

NEWSLETTER ISSUE 24 OCTOBER 2017

In this newsletter, we look at a recent damages decision awarded to an owner by NCAT under the provisions of the 2016 legislation. We also advise the changes we have made as a result of our last survey.

ROSENTHAL V THE OWNERS – SP 20211

A summary of this case is an owner experienced water penetration to their lot – No 64. The scheme felt it had an argument as to why it shouldn't address all causes of this – however the Tribunal did not find in their favour. A few critical points went against the Owners Corporation.

- They failed to do anything – even commission an experts report – till the owner referred the matter to NCAT.
- They were relying on a “works” bylaw that did not adequately lay out the changes performed by a previous owner (which would have made the current owner responsible for those areas), and the drawing which was annexed to the bylaw was too small for anyone (experts engaged by both parties and the Member) to delineate where the common property ended and the owner was responsible for the works..

WHAT THE MEMBER SAID

68 “I have taken the opportunity to examine the plans provided with special by-law 6 with a magnifying glass. Although the bylaw, under “C.Conditions”, purports to place on the owner from time to time of lot 64 the obligation to repair and maintain the building works I am unable to determine the precise scope of the works contemplated by the by-law. The difficulty in interpretation of the by-law is exacerbated by the previous alternations mentioned above and the consequent lack of a finite delineation of the extent of lot property and common property from which some understanding of the changes propose by by-law 6 could be extrapolated.....”

....70 Special by-law 23 suffers from the same difficulty. It was said to involve the relocation of the pergola from one location to another and to deal with fixing of it in place. The plan provided with the by-law is again of unfortunately small scale. It has some hand written notations and arrows on it.....I find it impossible to determine with any confidence the scope of the work contemplated by the by-law and consequently am unable to determine the scope or extend of the obligation imposed by Conditions (a) and (b) of the by-law.

REFERENCE TO SUPREME COURT PRECEDENCE

During the case member Smith was taken to Judge Brereton's comments in the case of Siewa's and took a direct quote from His Honour – where he explained the duty to maintain common property in the following terms:

3Section 62(1) imposes on an owners corporation a duty to maintain, and keep in a state of good and serviceable repair, the common property. That duty is not one to use reasonable care to maintain and keep in good repair the common property, nor one to use best endeavours to do so, nor one to take reasonable steps to do so, but a strict duty to maintain and keep in repair”

Member Smith also made the point that Siewa's extends to the obligation on an Owners Corporation where it is necessary to comply with the duty, to engage expert assessment of the common property.

S106(1) – THE OBLIGATION TO REPAIR AND MAINTAIN V THE PROVISIONS OF A BYLAW

Member Smith went on to make it very clear that where there is a doubt the obligation is on a scheme to determine if it has adequately passed on the responsibility to maintain common property to an owner.

At 84 of the transcript he said: “The fact that the statutory duty imposed by s106(1) is a strict one and that it requires the Owners Corporation to take preventative measures before a thing falls into a state of disrepair, I am satisfied, places the burden squarely on the Owners Corporation, in the face of an apparent breach of that duty, to establish that it is excused in the particular circumstances of the case from its clear and strict obligation.

85 That is, if the Owners Corporation seeks to escape the strict duty imposed by S106(1) by establishing that a lot owner has the duty to repair and maintain the common property from which the water ingress originates pursuant to a by-law in that regard, the burden is upon the Owners Corporation to establish the veracity of that claim”.

Member Smith ordered that the Owners Corporation pay the owners of lot 64 \$8793.49 as well as their legal costs because they “have been entirely successful in this application”. This is on top of the repairs the Tribunal ordered them to effect to the common property. It was noted however at 114 of the transcript that “The capacity of the Tribunal to make unlimited orders on application under S106(5) is therefore entirely consistent with the Tribunal’s wider powers”.

The lesson here is to

- Engage experts when an issue is not straight forward – eg consulting engineers, lawyers etc.
- Ensure that bylaws are drawn up by a lawyer who specialises in strata
- That any drawings referred to in the bylaw are clear and easy to read

SURVEY OUTCOMES

Thank you to those of you who responded to our survey earlier in the year. We received some very constructive feedback and we can now advise regarding the points raised and changes we have made in the past 10 months.

- Receipt of levy notices and meeting information via email. If you are not already doing this and wish to please visit our website – on the home page – you will find a red ribbon “**Quick Service Request Forms**” there you will find a **S22 form** to download. Please email your completed form to mail@prostrata.com.au and we will update this for you within 7 days.
- Attend at meetings via Skype or teleconference. A few owners have already used these options since the November 2016 legislation came in. Only two schemes have chosen not to pass the motion to allow this option. If you need to use this for a meeting, please speak to your manager at least 72 hours before the scheduled time for the meeting so the appropriate arrangements can be put in place.
- Levy notices can now be paid in 8 convenient ways. For more information visit stratacash.com/levy-payments
- Each scheme has a portal to a website that has various information available – depending if you are a committee member or an owner, determines what information you can see. If you haven’t already accessed it – why not take a few minutes to familiarise yourself – using the log on passcode provided when you became a PSS client.
- At the beginning of the year we changed to EFT payments for almost all contractor and utility services. This change brings with it savings to your scheme and good relationships with your service providers.
- We now send diary reminders to committee members when a vote is due for a meeting by written vote – we anticipate this will mean that quorums are easier to achieve and thus instructions are given to us quickly.
- We have developed forms on our homepage – **Quick Service Request Forms** – which automatically refers these enquiries to the relevant team member who can get back to you within 4 hours. So, the next time you need a fob/key or copy of the bylaws etc – please visit our website and see what form may suit your enquiry.

Pre-meeting electronically voting As an aside – some of you may be wondering when you will be able to do this – our software company expects they will release this side of the program at the end of the year. This will allow you to vote before a meeting – rather than providing a proxy – or attending via skype etc.

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