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UPGRADE THAT BALUSTRADE!

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Preamble

In a landmark ruling, today the Appeal Panel of NCAT has ordered an owners corporation to upgrade a balustrade to comply with the Building Code of Australia. This case marks the first time that an owners corporation has been ordered to upgrade an unsafe balustrade to achieve compliance with the Building Code of Australia. The case cuts against the long held view that the provisions of the Building Code of Australia are not retrospective and that an owners corporation does not have to upgrade an unsafe balustrade to comply with the Code.

Introduction

The Building Code of Australia (**BCA**) contains requirements for balustrades in apartment buildings. Those requirements are set out in clause D2.16 and have existed since 1 July 1997. Briefly, they require a balustrade to have a height of at least 1 metre when measured vertically from the surface beneath, not have openings that allow a 125mm sphere to pass between the lowest rail and floor beneath the balustrade, not have openings between rails more than 460mm and not have horizontal climbing elements between 150mm and 760mm above the floor. Those requirements promote safety and are intended to prevent a person falling through or over, or climbing over, a balustrade.

The BCA is not Retrospective

There are many balustrades that were constructed before the commencement of the BCA. Many of those balustrades do not meet the safety requirements for balustrades in the BCA. For example, many of those balustrades are less than 1 metre high, contain gaps between railings that are greater than 460mm or have horizontal railings that facilitate climbing. The question that is often asked is whether an owners corporation that has balustrades that do not comply with the safety requirements of the BCA is required to upgrade those balustrades to achieve compliance with the BCA. The typical answer to that question has been that the requirements of the BCA are not retrospective as a result of which an owners corporation is not required to upgrade its balustrades to comply with the BCA. The decision of the Appeal Panel of NCAT handed down on 22 September 2021 in the case of *SP36613 v Doherty; Doherty v SP36613* [2021] NSWCATAP 285 (in which Adrian Mueller acted for the successful lot owners) turns that reasoning on its head.

The Doherty Case

Ms Doherty and Mr Parrab own an apartment on the top floor of a 7 storey mixed use strata building in Surry Hills, Sydney. Ms Doherty and Mr Parrab's apartment has a rooftop courtyard which is surrounded by a balustrade (**balustrade**).

The balustrade was built when the building was constructed in about 1990. The balustrade does not meet the safety requirements of the BCA. The balustrade is not 1 metre high, contains large gaps through which a person could fall and is easily able to be climbed over. Ms Doherty became concerned that the balustrade was unsafe. She asked the owners corporation to upgrade the balustrade to make it compliant with the safety requirements of the BCA. The owners corporation refused to do so. Ms Doherty unsuccessfully applied to NCAT for an order to force the owners corporation to upgrade the balustrade. NCAT held that the requirements of the BCA were not retrospective. Ms Doherty appealed against NCAT's decision. Her appeal was successful. The Appeal Panel of NCAT ordered the owners corporation to renew the balustrade to ensure that it is compliant with the safety requirements of the BCA.

The Appeal Panel's Reasoning

The Appeal Panel concluded that the owners corporation knew or should have known that the balustrade was unsafe. This was for several reasons.

Several years earlier, the Local Council had ordered the owners corporation to upgrade other balustrades throughout the building to make them safe. Those balustrades were of the same design as the balustrade surrounding Ms Doherty and Mr Parrab's courtyard. The Appeal Panel considered that the Council order should have put the owners corporation on notice that the courtyard balustrade might be unsafe as a result of which the owners corporation should have investigated the safety of the balustrade. Subsequently, the Council had also written to the owners corporation to recommend that balustrades have a height of at least 1 metre, have no openings between bars more than 100mm and no horizontal parts that allow children to climb over them.

Further, the owners corporation's consulting engineer had written a report making clear that the balustrade did not comply with the safety requirements of the BCA because it was not 1 metre high and it contained elements which allowed children to climb over the balustrade. The report of the engineer observed that non-compliant balustrades pose a high risk to the safety of building occupants particularly their children and strongly recommended that the balustrade be replaced with a new, BCA compliant balustrade. Whilst a compulsory strata manager had instructed the consulting engineer to proceed with his recommendations to replace the balustrade on the basis that it affected the safety of residents in the building, the appointment of that compulsory strata manager came to an end and the owners corporation did not replace the balustrade.

The owners corporation had also engaged an expert to prepare a safety report which identified as the major hazard for immediate attention balustrades that were less than 1 metre in height and which otherwise did not comply with the safety requirements of the BCA and represented a falling hazard. The safety report strongly recommended that the owners corporation consider replacing the non-compliant balustrades.

In those circumstances, the Appeal Panel concluded that not only was the balustrade unsafe but the owners corporation knew or should have known that the balustrade was unsafe.

The Duty to Replace Common Property

The Appeal Panel then considered whether the duty of the owners corporation to repair and replace common property under section 106 of the *Strata Schemes Management Act 2015* required the owners corporation to replace the balustrade.

The Appeal Panel concluded that it did because the unsafe nature of the balustrade was obvious or patent and, even more importantly, the owners corporation knew or should have known that the balustrade was unsafe.

The Appeal Panel held that the duty under section 106 extends to maintenance, repair and replacement beyond common property that has just physically deteriorated in condition or operation and covers an item of common property that is obviously unsafe or presents an obvious safety risk once investigated where the need for that investigation is obvious or at least reasonable.

The Appeal Panel also held that that duty requires the owners corporation to investigate obvious safety risks including those that are brought to its attention by a lot owner. Importantly, the Appeal Panel held that it did not matter whether the balustrade complied with the applicable standards when it was built in circumstances where the balustrade posed an obvious safety risk.

What About Previous Case Law?

In reaching its decision, the Appeal Panel distinguished the earlier decision of the NSW Court of Appeal in *Ridis v SP10308* [2005] NSWCA 246. In that case, the Court held that an owners corporation was not required to replace old annealed glass in an entrance door to a strata building (that shattered on impact and caused a serious injury) with modern safety glass. However, the Court reached that conclusion because the owners corporation did not know, and ought not to have reasonably known, that the old annealed glass was unsafe and posed a risk of personal injury. In the *Doherty* case, the owners corporation clearly knew or should have known that the balustrade was unsafe and that is why it was required to act and could not turn a blind eye to the safety risk.

The Wash Up

The decision in the *Doherty* case turns on its head the commonly held assumption that an owners corporation is not require to upgrade an unsafe balustrade that does not comply with the safety requirements of the BCA particularly where the balustrade complied with the applicable standards when it was built. The case shows that where a balustrade is obviously unsafe, or an owners corporation ought reasonably to know that a balustrade is unsafe, the owners corporation is required to make the

balustrade safe and compliant with the safety requirements of the BCA. The case also means that an owners corporation that obtains expert advice identifying unsafe balustrades cannot turn a blind eye to the safety problem.

Note: JS Mueller & Co acted for the successful owners in the *Doherty* case.

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About JS Mueller & Co Lawyers

JS Mueller & Co Lawyers has been servicing the strata industry across metropolitan and regional NSW for over 40 years. We are a specialist firm of strata lawyers with in depth and unmatched experience in, and comprehensive knowledge of all strata law inclusive of by-laws, building defects and levy collections.

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