

NEWSLETTER ISSUE 11 July 2013

Recent Survey

A big thank you to the Secretary's and Treasurer's in each of our schemes who took part in our survey – your honest feedback regarding things like our AGM paperwork format, suggestions on newsletter content and overview of our performance was extremely useful and has been taken on board.

We did find that there was a large difference in service expectations of small plans as opposed to our larger schemes requirements. We are working towards developing tailored options as to fee and service structure accordingly and will have this ready by 1 September for discussion at your AGM.

Biggest morning tea

We decided to hold this event on a Friday afternoon when we hoped more of our contractors etc could come. We had three raffles, provided food and drinks and raised \$2110 for the Cancer Council. Attendance was up on last year and we look forward to interest growing and continuing to provide support towards this very worthy cause.

Court case review – When an owner undertakes repairs to common property

It is with thanks to JS Mueller and Co that we can provide the following extract from their November 2012 newsletter.

In *The Owners – Strata Plan 32735 -v- Heather Lesley-Swan* [2012] NSWSC 383 (10 August 2012) the owner of a unit in Potts Point, Sydney, Ms Lesley-Swan, carried out repairs to the common property balcony adjacent to her unit without the permission of the owners corporation. Ms Lesley-Swan sued the owners corporation to recover the money she spent carrying out the balcony repairs. Her claim was successful in the Local Court where she was awarded compensation of \$9,597.18 to cover the cost of repairing the balcony and an additional \$30,400 in compensation for lost rental over a 19 week period she claimed her unit could not be rented due to the defective condition of the balcony. The owners corporation successfully appealed against the decision of the Local Court with the Supreme Court overturning the Local Court's decision to award Ms Lesley-Swan compensation for the balcony repairs.

FACTS

The facts in the Lesley-Swan case are not uncommon. In mid to late 2006 a section of tiles on the balcony adjacent to Ms Lesley-Swan's unit had popped and lifted. There was no dispute that the balcony tiles formed part of the common property. The owners corporation and Ms Lesley-Swan fell into dispute about the way in which the defective tiling would be repaired. The owners corporation wanted to replace the section of tiling which had lifted with original terracotta tiles. Ms Lesley-Swan asserted that the entire balcony needed to be retiled with new, ceramic tiles which would match the tiles she intended to use during forthcoming renovations to her unit. The disagreement between the parties continued for several months.

In April 2008 Ms Lesley-Swan wrote to the owners corporation and indicated that she would be "undertaking repair of the tiling to current building standards at our own expense". Shortly afterwards the owners corporation obtained an interim order from a strata schemes adjudicator restraining Ms Lesley-Swan from carrying out any repairs to the balcony tiling. But that did little to solve the impasse and in early September 2008 Ms Lesley-Swan's contractor retiled the whole of the balcony with new tiles. This work was done without the permission of the owners corporation.

THE COURT'S REASONING

In considering Ms Lesley-Swan's claim to recover from the owners corporation the cost of retiling the balcony, the Supreme Court observed that the strata legislation imposes on the owners corporation (not unit owners) the responsibility for repairing common property. Importantly, the Court held that the strata legislation does not authorise a unit owner to unilaterally undertake repair work on common property.

The Court concluded that there were, essentially, two ways in which a decision to repair common property could be made, namely either by the owners corporation itself or pursuant to an order made by a strata schemes adjudicator or court.

The Court said that an owner faced with an owners corporation that refuses to repair common property is given a remedy under the strata legislation to obtain an order from a strata schemes adjudicator to require the owners corporation to allow the owner to carry out the repairs himself or, alternatively, to apply for an injunction to force the owners corporation to do the repairs.

The Court made some interesting observations about the rationale for ensuring that all repairs to common property remain under the control of an owners corporation. The Court said that if an individual owner was free to have his contractor repair common property (where an owners corporation had failed to do so) "the integrity of a particular strata scheme could be readily undermined" because repairs done by individual owners could result in "strata safety issues, or impact on the convenience of other owners or result in visual or structural features or other matters that are out of keeping with the style and integrity of the unit building itself".

The Court also observed that where an owners corporation engages a contractor to repair common property, the owners corporation will have enforceable contractual rights against a contractor should he fail to meet relevant standards. But where work is performed by a contractor on behalf of an individual owner on common property, an owners corporation would not have that contractual right against the contractor.

The Court said that the general law does not encourage an owner of one property to perform work on his neighbour's property because that would encourage disputes, turmoil or disorder. The Court concluded that this principle of law was abundantly clear in the case of strata buildings because the strata legislation is designed to maintain order between owners and owners corporations and one of the ways it achieves this goal is by allocating to the owners corporation the responsibility for repairing the common property.

The Court concluded that for these reasons a unit owner could not proceed to perform maintenance or repair work on common property (without the permission of the owners corporation or an order by a strata schemes adjudicator) and then recover the cost or expense of the work from the owners corporation. Consequently the Supreme Court overturned the Local Court's decision to award Ms Lesley-Swan compensation for the cost of retiling the balcony.

CONCLUSION

The decision in the Lesley-Swan case will have wide application across the strata industry because it is not uncommon for owners to carry out repairs to common property and claim the cost of the repairs from owners corporations.

The lesson to be learnt from the Lesley-Swan case is that if an owners corporation fails or refuses to repair defective common property, a unit owner cannot repair the defect without the owners corporation's permission or an order made by a strata schemes adjudicator, and any owner who unilaterally performs the repair will do so at their own peril and will not be able to recoup the cost of the repair from the owners corporation. Any unit owner confronted with an owners corporation that does not repair common property should not take the law into their own hands but rather should obtain an order either forcing the owners corporation to carry out the repairs or, if appropriate, an order to permit the owner to do the repairs.

[Please remember that all our previous newsletter publications are on our website – see the home page – there are details as to the content of each so it is easy to find the one you are looking for.](#)