

## *NEWSLETTER ISSUE 29 JUNE 2019*

### **APPEARANCE OF A LOT - FROM THE EXTERIOR OF THE BUILDING**

This is a topic that we've found over the years that most schemes are sensitive about. No doubt part of why one purchases into a scheme is because of the aesthetics. In this edition we look at the issue that the Courts and NCAT find themselves dealing with – the definition of what is “in keeping”.

The Supreme Court dealt with the appeal case of the Adjudicator's decision at NCAT in 2016 regarding Ms Drewe's replacement of her balcony doors with something not uniform to the others in her Manly scheme. And now we have the 2018 decision in NCAT regarding works in a courtyard and whether they were in keeping with others within that apartment block.

Our advice from these two cases - scheme's need to gather advice from both experts and lawyers - and carefully consider same objectively, before venturing into any form of litigation on this matter.

**Drewe's case (vs SP69140)** an extract from LookUpStrata written by Adrian Mueller of JS Mueller and Co Lawyers

#### **Window Proposal**

Ms Stephanie Drewe owns an apartment in a large strata title apartment building in North Manly, Sydney. In early 2013, Ms Drewe sought the consent of the owners corporation to install a timber window in her bedroom. The strata committee rejected Ms Drewe's application largely because all of the windows and doors in the building were powder coated aluminium. Ms Drewe's proposal in relation to the window went no further.

#### **Bi-fold Doors**

In December 2013, Ms Drewe installed bi-fold timber doors at the entry to the verandah of her apartment to replace the powder-coated aluminium doors which formed part of the common property of the building. This was done without any prior notice to the owners corporation and without its approval. In October 2014, the owners corporation's building manager informed Ms Drewe that the bi-fold timber doors she had installed were in breach of the by-laws and requested that she reinstate the original powder coated aluminium doors. Ms Drewe failed to do so.

#### **The AGM**

In January 2015, Ms Drewe wrote to the strata manager of the owners corporation attaching a building works application and requesting that a motion be placed on the agenda of the AGM for the owners corporation to retrospectively approve the timber bi-fold doors. Subsequently, the agenda for the AGM was circulated to owners and it included a motion for the owners corporation to approve by special resolution the work undertaken by Ms Drewe without its prior approval. The AGM was held in February 2015 and the motion proposed by Ms Drewe was comprehensively defeated. Indeed, only Ms Drewe voted in favour of the motion. In March 2015, the owners corporation again asked Ms Drewe to reinstate the original powder-coated aluminium doors that she had replaced with her timber bi-fold doors. Ms Drewe refused to do so. The owners corporation then served Ms Drewe with notices to comply with the by-laws, but she still did not reinstate the original powder coated aluminium doors.

#### **The Adjudicator's Decision**

In May 2015, Ms Drewe applied for orders by a Strata Schemes Adjudicator to approve the bi-fold doors she installed without the consent of the owners corporation. Ms Drewe's application also sought the creation of a by-law to allow her to keep the bi-fold doors on the condition that she was responsible for maintaining them. In September 2015, Ms Drewe's application was dismissed. The Adjudicator concluded that Ms Drewe did not establish that the owners corporation's decision to reject her application to keep the timber bi-fold doors was unreasonable.

#### **NCAT Decision**

Ms Drewe appealed against the Adjudicator's decision to NCAT. In about June 2016, NCAT upheld her appeal and made an order allowing Ms Drewe to retain her timber bi-fold doors. NCAT concluded that the decision made by the owners corporation to reject Ms Drewe's application to keep the bi-fold doors was unreasonable. This is because, in the view of NCAT, the owners corporation had predetermined Ms Drewe's application and was never prepared to agree to it. NCAT indicated there was no basis for the strata committee to conclude that the timber bi-fold doors would undermine the building's image as a landmark or require more maintenance than powder coated aluminium doors, and the concern of the owners corporation that if it approved Ms Drewe's application, it would be responsible for maintaining the bi-fold doors because there would be no by-law approving them was unfounded because, had Ms Drewe been asked to submit a by-law, she would have done so.

#### **Supreme Court Appeal**

The owners corporation appealed against NCAT's decision to the Supreme Court. The Supreme Court upheld the appeal and set aside the decision of NCAT as a result of which NCAT's decision to allow Ms Drewe to keep the timber bi-fold doors was revoked.



The Supreme Court quashed NCAT's decision because it concluded that NCAT had made numerous errors of law, had denied the owners corporation procedural fairness and had failed to carry out the task required of it in hearing an appeal against the Adjudicator's decision.

### Relevant Considerations

In reaching its conclusion, the Supreme Court confirmed the following matters:

- the task for the Adjudicator (and NCAT in the appeal) was to determine whether the owners corporation unreasonably refused consent to the installation of Ms Drewe's timber bi-fold doors;
- that question needed to be determined having regard to the circumstances that existed at the time the owners corporation refused to grant consent for the timber bi-fold doors to remain, namely at the AGM in February 2015;
- NCAT was required to confine itself to the decision of the Adjudicator and the evidence which underpinned that decision in order to determine whether the Adjudicator had erred and should not have treated the appeal as a fresh hearing at which completely new evidence could be considered;
- the ultimate question to be asked and answered by both the Adjudicator and NCAT was whether the owners corporation's refusal to give consent to the timber bi-fold doors at the AGM, based on the material then available, was unreasonable, not whether the reasons for its refusal were objectively reasonable (*Ainsworth -v- Albrecht* [2016] HCA 40 at [97]);
- the onus lay on Ms Drewe to establish that the reasons given by the owners corporation for rejecting her application to keep the timber bi-fold doors had no rational basis in that they were not guided by sound judgment or good sense.

### The Decision

The Supreme Court concluded that Ms Drewe had not established that the owners corporation's refusal to allow her to keep the timber bi-fold doors was unreasonable or that the reasons given by the owners corporation for making that decision were irrational. The Court noted that the reasons the owners corporation rejected Ms Drewe's application included:

- the importance of the uniformity of appearance of the building;
- the fact that the wooden bi-fold doors were not in keeping with the overall appearance of the building;
- that the grant of retrospective approval of the timber bi-fold doors required a by-law and none was submitted by Ms Drewe;
- wooden bi-fold doors require more maintenance than the original powder coated aluminium doors and, in the absence of a by-law, responsibility for the maintenance of the timber doors fell to the owners corporation;
- the grant of retrospective consent to the timber doors did not allow the owners corporation to control the engagement of contractors who installed the doors and their access to the building which exposed the owners corporation to a potential work, health and safety liability;
- the work done by Ms Drewe was contrary to the strata legislation and the by-laws of the building.

Ultimately, the Supreme Court concluded that Ms Drewe failed to establish that each of the reasons given by the owners corporation for rejecting her application had no rational basis. For that reason, the Court concluded that NCAT made numerous errors of law in overturning the Adjudicator's decision and granting Ms Drewe permission to keep the timber bi-fold doors. In the result, the Supreme Court set aside NCAT's decision.

### Conclusion

The decision in Drewe's case provides helpful guidance as to the matters that should be taken into consideration by an owners corporation when considering an application by an owner for retrospective approval of alterations carried out to common property without its consent. The case also clarifies the test that should be applied by NCAT when scrutinising a decision made by an owners corporation to reject an application by an owner to approve unauthorised works done to the common property. The case confirms that the onus is on the owner to demonstrate that the decision of the owners corporation is unreasonable rather than the owners corporation having to justify its decision and that in order for the decision of the owners corporation to be unreasonable, there must be no rational basis for making that decision. Ultimately, the case demonstrates the difficulties that will be faced by an owner who applies to NCAT to overturn a decision of an owners corporation to reject an application by the owner to keep unauthorised works done to the common property.

Now we examine the NCAT case - **The Owners – Strata Plan 30198 v Barnes [2018] NSWCATCD 8** – courtesy Phillipa Russell Lawyer

The NSW Civil and Administrative Tribunal last year held that unapproved work undertaken by the respondent to the courtyard area of her lot involving an installation of an entertainment area, deck and retaining wall was not contrary to a by-law prohibiting an owner from "maintain[ing] within [its] lot anything visible from outside the lot that, viewed from the outside of the lot, is not keeping with the rest of the building". The Tribunal considered the words "in keeping with the rest of the building" and:

- observed that the *Strata Schemes Management Act 2015 (NSW)* includes a lot in a strata scheme in the definition of "building"; and
- held that "the words "in keeping with" impart a meaning of something being harmonious with whatever it is being compared to without imparting any intention of the two things being exactly the same" – in this case, the Tribunal observed photographs of other lot courtyards, considered their visual differences and concluded that, despite these differences, there was a uniformity of appearance between the lots based on the construction materials and garden plants.

### DO YOU HAVE A TOPIC OF INTEREST?

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