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LAWYERS



COMMON PROPERTY MAINTENANCE/ALTERATIONS

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COMMON PROPERTY MAINTENANCE/ALTERATIONS

1. The Question

Can a strata committee approve repairs which alter, add to or improve common property?

2. The Answer

The answer to that question is generally “yes”. The strata committee can generally approve repairs which alter, add to or improve the common property without the authority of a special resolution passed at a general meeting. But the answer is not obvious and causes much confusion. Why is this so?

3. Legal Analysis

3.1 Maintenance of Common Property

Section 106 of the *Strata Schemes Management Act 2015* (**2015 Act**) requires the owners corporation to maintain and repair common property and, where necessary, to renew or replace any fixtures or fittings in that common property. Section 106 is in the following relevant terms:

“106 Duty of owners corporation to maintain and repair property

- (1) An owners corporation for a strata scheme must properly maintain and keep in a state of good and serviceable repair the common property and any personal property vested in the owners corporation.
- (2) An owners corporation must renew or replace any fixtures or fittings comprised in the common property and any personal property vested in the owners corporation.”

The strata committee is generally able to carry out maintenance and repairs to the common property. This is because section 36(2) of the 2015 Act says that a decision of the strata committee is taken to be the decision of the owners corporation. In other words, section 36(2) gives the strata committee power to make certain decisions on behalf of the owners corporation such as decision to carry out acts of building maintenance.

Section 36(3) only restricts the strata committee from making a decision (e.g. to maintain or repair common property) if that decision is required by or under the 2015 Act to be made by the owners corporation by unanimous resolution or special resolution or in general meeting (which it normally would not be) or that decision is a decision on any matter or type of matter that the owners

corporation has determined in general meeting is to be decided only by the owners corporation in general meeting.

3.2 Changes to Common Property

Section 108 of the 2015 Act permits the owners corporation to make changes to the common property for the purpose of improving or enhancing the common property in certain circumstances. Section 108 is in the following relevant terms:

“108 Changes to Common Property

(1) Procedure for Authorising Changes to Common Property

An owners corporation or an owner of a lot in a strata scheme may add to the common property, alter the common property or erect a new structure on common property for the purpose of improving or enhancing the common property.

(2) Any such action may be taken by the owners corporation or owner only if a special resolution has first been passed by the owners corporation that specifically authorises the taking of the particular action proposed.”

Section 108 means that the strata committee is not able to alter, add to or erect a new structure on the common property, for the purpose of improving or enhancing the common property. These actions are only able to be taken by the owners corporation pursuant to the authority of a special resolution that is passed at a general meeting.

3.3 Maintenance of Common Property -v- Changes to Common Property

The interaction between the predecessors to section 106 (maintenance and repair of common property) and section 108 (changes to common property) of the 2015 Act, was considered by the NSW Court of Appeal in *Stolfa -v- Hempton [2010] NSWCA 218*. There the Court said the following at [10]:

“It was submitted that even though [Section 106] required repair and maintenance to be done, because the work in fact improved or enhanced the common property, a special resolution was required. The Judge was correct to reject that submission. If, as a matter of fact, all the work satisfied the description in [Section 106] as repair and maintenance, they were not subject to any requirement of a special resolution

in [Section 108]. The statute should not be construed so as to require the owners corporation to act, but then to place a voting barrier in its path in complying with the statute.”

In the *Stolfa* case, a common property timber floor had rotted and needed to be replaced. The owners corporation organised to replace the rotted timber floor with a new concrete floor. Certain owners objected to the replacement of the rotted timber floor with a concrete floor on the basis that the concrete floor would alter or add to the common property and therefore needed to be approved by special resolution at a general meeting. The Court disagreed. The Court was satisfied that the floor was being replaced in order to maintain and repair the common property and therefore did not need to be approved by a special resolution at a general meeting. The Court held that even though the concrete floor involved a superior construction to what pre-existed it to the extent that a concrete slab was substituted for timber flooring, the work was done to keep the building in a state of good and serviceable repair. In other words, the purpose of the work was to avoid damage to and defects in the building, not to introduce some new improvement as a result of which the work was able to be done under the equivalent of Section 106 of the 2015 Act.

The same issue was again considered by the NSW Court of Appeal in *The Owners – Strata Plan No. 50276 -v- Thoo* [2013] NSWCA 270. There, the Court made the following relevant remarks at [3] – [7]:

“[Section 108] is concerned with forms of activity undertaken “for the purpose of improving or enhancing the common property”. Two of the relevant forms of activity are adding to the common property and altering the common property. [Section 106], by contrast, creates a duty to “renew or replace any fixtures or fittings comprised in the common property”.

Replacement is a large concept. If a modest single bulb light fitting is removed and a grand crystal chandelier is installed in its place, the former has obviously been replaced by the latter. There is also replacement if a substantial brick wall is erected on a site previously occupied by a flimsy brushwood fence. Replacement connotes no more than the installation of one thing in the place of another to achieve functional equivalence.

Generally speaking, renewal or replacement of fixtures or fittings will, of its nature, involve improvement because old will be superseded by new. It may also entail alteration or addition, in that the new or replacement item may be larger than or otherwise different from the old. To the extent that alteration or addition is, in that way,

incidental to renewal or replacement, [Section 106] both requires and allows it" (emphasis added)

3.4 Discussion

The following is able to be stated as a result of the conclusions reached in the *Stolfa* and *Thoo* cases and strata legislation analysed above:

- If an item of common property is in need of maintenance or repair, and is beyond repair, that item is able to be replaced in accordance with section 106 of the 2015 Act;
- Generally, the strata committee is entitled to maintain and repair an item of common property, or to renew or replace an item of common property that is in need of renewal or replacement, in accordance with section 106 of the 2015 Act;
- If an item of common property is in need of maintenance or repair, and is beyond repair, and that item is replaced, it does not matter whether or not the replacement item is an improvement on the old item, or entails an alteration or addition because it is larger than or otherwise different from the old item – in those circumstances the item is still able to be replaced in accordance with section 106 of the 2015 Act;
- If an item of common property does not need maintenance or repair or replacement and, in those circumstances, it is proposed to be replaced, to improve or enhance the common property, that is only able to be done by the owners corporation first passing a special resolution to specifically authorise the particular replacement in general meeting in accordance with section 108 of the 2015 Act;
- It is not possible to make a by-law to delegate to the strata committee power to improve or enhance the common property, by altering, adding to or erecting a new structure on the common property, in accordance with section 108 of the 2015 Act, because a by-law cannot be inconsistent with the 2015 Act which requires this work to be approved by the owners corporation in general meeting.

4. Conclusion

A strata committee will in general be able to replace an item of common property that is in need of maintenance or repair, or replacement, provided that its power to do so has not been restricted by the general meeting.

But the strata committee is not able to replace an item of common property that does not need maintenance or repair, or replacement, for the purpose of improving or enhancing the common property, and such action must first be specifically approved by a special resolution passed in general meeting.

So there is no need for a special resolution to be passed to allow the strata committee to replace a broken light fitting!

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