary to restore the common property to its original state. The Krimbogiannis's did not grant the owners corporation approval to enter their premises because they wanted to keep the glass sliding door to facilitate deliveries to their business.

Rounds 1, 2 & 3 – Adjudicator, CTTT & District Court

The owners corporation applied to an Adjudicator for an order to access the premises pursuant to section 145 of the *Strata Schemes Management Act 1996* ("Strata Act"). That application was refused. The owners corporation unsuccessfully appealed to the CTTT. Unperturbed, the owners corporation appealed again to the District Court but its appeal was dismissed. The main reason the owners corporation was unsuccessful and did not get an access order to the Krimbogiannis's premises was because the glass sliding door that had been installed without the approval of the owners corporation was in good condition



and did not need to be repaired. For this reason, the Adjudicator, CTTT and District Court held that the glass sliding door did not need to be maintained or repaired under section 62 of the Strata Act as a result of which the Adjudicator had no power to grant the owners corporation an access order.

Final Round – The Court of Appeal

The owners corporation remained dissatisfied and sought a review of the District Court's decision in the highest court in the State, the Court of Appeal. On 5 December 2014, the Court of Appeal held that the District Court (and the Adjudicator and CTTT) had all decided the case incorrectly. This is because the Court of Appeal found that the owners corporation's duty to maintain common property included an obligation to preserve the common property by not removing, replacing or destroying it, or to preserve the fabric of the building. This meant that the owners corporation had the right under section 62 to remove the sliding glass door that had been installed by the Krimbogiannis's predecessors and reinstate the glass panel that formed part of the external wall of the building. In turn, this meant that the owners corporation had the right to obtain an access order from an Adjudicator under section 145 of the Strata Act to enter the Krimbogiannis's premises to carry out that work: see *The Owners – Strata Plan 21702 -v- Krimbogiannis* [2014] NSWCA 411.

Right to Start Legal Action Confirmed – The Gazebo Apartments Case

The Facts

The Gazebo was a well known hotel located in Kings Cross, Sydney. The Gazebo Hotel was refurbished between 2002 and 2005. The refurbishment converted the hotel into a strata title apartment building. The owners corporation of the Gazebo alleged that the work involved in the refurbishment was defective and it sued the developer of the Gazebo for (among other things) compensation to cover the cost of repairing the alleged defects.

The Problem

The owners corporation started the legal action against the developer without first passing a resolution at a general meeting to approve the legal action as required by section 80D of the Strata Act. This was done because the owners corporation feared that it would run out of time to start legal action against the developer if it waited to hold a general meeting to pass such a resolution because a limitation period was about to expire. However, the owners corporation did pass a resolution at an AGM to authorise the legal action soon after it began.

Supreme Court Ruling

The developer argued that the legal action against it should be dismissed because at the time the legal action was started the owners corporation had not passed a resolution at a general meeting and had therefore breached section 80D. The Supreme Court held that the legal action was still valid even though it had not been approved by a resolution passed at a general meeting before it was started, and that the owners corporation could comply with section 80D as long as it passed a resolution at a general meeting at some point even if that was after the legal action had begun.

Court of Appeal Ruling

The developer appealed to the Court of Appeal. On appeal, the developer argued that section 80D required a resolution at a general meeting to be passed *before* the start of legal action. The developer said that a failure to do so rendered the legal action liable to be dismissed.

The Court of Appeal dismissed the developer's appeal. The Court of Appeal held that section 80D does require a resolution to be passed by an owners corporation before it starts legal action. However, the Court of Appeal said that legal action started in contravention of section 80D is not invalid and need not necessarily be struck out or dismissed by a court or tribunal. Rather, the court or tribunal will have a discretion as to what it will do with legal action that has been started in breach of section 80D and, depending on the circumstances, the court or tribunal may be entitled to allow the legal action to continue.

The Court of Appeal explained that where the breach of section 80D is promptly cured by the owners corporation passing a resolution at a general meeting to approve the legal action then, even though the resolution is passed after the legal action has started (in breach of section 80D), a court or tribunal would not normally dismiss the legal action in those circumstances because the lot owners have had their say and have approved the legal action. The Court of Appeal said that the primary purpose of section 80D is to protect lot owners from unauthorised expenditure on legal action, not to protect third parties who are sued by owners corporations. This meant that the purpose of section 80D would not be promoted if legal action which was subsequently approved by the lot owners was dismissed on the application of the third party who was sued because of a breach of section 80D. One of the Court of Appeal judges also held that the owners corporation was able to ratify the decision to start the legal action: see *2 Elizabeth Bay Road Pty Ltd –v- The Owners – Strata Plan No. 73943* [2014] NSWCA 409.

Conclusion

The *Krimbogiannis* case confirms that an owners corporation is able to obtain an access order from an Adjudicator to enter a lot to rectify unauthorised works done to the common property by the lot owner or occupier.



The Gazebo Apartments case confirms that an owners corporation is able to start legal action without first obtaining general meeting approval (particularly where a limitation period is about to expire) and continue the legal action provided that general meeting approval is subsequently (and preferably – promptly) obtained.

The result in these cases will be welcomed by the broader strata community particularly in the light of impending reforms to the home building legislation which may result in some owners corporations starting legal action urgently without general meeting approval.

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About JS Mueller & Co Lawyers

JS Mueller & Co Lawyers has been servicing the strata industry across metropolitan and regional NSW for almost 40 years. We are a specialist firm of strata lawyers with in depth and unmatched experience in, and comprehensive knowledge of strata law and levy collection.

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