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# YOU'RE ON YOUR OWN: LEASHOLD OWNERS CORPORATIONS GIVEN NO RIGHT TO MAKE BUILDING DEFECT CLAIMS

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## YOU'RE ON YOUR OWN: LEASEHOLD OWNERS CORPORATIONS GIVEN NO RIGHT TO MAKE BUILDING DEFECT CLAIMS

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A recent decision of the NSW Court of Appeal has found that the owners corporation of a leasehold strata scheme had no right to make a claim against the builder or developer of its scheme for building defects. This decision means that the owners corporations of most leasehold strata schemes will need to foot the bill for the costs to repair building defects.

### **Introduction**

Spring Cove is a harbourside bay located in Manly, Sydney. There is a parcel of land in Spring Cove (**Spring Cove**) that is owned by the Roman Catholic Church for the Archdiocese of Sydney (**trustees**). In about 2015, the trustees granted development rights to Spring Cove Developments Pty Ltd (**Spring Cove Developments**) to construct 16 luxury townhouses and apartments on the land owned by the trustees.

### **The Leasehold Strata Scheme**

In August 2015, a strata plan for Spring Cove was registered. The trustees retained ownership of Spring Cove. The trustees granted leases over each of the lots in the strata scheme and also agreed to lease the common property in Spring Cove directly to the owners corporation. All of the leases were for a term (including an option to renew) of 99 years.

### **Building Defects**

The owners corporation alleged that the apartments and common property in Spring Cove had a number of defects. The owners corporation sued the trustees and Spring Cove Developments in the NSW District Court claiming damages for breach of the statutory warranties in the *Home Building Act 1989*. The owners corporation claimed that it was entitled to sue the trustees and Spring Cove Developments as it was the “immediate successor in title” to the trustees and therefore entitled to the benefit of the statutory warranties under the *Home Building Act 1989*.

### **District Court Decision**

The owners corporation was unsuccessful in the District Court. The District Court concluded that the owners corporation was not a successor in title to the trustees because it did not own the common property and, instead, only held a 99 year lease over the common property. For that reason, the District



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Court found that the owners corporation was not entitled to sue the trustees and Spring Cove Developments for a breach of the statutory warranties in the *Home Building Act 1989*.

### **The Court of Appeal**

The owners corporation appealed against the District Court's decision to the NSW Court of Appeal. The central issue in the appeal was the question of whether or not the owners corporation was an immediate successor in title to the trustees in respect of the common property in Spring Cove and therefore entitled to the benefit of the statutory warranties in the *Home Building Act 1989* for defective residential building work. The Court of Appeal concluded that the owners corporation was not an immediate successor in title to the trustees essentially for the same reasons that the District Court reached that conclusion. The Court of Appeal held that:

- (a) at the time the strata plan was registered, the trustees remained the owner of the common property in Spring Cove under the *Strata Schemes (Leasehold Development) Act 1986* and the owners corporation only held a 99 year lease over the common property;
- (b) even though the *Strata Schemes Development Act 2015* now vests title to the common property in a leasehold strata scheme in an owners corporation (and that legislation has now replaced the *Strata Schemes (Leasehold Development) Act 1986*) that could not retrospectively vest title to the common property in the owners corporation or alter the title acquired by the owners corporation pursuant to the 99 year lease granted by the trustees;
- (c) the expression "successor in title" should be understood in its formal sense, namely a person who holds title after another and, here, that title was the title to and ownership of the common property not a lesser form of title such as a leasehold interest in the common property granted under a 99 year lease;
- (d) in previous cases concerning building defects, the courts had held that the expression "successor in title" in the *Home Building Act 1989* did not extend beyond the traditional understanding of the phrase and requires a person's title to be transmitted to another person in order for that other person to qualify as a successor in title;
- (e) if a "successor in title" included a leaseholder, then there could be multiple successors in title who were entitled to enforce the statutory warranties against the builder which is not what the *Home Building Act 1989* intended.

- (f) For these reasons, the owners corporation's claim against the trustees and Spring Cove Developments was dismissed.

### **Conclusion**

The outcome of this case is that the owners corporation of a leasehold strata scheme, the strata plan for which was registered before the commencement of the new strata legislation on 30 November 2016, has no right to make a claim against a builder or developer for building defects under the *Home Building Act 1989*. This means that the owners corporations of most leasehold strata schemes will need to foot the bill for the costs to repair building defects. However, the decision in this case leaves the door open for the owners corporations of newly created leasehold strata schemes which are arguably the owners of the common property to make building defect claims against builders and developers.

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### **About JS Mueller & Co**

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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