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OWNER GETS TO KEEP BALCONY

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OWNER GETS TO KEEP BALCONY

Who is responsible for fixing a balcony on common property that has fallen into disrepair but was constructed without the approval of the owners corporation? The answer may surprise you.

Introduction

It is not uncommon for owners to build structures on common property without the approval of their owners corporation. But what happens when these structures fall into disrepair? Who is responsible for fixing them? And can the owners corporation insist on those structures being demolished? The recent decision in *Davenport -v- The Owners – Strata Plan 536; The Owners – Strata Plan 536 -v- Davenports* [2018] NSWCATAP 301 provides answers to these questions.

The Case

Ms Davenport owns an apartment in a four apartment building in Rose Bay, Sydney. There is a balcony attached to her apartment. The balcony was not constructed as part of the original building. Instead, the balcony was constructed in about 1968, several years after the strata plan for the building was registered.

Over time, the condition of the balcony deteriorated. The cost to repair the balcony was substantial. For that reason, the owners corporation of the building decided not to repair the balcony and, instead, to demolish it. Ms Davenport objected to the demolition of the balcony and her dispute with the owners corporation ended up in NCAT.

The NCAT Decision

In January 2018, NCAT ordered the owners corporation to demolish the balcony at its expense. NCAT concluded that the balcony was an illegal structure which had never been approved by the owners corporation and ought to be demolished. Ms Davenport appealed against NCAT's decision. Her appeal was successful and the Appeal Panel ordered the owners corporation to repair the balcony (instead of demolishing it) and invalidated the resolution the owners corporation had passed to demolish the balcony.

The Reasoning

The owners corporation argued that the balcony was an illegal structure because the construction of the balcony had never been approved by the owners corporation through a special by-law. The Appeal Panel rejected that argument. The Appeal Panel held that at the time the balcony was



constructed, all of the apartments in the building were owned by the same people who could, by their own unanimous resolution passed at their own meeting or a meeting of the owners corporation, approve the construction of the balcony without a special by-law. The Appeal Panel reached this rather surprising conclusion because it considered that the *Conveyancing (Strata Titles) Act 1961* (which applied at the time the balcony was constructed) did not deprive the owners of their right to deal with the common property (which they owned under the 1961 Act), for example, by passing a unanimous resolution to allow a balcony to be constructed on the common property. The Appeal Panel concluded that it was more likely than not that all of the owners approved the construction of the balcony by unanimous resolution. For that reason, the balcony was not an illegal structure but rather was approved by the owners and became common property. This meant that the owners corporation was responsible for repairing the balcony in accordance with this statutory duty to maintain and repair common property under section 106 of the *Strata Schemes Management Act 2015*.

The Decision to Demolish the Balcony

However, the dispute did not end there. At an annual general meeting held on 13 September 2016, the owners corporation passed an ordinary resolution to demolish the balcony. The Appeal Panel had to decide whether the owners corporation could validly pass this resolution given its finding that the balcony was lawfully constructed.

The owners corporation submitted that it had the authority to pass the resolution to demolish the balcony. This is because section 106(3) of the *Strata Schemes Management Act 2015* allows an owners corporation to determine by special resolution that it is inappropriate to repair a particular item of common property.

In a rather surprising conclusion, the Appeal Panel held that the power for an owners corporation to decline to repair a particular item of common property carries with it the power to demolish that item of property particularly where it has fallen into disrepair. Indeed, the Appeal Panel considered that in this way an owners corporation could give effect to a determination made under section 106(3) not to repair an item of common property otherwise the common property would remain in a state of disrepair which may create problems in the future.

However, the Appeal Panel considered that the resolution passed by the owners corporation to demolish the balcony was invalid. This was because the owners corporation only passed an ordinary



resolution to demolish the balcony (instead of a special resolution) which it could only do if the balcony was unauthorised (which it was not). The Appeal Panel concluded that because the balcony was authorised work that had fallen into disrepair, the owners corporation needed to pass a special resolution to determine not to repair the balcony and the resolution that was passed on 13 September 2016 was not a special resolution. Further, the Appeal Panel decided that the resolution of the owners corporation was defective in form because the resolution, by its terms, did not record a determination by the owners corporation that it was inappropriate to repair the balcony and that failing to repair the balcony would not affect the safety or detract from the appearance of the building.

Additionally, the Appeal Panel considered that even if the owners corporation had passed a special resolution that resolution should be set aside because the owners corporation did not have regard to all relevant factors in determining whether or not it was appropriate to repair the balcony. For example, the Appeal Panel considered that the owners corporation decided to remove the balcony because it considered it was an illegal structure and because the cost of repairing the balcony was significantly more than the cost of removing it but ignored Ms Davenport's rights to access and use the balcony.

Conclusion

The *Davenport* case delivered a surprising outcome. The Appeal Panel concluded that under the strata legislation that existed in 1968 it was possible for an owner to construct a balcony on common property with the approval of all of the owners and without a by-law. The other surprising aspect of the case which has greater significance is the conclusion of the Appeal Panel that a special resolution by an owners corporation not to repair an item of common property carries with it the power to demolish that property. The case highlights the care that must be taken when dealing with items of common property that are alleged to have been constructed without the authority of the owners corporation and highlights the pitfalls that can be faced by an owners corporation that wants to demolish an item of common property that is in need of repair instead of fix it. The case also serves as a reminder that motions for an owners corporation to determine not to repair an item of common property need to be carefully drafted so that they are appropriately worded to comply with the requirements of section 106(3) of the *Strata Schemes Management Act 2015*.

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