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MUST OWNERS PAY FOR THE MAINTENANCE OF COMMON PROPERTY THEY DO NOT USE?

ARE DIFFERENTIAL LEVIES POSSIBLE?

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MUST OWNERS PAY FOR THE MAINTENANCE OF COMMON PROPERTY THEY DO NOT USE? ARE DIFFERENTIAL LEVIES POSSIBLE?

Do all lot owners have to pay for the maintenance of every part of the common property in their strata scheme even if some of the owners do not use parts of that common property? And is it possible to make some owners liable for paying for the maintenance of certain common property and exclude other owners from that liability by way of a differential levy?

1. Introduction

There are many strata schemes that contain different components that can be used by some (but not all) owners.

A typical example is a strata scheme that contains multiple stages. Often the owners in one stage query whether they have to pay for the maintenance of common property in another stage.

This same question often gets asked by some owners when a special contribution is proposed to be levied to repair part of the common property they cannot access or use such as concrete spalling that only affects another owner's balcony.

There are other common examples where there are owners who do not use and therefore do not want to pay for the maintenance of certain common property, for instance:

- The owner of a ground floor lot who does not use a lift servicing the upper levels of the building;
- The owner who does not use recreational facilities such as a swimming pool or gym.

So what is the true position? Are all owners responsible for paying for the maintenance of every part of the common property even if some owners cannot or do not use part of the common property? And is it possible for an owners corporation to raise a differential contribution that is levied on some but not all owners or is levied in shares that are not proportional to the unit entitlements of the lots?

2. Summary

The scheme of the strata legislation is as follows:

- An owners corporation is the legal owner of the common property but the owners of the lots have a beneficial interest in every part of the common property;
- The owners corporation must maintain, repair and replace all of the common property;
- The owners corporation raises funds it needs to maintain, repair and replace the common property by levying on owners contributions to its administrative fund and capital works fund;
- The owners corporation must levy those contributions on all owners in shares proportional to the unit entitlements of their respective lots;



- An owners corporation is able to transfer to a group of owners the responsibility for organising and paying for the maintenance, repair and replacement of certain common property by making a common property rights by-law;
- However the owners corporation cannot make a common property rights by-law without the written consent of the group of owners who will be affected by the by-law or an order by NCAT;
- NCAT is unlikely to make a common property rights by-law if the owners who refuse to consent to the by-law have a good reason for doing so.

For these reasons, there is limited scope for an owners corporation to make a group of owners responsible for organising and paying for the maintenance, repair and replacement of certain common property, or to levy a differential contribution on certain owners only, without the consent of those owners.

3. An Explanation

Why should owners have to pay for the maintenance of common property they cannot use? And why cannot an owners corporation levy a differential contribution on some but not all owners? A careful analysis of the strata legislation and a case decided by the NSW Supreme Court in 1975 explain why differential levies are generally not possible and why all owners must normally pay for the maintenance of every part of the common property.

4. The Common Property

An owners corporation is the legal owner of all parts of the common property throughout its strata scheme. This is because, on the registration of a Strata Plan, the ownership of all of the common property vests in the owners corporation: see section 24 of the *Strata Schemes Development Act 2015* (Development Act).

However, the owners corporation holds the common property as agent or trustee for the owners of all of the lots as tenants in common in shares proportional to the unit entitlement of the owners' lots: see section 28 of the Development Act. This means that, whilst the owners corporation is the legal owner of the common property, the owners of the lots are the beneficial owners of the owners common property: see *Owners – Strata Plan No. 43551 -v- Walter Construction Group Ltd* [2004] NSWCA 429.

The beneficial interest that owners have in the common property is what entitles the owners to use and enjoy the common property subject to the by-laws that apply to a strata scheme: see *Lin -v- Owners - Strata Plan No. 50276* [2004] NSWSC 88.

5. Responsibility for the Common Property

An owners corporation is not just the legal owner of its common property. The owners corporation is



responsible for the management and control of the use of that common property: see section 9(2) of the *Strata Schemes Management Act 2015* (**Management Act**). The owners corporation is also responsible for maintaining, repairing and replacing every part of the common property (subject to the by-laws): see section 106 of the Management Act.

Indeed, section 106 of the Management Act imposes a mandatory (not optional) duty on an owners corporation to properly maintain and keep in good repair the common property and, where necessary, to renew or replace any fixtures or fittings comprised in the common property. This means that the owners corporation has a strict duty to maintain and keep in good repair the common property: see *Seiwa Australia Pty Ltd -v- Owners Strata Plan 35042* [2006] NSWSC 157.

6. Responsibility for Funding Repairs to the Common Property

An owners corporation is also responsible for managing the finances of the strata scheme: see section 9(3) of the Management Act. This means, at each annual general meeting, the owners corporation must estimate how much money it will need to credit to its administrative fund and capital works fund for various forms of expenditure including for the maintenance and repair of common property and determine amounts to be levied as contributions to those funds: see sections 79 and 81 of the Management Act.

Further, where the owners corporation is faced with expenses it cannot at once meet from its administrative fund or capital works fund, it is required to raise a contribution to either fund in order to meet those expenses: see section 81(4).

The contributions which the owners corporation determines at its annual general meetings, and the special contributions that it determines at other general meetings, must be levied on the owners of all of the lots in its strata scheme. Indeed, these contributions must be levied in respect of each lot and are payable by all of the owners in shares proportional to the unit entitlements of their respective lots: see section 83(2) of the Management Act.

Therefore, in essence, an owners corporation raises the funds it needs to fulfil its strict statutory duty to maintain, repair and replace common property by levying contributions on the owners of all the lots in shares proportional to the unit entitlements of their respective lots.

The owners corporation is not entitled to levy contributions on some (but not all) owners, or to levy contributions on owners in shares that are disproportionate to the unit entitlements of their respective lots.

There are only two exceptions to this rule and they rarely apply: see section 82 (individual contributions may be larger if greater insurance costs caused by use of lot) and section 90 (contributions for legal costs awarded in legal proceedings between owners and owners corporation) of the Management Act.



7. The Scheme of the Strata Legislation

The scheme of the strata legislation were explained by the NSW Supreme Court in *Jacklin -v- Proprietors of Strata Plan No. 2795* [1975] 1 NSWLR 15 (at 24) in the following way:

The legislation takes the common property as a whole and treats each proprietor as having an undivided beneficial interest in every part of it, whether or not that part is susceptible of any use or enjoyment by that proprietor or of greater use or enjoyment by that proprietor than by any other. Similarly, with respect to the provision of funds for the repair and maintenance of all or any part of the common property, the legislation provides for only one fund with contributions to be levied proportionately on all proprietors irrespective of any individual proprietor's use and enjoyment thereof. Thus the ownership and the financial burden of common property is to be held and shared by all proprietors in common in shares according to their respective unit entitlements. Consistently with this unity of approach, the duty of control, management, administration, repair and maintenance of common property is imposed by the legislation upon the body corporate. This duty is necessarily owed to each and every proprietor. In my opinion, there flows from the scheme of the legislation as an incident of proprietorship of a lot a right in each proprietor to have the body corporate's duty performed in relation to all of the common property at the cost and expense of all proprietors in proportion to unit entitlements. As the duty is not only to repair and maintain but also to control, manage and administer, the right of each proprietor includes a right to have the whole administration of repairs and maintenance of common property carried out by the body corporate by its servants and agents.

8. Jacklin's Case

The *Jacklin* case concerned a strata scheme which comprised a tower block of 39 apartments and, some distance away, a building comprising three townhouses. The owners corporation levied contributions on all owners to fund the maintenance and repair of every part of the common property throughout the strata scheme. The owners of two of the townhouses complained that this system was unfair because they obtained no benefit from expenditure on the maintenance of the common property in the tower block. There were also other disputes between the owners corporation and the owners of the townhouses concerning the maintenance and repair of the common property.

The strata committee of that owners corporation passed a resolution which purported to: treat the townhouse common property as a separate class of common property; treat the townhouse owners as a separate group of owners; delegate to the townhouse owners responsibility for the maintenance and repair of the townhouse common property; limit the amount of the funds of the owners corporation to which the townhouse owners might have recourse to pay for the maintenance and repair of the townhouse common property; require the townhouse owners themselves to provide any funds, in addition to those raised by contributions levied by the owners corporation, that might be needed for the



maintenance and repair of the townhouse common property; and, purported to absolve the other owners from the responsibility for providing funds for the maintenance and repair of the townhouse common property. That resolution was ratified at the next annual general meeting of the owners corporation.

After that resolution was ratified at the next annual general meeting, the owners corporation refused to carry out any maintenance or repairs to the townhouse common property. Two of the townhouse owners applied to the Supreme Court to resolve the impasse. The Court concluded that the resolution was inconsistent with the right of the townhouse owners as lot owners to have the owners corporation carry out its duty to maintain and repair every part of the common property using funds held in its administrative fund and capital works fund that had been raised by way of contributions levied on all owners. The Court concluded that the resolution passed by the strata committee and at the next annual general meeting to, in effect, treat the townhouse common property as a separate category of common property, was void and of no effect.

9. Transferring to Owners Responsibility for the Repair of Common Property: A Common Property Rights By-Law

Following the *Jacklin* case, the strata legislation was amended. The amendment permitted an owners corporation to make a by-law which granted one or more owners special rights over the whole or a specified part of the common property and imposed on those owners the responsibility for the maintenance and repair of that common property. The legislation was also amended to make clear that to the extent that an owners corporation made such a by-law, it relieved the owners corporation from its responsibility to maintain and repair the common property that was the subject of the by-law.

The amendments that were made to the legislation have been carried through to the Management Act. Under that Act, an owners corporation is able to make a common property rights by-law. That is a by-law that confers on the owner or owners of a specified lot or lots a right of exclusive use and enjoyment of, or special privileges in respect of, the whole or any specified part of the common property: see section 142 of the Management Act.

A common property rights by-law must deal with the responsibility for the maintenance and repair of the common property that is the subject of the by-law. This means that a common property rights by-law must either provide that the owners corporation is to continue to be responsible for the maintenance and repair of the relevant common property, or impose on the owner or owners who are the subject of the by-law the responsibility for that maintenance and upkeep: see section 144(1) of the Management Act.

Section 144(3) says that to the extent to which a common property rights by-law makes an owner or group of owners directly responsible for the maintenance and repair of any common property, it discharges the owners corporation from its obligations to maintain and repair that property under the Management Act.



10. Making a Common Property Rights By-Law

An owners corporation is required to do three things in order to make a common property rights by-law. First, the owners corporation must pass a special resolution at a general meeting to approve the by-law. Second, the owners corporation must obtain the written consent of the owner or group of owners on whom the by-law confers rights or special privileges. Third, the owners corporation must cause the by-law to be registered by the Registrar-General in the folio of the Register for the common property: see sections 141 and 143 of the Management Act. If the owners corporation does not fulfil each of these requirements, the by-law will not be valid or enforceable: see *James -v- The Owners Strata Plan No. SP11478 (No. 4)* [2012] NSWSC 590.

11. Making a Common Property Rights By-Law Without the Consent of the Affected Owners

The strata legislation provides an owners corporation with a remedy where an owner or group of owners fail or refuse to give their written consent to the making of a common property rights by-law. Section 149 of the Management Act entitles an owners corporation to apply to the NSW Civil and Administrative Tribunal for an order to make a common property rights by-law without the written consent of the owners on whom the by-law confers rights or special privileges.

The Tribunal is only able to make a common property rights by-law, in those circumstances, if it considers that the refusal of the owners to consent to the common property rights by-law was unreasonable. In considering whether to make a common property rights by-law in those circumstances, the Tribunal must have regard to the interests of all owners in the use and enjoyment of their lots and common property and the rights and reasonable expectations of any owners deriving or anticipating a benefit under the by-law: see section 149(2).

There have been cases where the Tribunal has been asked to make a common property rights by-law in circumstances where the owners on whom the by-law would confer rights or special privileges have refused to consent to the by-law. Those cases reveal that the Tribunal will only consider a decision by those owners to refuse to consent to the by-law to be unreasonable if the decision is not based on, or guided by, reason or good sense, or is immoderate, capricious or exorbitant: see *Garth Pattison – Owner of Lots 51 and 52* [1999] NSWWSB 66.

Ultimately, in assessing whether a decision made by a group of owners to refuse to consent to a common property rights by-law is reasonable, the Tribunal needs to decide whether those owners exercised sound judgment or good sense: *Pattison*. This means that if the owners who refuse to consent to a common property right by-law have, viewed objectively, a good reason for withholding that consent, the Tribunal would not make an order to permit the by-law to be made in without their consent.



12. Varying Contributions or Payment Methods

The Tribunal is given a broad power to resolve most types of strata disputes under the Management Act. This includes power to vary contributions that are levied by an owners corporation on the owners of the lots in its strata scheme: see section 87 of the Management Act. Indeed, the Tribunal is able to order payment of contributions of a different amount or in a different manner. However, the Tribunal is only able to make such an order if it considers that the amount levied or proposed to be levied by way of contributions is inadequate or excessive or that the manner of payment of the contributions is unreasonable. Typically, the expression “manner of payment of contributions” relates to the method or timing of payments of contributions, not the persons by whom the contributions are payable or the proportions in which those contributions are payable.

13. Conclusion

The strata legislation treats the common property as a whole and says that each owner has an interest in every part of it, whether or not that part is able to be used by that owner. This helps explain why owners generally have to pay for the maintenance of every part of the common property even if they cannot use some parts of the common property.

Further, whilst the legislation has been amended over the years, there is still limited scope for an owners corporation to make a group of owners responsible for organising and paying for the maintenance, repair and replacement of a particular part of the common property, or to levy a differential contribution on certain owners only, without the consent of those owners.

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About JS Mueller & Co

JS Mueller & Co has been servicing the strata industry across metropolitan and regional NSW for over 30 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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