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RENOVATION BY-LAWS WHERE DO YOU STAND?

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RENOVATION BY-LAWS

A. WHAT SORT OF RENOVATIONS REQUIRE A BY-LAW?

In order to answer this question, certain parts of the strata legislation need to be reviewed:

Section 65A of the Strata Schemes Management Act 1996

65A Owners corporation may make or authorise changes to common property

- (1) *For the purpose of improving or enhancing the common property, an owners corporation or an owner of a lot may take any of the following action, but only if a special resolution has first been passed at a general meeting of the owners corporation that specifically authorises the taking of the particular action proposed:*
- (a) *add to the common property,*
 - (b) *alter the common property,*
 - (c) *erect a new structure on the common property.*
- (2) *A special resolution that authorises action to be taken under subsection (1) in relation to the common property by an owner of a lot may specify whether the ongoing maintenance of the common property once the action has been taken is the responsibility of the owners corporation or the owner.*
- (3) *If a special resolution under this section does not specify who has the ongoing maintenance of the common property concerned, the owners corporation has the responsibility for the ongoing maintenance.*
- (4) *A special resolution under this section that allows an owner of a lot to take action in relation to certain common property and provides that the ongoing maintenance of that common property after the action is taken is the responsibility of the owner has no effect unless:*
- (a) *the owners corporation obtains the written consent of the owner to the making of a by-law to provide for the maintenance of the common property by the owner, and*
 - (b) *the owners corporation makes such a by-law.*

- (5) *A by-law made for the purposes of this section:*
- (a) *may require, for the maintenance of the common property, the payment of money by the owner concerned at specified times or as determined by the owners corporation, and*
 - (b) *must not be amended or repealed unless a special resolution has first been passed at a general meeting of the owners corporation and the owners corporation has obtained the written consent of the owner concerned.*
- (6) *The provisions of sections 52 (3), 54 (2) and (3) and 55 apply to a by-law made for the purposes of this section in the same way as those provisions apply to a by-law to which Division 4 of Part 5 of Chapter 2 applies.*

Section 5 – Strata Schemes Freehold Development Act 1973 (underlinings added)

- (2) *The boundaries of any cubic space referred to in paragraph (a) of the definition of "floor plan" in subsection (1):*
- (a) *except as provided in paragraph (b):*
 - (i) *are, in the case of a vertical boundary, where the base of any wall corresponds substantially with any line referred to in paragraph (a) of that definition – the inner surface of that wall, and*
 - (ii) *are, in the case of a horizontal boundary, where any floor or ceiling joins a vertical boundary of that cubic space – the upper surface of that floor and the under surface of that ceiling, or*
 - (b) *are such boundaries as are described on a sheet of the floor plan relating to that cubic space (those boundaries being described in the prescribed manner by reference to a wall, floor or ceiling in a building to which that plan relates or to structural cubic space within that building).*

Upon reviewing that legislation, it can be seen that under section 65A(4) of the *Strata Schemes Management Act*, a by-law (and the owner's written consent) is only needed if the owner is to be responsible for the ongoing maintenance and repair of common property. This is normally the case, so by-laws are normally required.

B. IS APPROVAL NEEDED EVEN WHERE YOU ARE JUST FIXING CUPBOARDS TO AN EXTERNAL WALL?

Strictly speaking, if a kitchen or bathroom cupboard is being fixed to an external wall (a wall around the outside of a lot shown with a line on the strata plan), then the screw will be placed through the inner surface of that wall. Under section 65A, a by-law would appear to be required.

Additionally, standard By-Law 5 needs to be taken into account.

5. Damage to common property

- (1) *An owner or occupier of a lot must not mark, paint, drive nails or screws or the like into, or otherwise damage or deface, any structure that forms part of the common property except with the prior written approval of the owners corporation.*
- (2) *An approval given by the owners corporation under clause (1) cannot authorise any additions to the common property.*
- (3) *This by-law does not prevent an owner or person authorised by an owner from installing:*
 - (a) *any locking or other safety device for protection of the owner's lot against intruders or to improve safety within the owner's lot, or*
 - (b) *any screen or other device to prevent entry of animals or insects on the lot, or*
 - (c) *any structure or device to prevent harm to children, or*
 - (d) *any device used to affix decorative items to the internal surfaces of walls in the owner's lot,**unless the device is likely to affect the operation of fire safety devices in the lot or to reduce the level of safety in the lots or common property.*
- (4) *Any such locking or safety device, screen, other device or structure must be installed in a competent and proper manner and must have an appearance, after it has been installed, in keeping with the appearance of the rest of the building.*
- (5) *Despite section 62 of the Act, the owner of a lot must:*
 - (a) *maintain and keep in a state of good and serviceable repair any installation or structure referred to in clause (3) that forms part of the common property and that services the lot, and*
 - (b) *repair any damage caused to any part of the common property by the installation or removal of any locking or safety device, screen, other device or structure referred to in clause (3) that forms part of the common property and that services the lot.*

Under By-Law 5(1), therefore, the owners corporation's written approval is needed even where a nail or screw is being placed into a common property wall. Standard By-Law 5 does not state that a by-law is required, however, when read in conjunction with section 65A(4), if the owner is to be responsible for the ongoing maintenance, then the by-law is required.

C. WHAT DOES THE MOTION NEED TO SAY?

The leading case in this area continues to be the *Stolfa* case (*Stolfa v Owners Strata Plan 4366 & ors* [2009] NSWSC 589 (26 June 2009)).

The *Stolfa* case is authority for the following:

- (i) if works are not maintenance and repair under section 62, then they are enhancing common property under section 65A. This means they need a special resolution, rather than the ordinary resolution (which can even be passed at executive committee level) needed for common property repairs;
- (ii) even if common property is subject to the grant of exclusive use, it is still common property. This means that if there is already a by-law in place giving an owner exclusive use of a certain area (like a courtyard), then any alterations to it still require the owners corporation's approval by special resolution, and probably a by-law (assuming the owner will be responsible for the ongoing maintenance);
- (iii) even if the works are "primarily to enhance the amenity of a lot", the works involve "improving common property". In the *Stolfa* case, the court is not particularly strict on needing to show that the proposed works enhance the common property. There seems to be more of a presumption that if a renovation alters common property, then it is enhancing it. Lot owners are unlikely to carry out renovations to make it worse.

Under a strict reading of s65A(4), the special resolution authorising the work should state that the owner will be responsible. This is why you see somewhat lengthy and complicated resolutions. It is not specifically stated that one resolution needs to grant the by-law, approve the work and make the owner responsible, but it seems safer to do it this way.

D. WHAT IF THE RENOVATIONS ARE ALREADY DONE?

In these circumstances, there are really only two options:

- (a) section 52(2) specifically allows for retrospective by-laws to be passed after the work has been done. The by-law would place the responsibility for the ongoing maintenance and repair of that work on the owner and make them responsible for any damage it causes to common property;
- (b) the second option is taking Tribunal action against the owner to reinstate common property. Normally, based on the existing case law, such action should have strong prospects of success. Certain Supreme Court and Tribunal cases confirm that the owners corporation is to

- (c) be responsible for the control and administration of its own common property, so if an owner has altered it without approval, then it should be put back to the previous condition.

If, however, the owner has done this “in error”, and seeks subsequent ratification by way of a by-law, then the Tribunal might see the situation differently. It might, in those circumstances, acknowledge that the owner has done the wrong thing but suggest that the best outcome is to retrospectively approve the works by s52(2) by-law, as the owner will be responsible for their maintenance and repair. However, if the owner has not sought approval by way of a retrospective by-law or otherwise, then the chances of success for the owners corporation in its own action to reinstate the common property should be strong.

E. GENERIC BY-LAWS

- *What are they?*

Generic by-laws authorise all, or a group of owners in a strata scheme to carry out similar types of work. For example, they authorise all owners to have air conditioners installed.

- *Why have generic by-laws?*

Without a generic by-law, each time an owner wishes to carry out any item of work which alters common property (no matter how small), they need their own special resolution and a by-law. Sometimes, the cost of having the by-law prepared, approved and registered can exceed the cost of the actual work, for example, with an extractor fan for the bathroom.

The purpose of generic by-laws is to allow all owners in the scheme to carry out certain types of work, thereby cutting down cost and time involved in the process. In that example, the by-law might state that all owners have the right to install an extractor fan to extract air from their bathroom.

- *Can you do generic by-laws?*

If a section 65A works by-law can authorise one owner to carry out certain work, why can't it authorise several owners to do the same work? There is no reason why you cannot have generic by-laws authorising certain owners to carry out the same type of work.

However, regard needs to be had to paragraph 94 of the *Stolfa* case (underlining added):

“The requirements imposed by s.65A for specific authorisation of the taking of the particular action proposed ... means that a general authorisation to alter Common Property will not suffice. A resolution authorising enclosure of a particular verandah is a specific authorisation

of a particular action, even if it does not specify the precise plans and building materials to be used”.

Accordingly, if the generic by-law simply permits the installation of an awning, it might not be sufficiently specific, according to paragraph 94 of the *Stolfa* case. That is, the authorisation might not be specific enough to satisfy section 65A of the Act.

The relevant building work in the *Stolfa* case was enclosing a balcony. Brereton J found that authorising the enclosure of a specific balcony is sufficient. Accordingly, if a generic by-law stated that all owners had the right to install an awning over the back door of their townhouse, the full width of the opening/door, then this should satisfy s65A, according to what Brereton J said in the *Stolfa* case. The *Stolfa* case states that the precise plans and building materials do not need to be stated, however if the by-law also stated that the awning should be of a similar colour to the external part of the building and consistent in style, then it certainly could only make it more rather than less specific. With a generic by-law, it is often desirable to state all the conditions on the work, as the section 65A resolution and by-law might be the last chance the owners corporation has to exercise control over that work.

It is important to note here that a by-law cannot state generally that renovations are allowed subject to approval by the executive committee. At some point, there needs to be an approval of that specific work by special resolution at a general meeting (section 65A).

F. CONSENT FORMS

The by-law and motion could state that they are an approval under section 65A, or that they grant a special privilege under section 52 (to do work on common property). The *Stolfa* case suggests it should be a section 65A resolution but in both cases, the owner's written consent to the by-law, and the by-law, are required.

There is a difference, however, in the LPI practice. Under the Registrar-General's guidelines, when you try to register a section 65A by-law, you also need to lodge all of the consent forms. Obviously, it will often be the case that not all consent forms can be obtained for generic by-laws.

Under section 52(3) of the *Strata Schemes Management Act*, after two years from the making (i.e. passing) of the by-law, it is conclusively presumed that all of the conditions precedent were followed, including obtaining all the necessary consent forms. If a by-law is passed and registered without obtaining all of the necessary consent forms, then theoretically an owner could take Tribunal action to have the by-law overturned. However due to s52(3), such a risk only exists for 2 years.

An owner could try to run a Tribunal action to overturn such a by-law under s159(1), to invalidate the by-law because the owners corporation “did not have the power to make the by-law”. The argument would be that because not all consent forms were obtained, the owners corporation did not have the power to make the by-law in the first place, so the 2-year restriction does not apply. Section 52(1)

states that the owners corporation can make a special privilege by-law “but only...with the written consent of the owner or owners of the lot or lots concerned”. Section 65A(4) says the special resolution approving the work has no effect unless the owners corporation obtains the owner’s (ie each owner’s) written consent. However, section 65A(6) says that section 52(3) applies, so after 2 years it is conclusively presumed that all preliminary steps were complied with and performed.

I think most likely, due to the inclusion of ss52(3) and 65A(6), a Tribunal would find that obtaining all the consent forms is a preliminary step, and that there is a 2-year restriction on Tribunal action. Also, it is important to note that even if such action is taken, the Tribunal has a discretion to overturn the by-law. It is not certain that this would happen.

If an owners corporation wishes to pass a generic renovations by-law and not all of the consent forms are obtained, then it has three options:

- (i) Do not proceed with the by-law at all;
- (ii) Proceed with the by-law, but amend it so that only those of the owners who provided their written consent have the benefit. That is, insert the specific lot numbers of those owners who provided their consent, by deleting “all lots” from the definition of “Lot” and insert “lots x, y and z”. This would result in the by-law being immune to challenge;
- (iii) Proceed with the by-law for all lots, and take the risk that an owner may within two years (or possibly longer) challenge the by-law, and if challenged, NCAT would overturn it.

G. TYPES OF GENERIC BY-LAWS WHICH MIGHT AND MIGHT NOT BE CONSIDERED ACCEPTABLE TAKING INTO ACCOUNT SECTION 65A AND THE *STOLFA* CASE

<u>Questionable</u>	<u>Generic by-law which should satisfy the Stolfa case</u>
Owners can install awnings	Owners can install awnings over their back door the width of the opening
Owners can install solar panels	Owners can install solar panels on the roof directly above their villa provided the solar panels are flush with the roof and do not exceed 12m ² in size
Owners can install air conditioners	Owners can install air conditioners if they are placed on or bolted to the lot’s balcony floor and the split system is attached to the wall separating the inside and the outside of the lot
Owners can install skylights	Owners can install a skylight in the roof above their lounge room
Owners can remove internal walls	Owners can remove the internal wall between the Lot’s kitchen and living area – and set out parameters, like must submit engineering certificate before commencing works
Owners can install pergolas	Owners can install pergolas in their rear courtyard as long as they: <ul style="list-style-type: none"> • are no higher than 2.5m from ground floor slab level; • are no bigger than 20m² in area; and • are of a similar colour to the external paint colour of the building. Note Stolfa – materials don’t <i>have</i> to be stated, but certainly can be

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