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# LIFT REFURBISHMENTS

DO OWNERS CORPORATIONS HAVE TO PAY COMPENSATION TO AFFECTED OWNERS AND TENANTS?

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## LIFT REFURBISHMENTS - DO OWNERS CORPORATIONS HAVE TO PAY COMPENSATION TO AFFECTED OWNERS AND TENANTS?

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Can an owners corporation shut down the lifts in its building to refurbish them? If so, does the owners corporation have to pay compensation to owners and tenants who cannot access their apartments via the lifts during a lift refurbishment? And does a lift refurbishment need to be authorized by special resolution?

### **1. Introduction**

As buildings age so does common property infrastructure. So it is inevitable that one day aging infrastructure will need to be replaced. Take lifts as an example. As lifts age, replacement parts may no longer be available. This may force an owners corporation to refurbish or replace the lifts for its building. What happens if, during that lift refurbishment, all of the lifts for the building are taken out of service and cannot be used? Do owners and tenants who cannot access their apartments via the lifts during the lift refurbishment have a right to claim compensation from the owners corporation for rental loss or alternative accommodation expenses particularly in the case of elderly or disabled tenants who are forced to live elsewhere during the lift refurbishment? And does a lift refurbishment need to be approved by special resolution?

### **2. Can Lifts be Shut Down During a Refurbishment?**

Most lifts are situated on the common property of a strata building. An owners corporation is the legal owner of the common property. This means the owners corporation is responsible for managing and controlling the use of the common property including the lifts.<sup>1</sup> However, the owners corporation owns the common property as the agent of the owners.<sup>2</sup> This means that the owners are the equitable co-owners of the common property and are entitled to use and enjoy the common property and permit their tenants to do so.<sup>3</sup>

There is a tension between the right of the owners corporation to manage and control the use of the common property and the right of the owners and their tenants to use and enjoy the common property. This tension was resolved in *Lin's* case where the NSW Supreme Court held that whilst an owners corporation is able to manage and control the use of the common property by owners and their tenants, an owners corporation cannot refuse to allow owners and their tenants to access the common property altogether.

This means that an owners corporation is able to restrict the use of common property by owners and their tenants, for example, by restricting use of area of common property such as a swimming pool to between certain hours only. But the owners corporation cannot altogether permanently prohibit an owner or tenant from using a particular part of the common property.<sup>4</sup>

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<sup>1</sup> See s.9 Strata Schemes Management Act 2015.

<sup>2</sup> See s.28 Strata Schemes Development Act 2015.

<sup>3</sup> *Lin & Anor -v- The Owners – Strata Plan No. 50276* (2004) NSWSC 88.

<sup>4</sup> The owners corporation is, however, able to make a common property rights by-law conferring on one or more owners exclusive use of a particular part of the common property: see s.142 Strata Schemes Management Act 2015.

It follows that an owners corporation is entitled to restrict owners and their tenants from using lifts during a lift refurbishment. This is because a restriction on the use of the lifts by owners and tenants during the lift refurbishment will only be temporary and therefore not prohibit owners and tenants from using the lifts altogether. Of course, the owners corporation should ensure that owners and tenants are still able to access their apartments during the lift refurbishment, for example, via a staircase.

### **3. Does a Lift Refurbishment Require a Special Resolution?**

An owners corporation must properly maintain and keep in good repair the common property and, where necessary, renew or replace any fixtures or fittings comprised in the common property such as the lifts.<sup>5</sup>

It follows that if the lifts in a strata building have aged and deteriorated to the point where they are beyond repair<sup>6</sup> the owners corporation is required by law to renew or replace the lifts.

If the owners corporation is required to carry out the lift refurbishment as part of its duty to repair or replace common property, then the lift refurbishment is able to be authorised by an ordinary resolution. This applies even if the lift refurbishment will add to, alter, improve or enhance the common property.

The owners corporation is not able to add to or alter the common property for the purpose of enhancing or improving the common property without first passing a special resolution at a general meeting.<sup>7</sup> However, this does not mean that the owners corporation must pass a special resolution if it intends to replace an item of common property that is in need of repair or replacement in a manner that will enhance or improve that item of common property.

This is because the replacement of items of common property will often involve an enhancement or improvement of the common property because old will be superseded by new. It may also involve altering or adding to the common property because the new or replacement item may be larger than or otherwise different from the old item.

But as long as all of the work involved in the lift refurbishment is being carried out as part of the owners corporation's duty to repair common property, that work is able to be authorised by ordinary resolution.<sup>8</sup>

If, however, the lift refurbishment is not strictly necessary because the lifts are able to be repaired, or there is nothing wrong with the lifts but owners simply want to improve them, then the lift refurbishment would require a special resolution in order to be authorised.

### **4. Are Owners Able to Make Compensation Claims?**

As mentioned, the strata legislation imposes a duty on an owners corporation to maintain and repair and, where necessary, renew or replace the common property. If the owners corporation breaches that duty an owner is able to claim from the owners corporation compensation for any reasonably foreseeable loss suffered by the owner as a result of the owners corporation's breach of its statutory duty.<sup>9</sup>

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<sup>5</sup> See s.106 *Strata Schemes Management Act 2015*.

<sup>6</sup> This would include where replacement parts for the lifts are unable to be sourced.

<sup>7</sup> See s.108 *Strata Schemes Management Act 2015*.

<sup>8</sup> See *Stolfa –v- Hempton* [2010] NSWCA 218; *The Owners – Strata Plan No. 50276 –v- Thoo* [2013] NSWCA 270.

<sup>9</sup> See s.106(5) *Strata Schemes Management Act 2015*.

However, assuming common property lifts have deteriorated and need to be replaced, the carrying out of a lift refurbishment would not result in the owners corporation breaching its statutory duty to repair common property. Rather, the lift refurbishment would be carried out by the owners corporation in compliance with that duty. Of course, owners and tenants would still need to be able to access their apartments during the lift refurbishment, for example, by use of stairs.

But assuming access to apartments via the stairs is available, in those circumstances, it is difficult to see how an owner or tenant would be entitled to claim compensation from the owners corporation, for example, for loss of rent or alternative accommodation expenses if a tenant is forced to move out of the building during the lift refurbishment, as a consequence of the lift refurbishment.<sup>10</sup>

This view tends to be confirmed by a recent decision of the NSW Supreme Court concerning a compensation claim made by an owner against an owners corporation and strata manager.<sup>11</sup> In that case, an owner argued that a strata manager owed her a duty of care to exercise the functions of the owners corporation reasonably and in accordance with the strata legislation so as to prevent her suffering financial loss. The owner claimed that the strata manager breached that duty as a result of which she suffered loss and was entitled to compensation. The Court rejected the owner's compensation claim. The Court held that the duty of the owners corporation to repair common property (which is a strict duty) would be irreconcilable with a duty owed by the owners corporation to owners to exercise its functions reasonably in a manner that would not cause owners to suffer financial loss. In other words, the Court concluded that in general an owners corporation will not owe an owner a duty of care to exercise its functions reasonably to avoid the owner suffering financial loss.

This does not mean that it is not possible for an owner or tenant to have a right to claim compensation against an owners corporation in connection with a lift refurbishment. The owners corporation does owe a duty to exercise its functions reasonably including its duty to repair the common property.<sup>12</sup> Therefore, if the owners corporation carries out a lift refurbishment recklessly or negligently, for example, by failing to complete the lift refurbishment within a reasonable period, then that may give rise to a right for an owner or tenant to claim compensation from the owners corporation.

## **5. Conclusion**

A lift refurbishment is a major capital works project that needs to be handled with care. There are many thorny issues to navigate. But if a lift refurbishment is managed properly, it is possible to authorise the refurbishment by ordinary resolution and the scope for owners and tenants to make compensation claims should be very limited.

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*10 An owners corporation may in some circumstances have in place an insurance policy that provides cover to owners and tenants for rental loss or alternate accommodation expenses in the case of a lift refurbishment.*

*11 See James –v- The Owners – Strata Plan No. 11478 [2016] NSWSC 1558.*

*12 See James –v- The Owners – Strata Plan No. 11478 (No. 4) [2012] NSWSC 590.*

#### About JS Mueller & Co

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