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# SUPREME COURT REJECTS PROPOSAL TO UPGRADE COMMON PROPERTY

**Adrian Mueller**  
Partner | Senior Lawyer  
B.Com LLB FACCAL  
[Email](#) | [LinkedIn](#)

## SUPREME COURT REJECTS PROPOSAL TO UPGRADE COMMON PROPERTY

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The Supreme Court has rejected a proposal by an owners corporation to upgrade its common property in a way that would have impeded access to an owner's car space. What are the broader implications of this case?

### Introduction

The case of *EB 9&10 Pty Ltd -v- The Owners SP934* [2018] NSWSC 464 involved a residential strata scheme in inner Sydney which contained 80 residential apartments, 27 car space lots and common property. Car space lot 89 was owned by EB 9&10 Pty Ltd (**EB**). The car space was purchased as an investment by EB and was not attached to any apartment in the building. The owners corporation of the building proposed to change the use of and upgrade an area of common property adjacent to car space lot 89. This upgrade, if implemented, would have impeded the ability of EB or its tenant to drive a standard size vehicle into and out of car space lot 89. The question for the Supreme Court to decide was whether or not the owners corporation should be entitled to upgrade the common property in a manner that had that effect.

### The Proposals

On 20 July 2016, the owners corporation passed a special resolution to apply to the City of Sydney for a pre-DA meeting for the construction of a new building on the common property adjacent to car space lot 89 (**building proposal**). The building proposal involved the building of a wall parallel to the southern boundary of car space lot 89 with a gap of 575mm between that boundary and the proposed wall. On 10 November 2016, the owners corporation passed a special resolution to pursue an alternative proposal to use the area of common property adjacent to car space lot 89 as a communal recreation and garden area (**garden proposal**). The plan for the garden proposal showed a gap of 300mm between the southern boundary of car space lot 89 and the proposed garden area. No steps were taken by the owners corporation to implement either the building proposal or the garden proposal.

### The Problems with the Proposals

In the case, EB relied on expert evidence of a civil engineer. The engineer gave evidence (which was uncontested) that it was impossible to get into or out of car space lot 89 with a standard sized car without passing over the area of common property that was the subject of the building proposal and the garden proposal by between 870mm-1,175 mm. In other words, the engineer said that if the owners corporation pursued the building proposal or the garden proposal it would be impossible to park a standard sized car in car space lot 89.

### **The Decision**

The Court observed that under the strata legislation, an owners corporation holds the common property as the agent for the owners of the lots, must maintain and repair the common property and that owners cannot use or enjoy the common property in a way that interferes unreasonably with the use or enjoyment of another lot. The Court concluded that those parts of the strata legislation make clear that the fundamental purpose of common property is to provide owners with reasonable access to their lots and that, based on existing case law, an owners corporation cannot exercise its rights in relation to the common property (which it holds as agent for the owners) in a way which derogates or takes away from any owner's right to use the common property for reasonable access to his or her lot. The Court even suggested that this extended to cover a proposal by an owners corporation to sell or lease an area of common property. The Court concluded that it was appropriate for a declaration to be made that, in effect, the owners corporation is not entitled to restrict or impede EB's access to and use of car space lot 89 via a strip that intrudes 870mm into the area of common property adjacent to that car space for the entire length of the boundary between that area and the car space.

### **The Wash Up**

The decision in the *EB* case has important ramifications for owners corporations. The case shows that the broad powers given to an owners corporation under the strata legislation to alter, add to, upgrade, sell or lease common property are not unqualified. Put simply, an owners corporation is not entitled to change the common property in a way that unreasonably interferes with an owner's use or enjoyment of his or her lot, for example, by unreasonably impeding that owner's access to his or her lot via the common property.

### **Conclusion**

The lesson to be learned from the *EB* case is that the right of an owners corporation to make changes to the common property is not unqualified. Any changes to the common property made by an owners corporation, be they physical changes or proposals involving the sale or leasing of common property, or a change of use of common property, must be reasonable and, more specifically, cannot interfere unreasonably with the use or enjoyment of an owner's lot or unreasonably impede access to that owner's lot.

**Adrian Mueller**

Partner | BCOM LLB FACCAL  
adrianmueller@muellers.com.au

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**About JS Mueller & Co**

JS Mueller & Co has been servicing the strata industry across metropolitan and regional NSW for over 30 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.

02 9562 1266  
enquiries@muellers.com.au  
www.muellers.com.au



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