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Tenacious Owners Corporation Smashes Through Resistance to Access Order: Court of Appeal Clarifies Obligations and Rights to Reinstate Common Property

- *The Owners – Strata Plan 21702 v Krimbogiannis* [2014] NSWCA 411 ("the Connaught case") -

In a Nutshell

The NSW Court of Appeal has recently held in the Connaught case that section 62 of the Strata Schemes Management Act 1996 (**"the Act"**), which sets out an owners corporation's duties to maintain and repair common property, should be interpreted as:

1. requiring an owners corporation to reinstate any common property that has been removed without authorisation by an owner or occupier of a lot;
2. grounds for a tribunal or court to order that access be granted to the lot to allow the Owners Corporation to reinstate the common property.

Note: The Connaught case does not disturb authority that an owners corporation may recover from a lot owner or occupier the costs of reinstatement of common property.

Action to Take

Where an owner or occupier of a lot has removed, altered or interfered with common property section 62 of the Act requires that the owners corporation reinstate the common property.

Accordingly, the owners corporation should consider obtaining legal advice in relation to the options available to it whether in the form of:

- passing a retrospective by-law to address the unauthorised action; or
- taking action to reinstate the common property and seeking recovery of reinstatement costs from a lot owner or occupier.

Owners Corporation's Duties to Maintain and Repair Common Property

Background

In the Connaught case, the NSW Court of Appeal considered a factual scenario where the owners corporation had been repeatedly thwarted in its attempts to gain access to a lot to reinstate a fixed glass panel that had formed part of the common property and which a tenant of a lot had without the proper authority or approval replaced with a sliding glass door.

The owners corporation sought access to the lot property to carry out works by:

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- writing to the owner of the lot and then the tenant of the lot;
- applying to an adjudicator for an order for access under section 145 of the Act, which was refused;
- applying to the Consumer, Trader and Tenancy Tribunal (**"the CTTT"**) for an order for access, which was refused;
- appealing in the NSW District Court the decision made by the CTTT refusing an order for access; and
- seeking relief from the NSW Court of Appeal, acting pursuant to its supervisory jurisdiction, from the decision made by the NSW District Court.

NSW District Court

The NSW District Court applied a restrictive interpretation of section 62 of the Act by relying upon comments made by the NSW Court of Appeal in *Ridis v Strata Plan 10308* [2005] NSWCA 246 and *The Owners Strata Plan 50276 v Thoo* [2013] NSWCA 270.

In essence, the District Court considered that the duty to "*maintain*" should be read in a limited manner by reference to the concept of "*repair*" based upon the words "*keep in a state of good and serviceable repair*". Accordingly, the NSW District Court dismissed the appeal by the owners corporation and would not permit access to the lot to carry out works to reinstate the fixed glass panel. The dogged Owners Corporation then applied to the NSW Court of Appeal seeking relief from the NSW District Court.

NSW Court of Appeal

By the time the case was heard by the NSW Court of Appeal, the recalcitrant tenant's lease had expired and the owners corporation had been granted access by the new tenant to perform the works that it had first attempted to perform some 8 years prior.

Despite the point being moot by the time the case had reached the NSW Court of Appeal, given the public interest in clarifying the extent of the duties of the owners corporation under section 62 of the Act, the NSW Court of Appeal considered that it was important that it hear the owners corporation's application for relief from the decision made by the NSW District Court, and provide a judgment.

The NSW Court of Appeal was unanimous in determining that the NSW District Court had made an error in law in its interpretation of section 62 of the Act.

The NSW Court of Appeal held that *Ridis* and *Thoo* had been incorrectly applied by the NSW District Court given that the factual scenarios in those cases did not concern the reinstatement of common property which had been removed without authorisation by an owner or occupier.

The NSW Court of Appeal held that the duties under section 62 of the Act which required an owners corporation to keep common property in good repair assumed the continued existence of the property and that maintaining the property included preserving it by not removing, replacing or destroying the common property.

Accordingly, where an occupier or owner of a lot removes common property without authorisation under section 62 of the Act, the owners corporation has a duty to reinstate that common property and seek access to the lot to perform such works and if necessary seek a Tribunal or court order that such access be provided.

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