



Building and Construction Law Specialists join Makinson & d'Apice

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Building and Construction Law Specialists join Makinson & d'Apice

In the second half of 2010, Makinson & d'Apice was privileged to be joined by the firm of Baker McDonell. The arrival of David Baker and his team of lawyers greatly boosted Makinson & d'Apice's capacity and ability to provide quality and experienced building and construction services in the strata and medium density area.

David brings to bear wisdom, knowledge and experience earned over three decades working in the building and construction area. He has been a member of the Fair Trading Tribunal (a forerunner of the Consumer, Trader and Tenancy Tribunal), and was also the Corporation Solicitor and Legal Manager of the Building Services Corporation.

The firm can now offer its clients a complete suite of services with respect to construction disputes and litigation which is sensible and practical in both legal and commercial context.

With David's experience and ability, our Dispute Resolution Group team is well positioned to provide assistance concerning Homeowners Warranty Insurance claims, breaches of the statutory warranties provided by the Home Building Act 1989, and professional negligence claims against construction and building professionals, engineers, certifiers, surveyors, architects, project managers, sub-contractors, amongst others.

Courts have described litigation as an "inescapably chancy" exercise. It can also, of course, be highly expensive. One of the significant benefits of the addition of David Baker and his team to the Makinson & d'Apice Dispute Resolution Group is that considerable specialist experience and a history of success is brought to bear with the ability to provide advice and

evaluation, mediation, informal negotiation and settlement conferences, conciliation, and the effective use of binding experts.

A visit to the Makinson & d'Apice website will reveal the scope and width of services able to be provided in this area, which can involve owners considerable turmoil and cost.

"Makinson & d'Apice was privileged to be joined by the firm of Baker McDonell ... greatly boosting the firm's capacity and ability to provide quality building and construction services."

services concerning alternative dispute resolution techniques, such as arbitration, early neutral

■ David Baker is a partner at Makinson & d'Apice.



A Proxy – what can they do or say?

An Owners Corporation

An owners corporation is a separate legal entity which has the principal responsibility for the management of the strata scheme. It can only make decisions affecting that scheme in certain ways:

1. owners, in general meeting, passing a resolution;
2. executive committee members passing a resolution; or
3. a duly appointed strata managing agent exercising a validly delegated power to make a decision.

Entitlement to Vote

Owners (and certain other persons) have a right to attend a general meeting. Section 118 of the *Strata Schemes Management Act 1996* (the "Act") provides that a person who has an interest in a lot gives the person a right to cast a vote "either personally or by nominee" at meetings but must notify the owners corporation of that interest.

By virtue of clause 10(1) of Schedule 2 to the Act, each owner, and each person entitled to a priority vote, has voting rights that may be exercised at a general meeting, but only if the owner or person is shown on the strata roll.

The voting rights may be exercised in person or by proxy (clause 10(3)(a)) or in the case of a corporation, by its company nominee in person or by proxy (clause 10(3)(b)). Clause 10 also provides that the voting rights of joint owners may be exercised by a proxy.



Proxy

These provisions give rise to the question: what is a "proxy"? The Dictionary to the Act is silent, and the term is not defined elsewhere in the legislation.

"Proxy" is defined in the Shorter Oxford Dictionary as:

- i. agency of substitute or deputy;
- ii. person authorised to act for another;
- iii. writing authorising person to vote on behalf of another.

The High Court of Australia in *Davison v Vickery's Motors Ltd (in liq)* (1925) 37 CLR 1, at 32, stated:

"Proxy" is not a technical word; but the appropriate meaning seems to be that suggested in the Oxford

Dictionary, (2b), 'a writing authorising a person to vote instead of another, at an election, a meeting of shareholders etc, or as formerly in the House of Lords'.

It is apparent that the term "proxy" is used in two distinct, but related, ways, namely:

1. a person appointed to represent another person at a meeting, and authorised to vote on behalf of the latter person, that is, the person appointed as the representative; and
2. the instrument in writing containing such an appointment, that is, the document by which a person is appointed as a representative.

The proxy, or person, is the agent of

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A Proxy – what can they do or say?

(Continued from page 2)

the principal, namely, the person making the appointment. As the general law of agency applies to proxies, it is timely to state that it is a general principle of Common Law that what people may do themselves, they may do by an agent. However, at Common Law, there is no right to appoint another person to vote on a person's behalf. In the strata law context one must look to the Act to ascertain whether the right to appoint another person to vote is available.

The Act

Clause 11 of Schedule 2 to the Act provides:

“(1) A person is a duly appointed proxy for the purpose of this Part if the person is appointed as a proxy by an instrument in the form prescribed by the regulations”.

The form of proxy (Form 2) is to be found in Schedule 8 to the *Strata Schemes Management Regulation 2010*.

Relevantly, the Form provides:

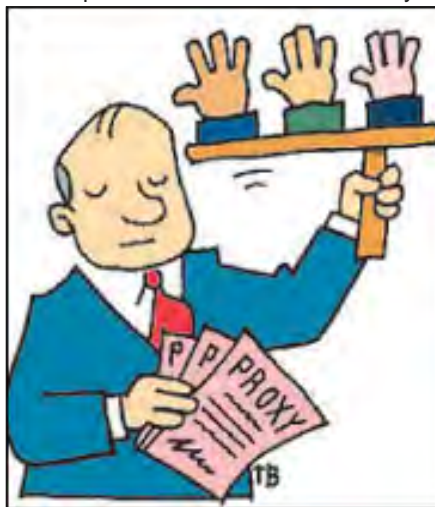
“We...the owners of lot...appoint...as our proxy for the purposes of meetings of the owners corporation...”

The Form goes on to specify the period for which appointment of proxy has effect and provision for the giving of instructions relating to voting on matters (full or restricted).

The Act of the regulation give no direction or instruction on questions relating to the proxy's participation in the conduct of the meeting, for instance, on taking points of order, seeking adjournment of the meeting or moving amendments to motions.

Further, they are silent on whether the proxy may speak in support of, or against a motion.

Given the silence of clause 11 and the lack of specificity of Form 2, it is relevant to once again turn to the general law for guidance. A proxy has no power at a meeting beyond that specified in the rules of the body



at which the proxy is in attendance or a relevant statute (in this case, the Act).

It would be possible, therefore, for an owners corporation to make a by-law

“The Form goes on to specify the period for which appointment of proxy has effect and provision for the giving of instructions relating to voting on matters available”

(section 47 of the Act) by which proxies might be regulated or prescribed. Any such by-law must not be contrary to the Act, or beyond the power of the owners corporation.

In the absence of any relevant by-law, it is relevant to have regard to the Act itself. Clause 11 is prescriptive with respect to the authority, or power, of the proxy, and the form of the proxy or instrument itself. Dealing with the form first, the clause makes provision for the giving of instructions for voting (clause 11(2)(a)) and the period for which the proxy is effective (clause 11(4)).

Limitations

Turning to the authority or power which clause 11 confers, a proxy can not exercise a vote in relation to a matter if the person appointing the proxy is exercising personally a power to vote on that matter (clause 11(4)). Authority to vote is revoked if a subsequent instrument is completed and delivered to the secretary.

More particularly, clause 11(2)(a) prescribes that the form of proxy is to make provision for the giving of instructions on whether the person appointing the proxy directs the proxy to vote in a particular manner on a particular matter or the Agenda. Clause 11(7) prescribes that if the instrument appointing a proxy “limits the manner in which the proxy may

vote at the meeting”, a vote that does not observe the limitation is invalid. Methods of voting include by voices, by show of hands, on a poll and by

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A Proxy – what can they do or say?



(Continued from page 3)

acclamation.

The proxy must carefully consider any limitations which may be imposed on the manner of voting. Clause 11(9) provides that a proxy, if entitled to vote otherwise than as a proxy, may also vote in her own right, and, if appointed as proxy for more than one person, may vote separately as a proxy in each case. In the situation where a vote is conducted on a show of hands, the vote cast by that proxy counts as one vote only, even though the proxy may also be entitled to a personal vote as an owner, or may hold the proxies of more than one owner (*Ernest v Loma Gold Mines Ltd* [1897] 1 Ch 1). It follows that, unless or until a poll is demanded, a person present is counted as having only one vote (that is, on a show of hands) however many proxies are held.

It is evident from the foregoing that the person giving the proxy may direct, in the form, the matters (ie the agenda items) upon which the proxy may exercise voting rights. Further, the form of proxy may specify the manner in which the rights are to be exercised. (ie for or against the motion) Clause 11(8) instances examples as to the manner of exercises of a proxy.

Right to Speak

During the course of a meeting, a

motion is likely to be moved and debated, and possibly thereafter, amended. Further, it is possible that a procedural issue may arise, such as a point of order, a motion of dissent or a motion for the adjournment of the meeting. Can the proxy speak on those matters?

The approach of the English Court of Appeal in *Re Waxed Papers Ltd* [1937] 2 All ER 481 is relevant to this question. In that case, the Court held that the form of proxy did not restrict the holder of the proxy, so far as voting was concerned, to voting either for or against the scheme of arrangement (the matter at hand in the meeting), and the chairman was entitled to use the proxies which he held to vote upon an amendment to the motion in any way he thought fit.

Waxed Papers is good law in Australia. It follows, therefore, that if a proxy wishes to amend a motion, he may do so. In moving an amendment, the proxy, as a sheer matter of practicalities, would be compelled to speak in order to have the meeting consider the amendment. Further, he would be able to speak by way of explanation and in justification of the submitted change.

■ Ian McKnight is a Special Counsel at Makinson & d'Apice.

“The proxy must carefully consider any limitations which may be imposed on the manner of voting”

Law Reform:

Strata Title Law Reform Bill introduced

In the first issue of “Common Property”, we pointed out that in strata management and living, knowledge and education was crucial. It was stated that Makinson & d’Apice is well placed to assist those living and working in the medium density situation, and that it had an experienced and knowledgeable team of lawyers engaged in this field.

That experience and knowledge has now found expression in another area: strata law reform. For the past 18 months, Richard d’Apice and Ian McKnight have been working with Clover Moore, State member for Sydney and Lord Mayor of Sydney, with respect to some of the

additions and amendments which are required to make the *Strata Schemes Management Act* 1996, and related legislation more effective and user friendly. It has been a long and intensive project.

On 3 December 2010 Clover Moore introduced, into the Legislative Assembly, the *Strata Legislation Amendment Bill* 2010 which, it is anticipated, is the first of an ongoing series of Bills proposed to be brought before the New South Wales Parliament.

This first Bill deals with many procedural matters which require urgent attention.

Matters included are:

- requiring of disclosure by strata managing agents, caretakers of strata schemes and legal practitioners engaged to provide legal services in relation to strata schemes of any connections they have with certain persons.
- providing that an owner of a lot is jointly and severally liable with the occupier of the lot for damage caused by the occupier to the common property.
- placing limits on the number of persons that can reside on a lot in a strata scheme.
- enabling the Consumer, Trader and Tenancy Tribunal (the “Tribunal”) to make certain orders for the settlement of disputes in respect of strata management statements.
- making it an offence to contravene an order made under the Act, and the administration of strata schemes.



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Law Reform:

Strata Title Law Reform Bill introduced

The second and third Bills will address issues such as:

- compulsory training for executive committee members
- timing of levy payments
- recovery of costs incurring in the recovery of levies
- short term rentals
- identity of unit occupants
- illegal parking
- noise disputes
- jurisdiction of the Tribunal
- contempt powers of the Tribunal
- vexatious and frivolous applications and costs
- jurisdiction of the Supreme Court.

Work has also commenced on the development of a discussion paper dealing with the vexed and controversial topic of the termination of a strata scheme. This is a subject which has, in recent times, attracted much debate, but, as yet, has seen no



effective or acceptable conclusion. Makinson & d'Apice will be contributing to the on-going dialogue.

Makinson & d'Apice would welcome any suggestions in relation to the provisions of the *Strata Legislation Amendment Bill 2010* which can be found at

[http://www.parliament.nsw.gov.au/prod/parlment/nswbills.nsf/0/d3a98412112dec8eca2577ed001a2b80/\\$FILE/b2010-014-d11-House.pdf](http://www.parliament.nsw.gov.au/prod/parlment/nswbills.nsf/0/d3a98412112dec8eca2577ed001a2b80/$FILE/b2010-014-d11-House.pdf).

The Bill lapsed when the present Parliament was prorogued and will need to be reintroduced in the new Parliament. The opportunity exists for amendments to be made to improve the bill before it is reintroduced. We would also welcome suggestions for topics or issues that readers would like considered as part of the on-going process of law reform.

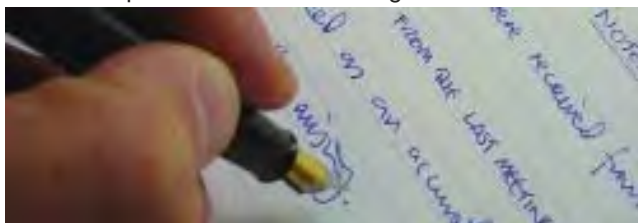
The firm continues, of course, to be vitally interested in education and the dissemination of knowledge in the vibrant medium density area. Accordingly, persons seeking to obtain educational assistance, including the provision of continuing professional development, should contact us with their enquiries

■ Richard d'Apice is a partner at Makinson & d'Apice.

Minutes and their Content

In issues 2 and 3, we reviewed the entitlement of owners to speak at meetings (if they are not financial) and meeting etiquette, respectively. It is now relevant to examine the issue of minutes, and the form they should take.

The *Strata Schemes Management Act 1996* (**the Act**) contains various references to minutes. Section 102 of the Act, for instance, provides that an owners corporation “must keep minutes that include particulars of motions passed at those meetings”.



An executive committee must keep a record of its decisions and full and accurate minutes of its meetings (see clause 12 of Schedule 3 to the Act). An executive committee must cause to be included in its minutes an accurate record of all resolutions passed. The Act also provides that minutes must be displayed in certain circumstances, and also circulated to owners (particularly in relation to general meetings). Aside from section 102 and clause 12 (referred to above), the Act is silent as to the contents of the minutes and how they might be worded.

When considering the contents of minutes, it should be borne in mind that minutes are not a transcript of what occurred at a meeting. In essence, they are a record of resolutions and matters ancillary thereto including motions which were proposed but not passed or not passed by the required majority. It is not necessary or desirable for every word spoken during the course of the meeting to be recorded.

The starting point with respect to the preparation of proper minutes is that they should be an accurate record of everything that is done at the meeting. In this regard, it must be recalled that an owners corporation, in very large part, takes action or makes decisions through the vehicle of a meeting. Minutes should be concise and accurate. The minutes should describe the nature of the meeting, including its date, time and venue. The names of those present by right and the unit they represent and of the chairperson should be set out. It should also record the names and

companies of any invitees present at the meeting. It is not sufficient to merely record the lots which were represented at the meeting. Names of attendees the lots they represent, should also be included. Proxies should also be noted so far as attendances are concerned, however, if the chairperson makes a ruling that a proxy is invalid, then that decision should also be recorded. Minutes should contain enough information to be understood by an owner who was not present at the meeting or any interested parties.

Generally, all decisions arrived at during the meeting should be recorded in the minutes. Decisions will reflect the wording of motions which appeared on the agenda or were moved at the meeting. It is essential, therefore, that motions are carefully and specifically worded. Clarity of expression is of the highest priority. The precise wording of all motions, and amendments that are proposed, should be meticulously recorded. If thought desirable, the names of the mover and seconder of a motion should also be noted. It is proper to incorporate into the minutes the numbers voting for or against a motion, particularly in relation to contentious motions but this is not essential.

Minor matters and trivialities should be omitted. Any matter, however, upon which a decision was made should be recorded. Minutes should record, for instance, that a motion has been ruled out of order and a ruling made with respect to a point of order or a request made for an adjournment.

It is most important that motions requiring a special or unanimous resolution be properly recorded as having been duly passed as a special or unanimous resolution as the case may be.

A resolution which is passed concerning, for instance, a contract or other agreement should record the nature and main terms of the transaction, including the parties to the agent, together with the relevant monetary amounts, quantities and dates.

If in doubt in relation to what should be included in minutes of a meeting, it would be prudent to include a matter rather than exclude it, but with particular regard to the guidelines outlined above and the need for brevity and conciseness of expression.

■ Ian McKnight is a Special Counsel and Evelyn Sun is a lawyer at Makinson & d'Apice.

Dysfunctional Executive Committees – what's to be done?

An Executive Committee of an Owners Corporation is the representative body of owners and consists of an elected group of persons, generally made at the Owners Corporation's Annual General Meeting. Essentially, it is responsible for the day-to-day control and management of the Owners Corporation. It is, however, subject to a degree of control and supervision by the Owners Corporation in general meeting including in circumstances where some of the Executive Committee's functions are subject to a restriction pursuant to section 21(2)(b) of the *Strata Schemes Management Act 1996 (NSW) (the Act)*.

It is a requirement of the Act (clause 34(e) of Schedule 2) that an Executive Committee be elected annually. What

“It is a requirement of the Act that an Executive Committee be elected annually.”

happens, however, when a member of the Executive Committee behaves in a fashion which is, for instance, disruptive, aggressive, or otherwise recalcitrant, to such an extent as to cause disruption to the proper functioning of the Executive Committee? A sacking or



sackings, and an appropriate strategy, may provide the answer.

Clause 4 of Schedule 3 to the Act refers to the circumstances in which a member vacates office. These include written resignation, ceasing to be an owner, and,

by virtue of the conclusion of the next meeting at which a new Executive Committee is elected by the Owners Corporation. Clause 4(1)(e) provides that an Owners Corporation may determine, in accordance with a special resolution, that the member's office as a member is vacated.

This is potentially a powerful weapon by which the Owners Corporation may wish to ensure the proper functioning of its Executive Committee by the appropriate performance and behaviour of all of its members.

The situation may, of course, arise where, after careful research being undertaken, owners consider that the requisite special resolution may not be achieved. In these circumstances, it may be an alternative to suggest that a “spill” of the Executive Committee take place so that the proper workings of the Executive Committee can be readdressed by virtue of a further election of a new Executive Committee.

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Dysfunctional Executive Committees – what’s to be done?

“The Act makes it clear that once an election is called, the chairperson should then call for nominations”

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The easiest way to ensure the “spill” takes place, would be to invite members to submit their written resignations. If this was not forthcoming, including on the part of the dysfunctional member or members, then the Owners Corporation, at a general meeting could place a motion on the agenda seeking a dismissal pursuant to subclause 4(1)(e) of each member, thereby avoiding

determination as to the number of members of the Executive Committee must be made at each Annual General Meeting and there is nothing in the Act which suggests that this determination is restricted only to Annual General Meetings. While the issue is arguable, the better view is that the Owners Corporation is not restricted to determining the number of members of the Executive Committee at the Annual General Meetings.



accusations of bias or unfair conduct. In carefully considering the strategic direction the Owners Corporation wished to take, members could consider the possibility of readjusting the number of members of the Executive Committee. A

However, in the event that the Owners Corporation desires to change the number of members of the Executive Committee at a general meeting following the Annual General Meeting, it should pass a motion revoking the motion made at the Annual General Meeting in which the determination of the number of members was made. The next motion should then be that, pursuant to clause 17 of the *Strata Schemes Management Regulation 2005*, an election of the Executive Committee be held. The Act makes it clear that once an election is called, the chairperson should then call for nominations and, at the appropriate time, declare the nominations closed. Once that has occurred, a further motion

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Dysfunctional Executive Committees – what’s to be done?



“Motions involving the dismissal of Executive Committee Members ... should be very carefully drafted.”

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would need to be passed determining, pursuant to clause 2(2) of Schedule 3 to the Act, the number of members to be determined.

Once the number of members to be elected had been reset, an election can then be held. If the number of nominations equals the number of members to be elected, the chairperson should simply declare the nominees duly elected. In the

event that the nominations exceeded the number, the chairperson would be obliged to conduct a ballot unless any nominees withdraw leaving the number of candidates equal to or less than the number of members of the Executive Committee as reset.

The last matter to consider is the election of a vacancy to the Executive Committee outside the circumstances outlined above, including the instance where an owner moves out of the complex and therefore ceases to be a member of the Executive Committee. Unless the election of a member to fill a vacancy has been made a restricted matter, then the Executive Committee itself may conduct an election for the replacement member. Once again, it may be politically more astute to conduct a general meeting for such election, however, the Act is silent as to this requirement.

Motions involving the dismissal of Executive Committee members and re-election of the committee, in the situation referred to above, should be very carefully drafted and, if necessary, confirmatory advice should always be sought.

■ Annabel Anker is a lawyer at Makinson & d'Apice

Cases observed

While there have been various decisions of the Court of Appeal and Supreme Court which relate to various aspects of strata schemes and company title property, we shall limit our observations in this issue to one particular item, namely, the duty to maintain and repair imposed by section 62 of the Act, and the reconciliation of that section with section 65A to improve or enhance common property.

The starting point, for the purpose of our comments, is the decision of Justice Brereton in *Seiwa Australia Pty Limited v Owners SP 35042* [2006] NSWSC 1157 ("Seiwa"). In that case his Honour observed that the section 62 duty which was imposed on an owners corporation, being a duty to maintain, and keep in a state of good and serviceable repair, the common property. He stated that the duty was:

"not one to use best endeavours to do so, nor one to take reasonable steps to do so, but a strict duty to maintain and keep in repair".

In *Nicita v Owners of Strata Plan 64837* [2010] NSWSC 68 Justice Bryson observed, at para 13, as followed:

"...It is well established, and was clearly stated in (Seiwa)...that section 62 creates a duty owed to each lot owner, breach of which gives rise to a private cause of action for breach of statutory duty... A duty of that kind is also enforceable in an appropriate case, by a mandatory injunction requiring compliance with section 62..."

Section 65A provides that for the purpose of improving or enhancing the common property the owners corporation or owner may, if a

special resolution has first been passed, add to, or alter the common property, or erect a new structure to the common property.

Stolfa's Case

The relationship between the sections 62 and 65A was examined in *Stolfa v Owners Strata Plan 4366* [2009] NSWSC 589. This was a decision of Justice Brereton.

The case involved a three lot strata scheme in Rose Bay. The property sloped away from the street towards Rose Bay. The building had been allowed to run down and deteriorate and the property, therefore, became suitable for refurbishment and enhancement. The plaintiffs owned the middle unit. Proceedings were initiated by them claiming specific and compensatory relief in respect of:

- A void area in the common property, located under a porch leading from the middle of the front garden but only accessible through unit 1.
- Work done and proposed to be done to unit 3, including the permanent enclosure of the verandah within brick walls.
- Damage to unit 2 (owned by the plaintiffs) said to have been occasioned by withdrawal of support afforded by unit 3 (below unit 2) and by the works affected to unit 1 (above and adjoining).

It is not necessary to set out in full the factual circumstances as they are somewhat protracted and extensive. Suffice it to say that various meetings considering and approving the works were held between the commencement of

2006 and the latter part of 2007. Evidence of the parties was somewhat at variance and the judge stated that in endeavouring to resolve the controversy between the parties, he had regard to the contemporaneous documentary records, principally the minutes of meetings of the Owners Corporation.

With respect to the works, in the void, his Honour commented that there had been no resolution as is contemplated by section 65A. Further, the owner of lot 1 had no written approval from the Owners Corporation pursuant to by-law 5 to carry out the works in the void. The owner of that lot contended that the works were repair or maintenance of common property within section 62 and, as such, did not require approval under section 65A or by-law 5.

In considering this question his Honour had regard to section 62 and the cases leading up to, and including his own decision, in *Seiwa*. The judge commented that the section provided that an Owners Corporation must maintain and keep in good repair the common property and any personal property vested in it (unless it decides that it is inappropriate to do so and that such decision will not effect the safety or detract from the appearance of any building or structure in the scheme: section 62(3)). He commented as follows:

"This is an absolute duty, and includes an obligation to take preventative measures to ensure that no problem arises, and to add articles or structures to the common property to rectify defects in the original construction ... The duty extends to oblige an Owners

Cases observed

Corporation to do things that could not be done for the benefit of the proprietors as a whole, or even a majority of them, but might benefit one lot more than the others ...

Section 65A(1) provides that, for the purpose of enhancing or improving the common property, an Owners Corporation or an owner of a lot may add to or alter the common property, or erect a new structure on the authorisation under section 65A. "common property, but only if a special resolution has first been passed at a general meeting of the Owners Corporation that specifically authorises the taking of the particular action proposed. A comparison of section 62 and section 65A indicates that the latter is concerned with controlling and regulating alterations and additions to common property, other than repairs and maintenance that an Owners Corporation is bound to effect under section 62. Section 65A applies to additions or alterations that will improve or enhance (as distinct from repair and maintain) the common property. Thus, if works fall within section 62, they do not require special authorization under section 65A."

His Honour referred to by-law 5 (being the standard by-law relating to marking, painting or otherwise damaging or defacing parts of common property) and observed that it was directed to individual lot owners, and not the Owners Corporation and is concerned with damaging or defacing common property, not with repairing it. He added that by-law 5 was not intended to, and did not, prohibit the Owners Corporation from effecting repairs and maintenance to common property under section 62. Having made this finding, his Honour found

that the works did not need a special resolution under section 65A.

He observed that prior to the disputed works, the void area had extensive damp, cracked walls and water entry. While the works involve a superior construction to what had preceded those works the judge found that the works constituted the keeping of a building in a state of good and serviceable repair and that their purpose was to avoid damage to and defects in the building, and not to introduce some new improvement or addition. His Honour's words are important and are worth stating. They were expressed:

"... Repairs were required to ... prevent water penetration into the void and under the building, and to provide support for the fill in the newly leveled front garden. Even though they may have involved a superior construction to what pre-existed them – particularly insofar as a concrete slab was substituted for timber flooring, I am satisfied that the void works constituted the keeping of the building in a state of good and serviceable repair. The purpose was to avoid damage to and defects in the building, not to introduce some new improvement. They came within the obligations and powers of the Owners Corporation under section 62 ..."

As the works fell within the obligations under section 62 it followed that they could be authorised by the Owners Corporation by a majority. They certainly did not require a special resolution. His Honour made the comment that a decision to determine a contribution was not, of itself a decision to perform or authorise the works for which the contribution was determined. The

determination was certainly not an authority to any lot owner to perform or authorise the works on behalf of the Owners Corporation.

It is worth commenting that his Honour made reference to the doctrine of fraud on the minority, which has been accepted to apply in the strata law context (see *Houghton v Immer (No 155) Pty (1977) 44 NSWLR 46*, and *Lin v The Owners Strata Plan No. 50276 [2004] NSWSC 88*). In rejecting the contention that there had been an extinction, exclusion or expropriation of the plaintiffs' rights in the common property, the judge found that all they had done was to pay a share of the costs of effecting repairs and maintenance to the void area.

The dispute with respect to Lot 3 and the enclosure of the verandah raised slightly different considerations. The judge commented that the verandah was common property and that it was irrelevant that the lot owner had been granted, by a by-law made pursuant to section 52 of the Act, exclusive use of the verandah. His Honour observed that a grant of exclusive use of common property does not deprive it of its character as common property. It is relevant to observe, as his Honour did, that the nature of common property can be changed only by registration of a strata plan of subdivision, and not by physically subsuming an area into a lot.

In the instant case, Justice Brereton observed that the works with respect to the verandah were "manifestly not merely repairs and maintenance". It followed, therefore, that these works could only be effected if there was a relevant section 65A special resolution specifically authorising them. In the particular case, the judge noted that this specific

Cases observed

authority need not be made at one particular meeting but might be made through the vehicle of several motions at different meetings. In this instant case there had been the requisite specific authority under section 65A for the work and, therefore, it followed that the plaintiff's were not entitled to relief on this ground.

The case raised a further brief discussion in relation to the effect of section 61(1). That section provides that the Owners Corporation has the management and control of the use of common property and the administration of the strata scheme



“The case ... demonstrates the need to ensure that minutes carefully reflect the decisions which were taken. ”

concerned. In section 61(2) the responsibilities of the Owners Corporation are enunciated including the repair and maintenance of common property. An argument had been made that this section conferred an additional power on the Owners Corporation to consent to proposed works. Although obiter dicta, Justice Brereton was of the opinion that the section did not

confer any additional power in that respect.

Implications of Stolfa's Case

It is apparent from Stolfa's case that care must be taken to differentiate repair and maintenance on the one hand and additions and alterations on the other. It may be that repairs and maintenance do involve a change to the common property to the effect that the construction is "superior" to that which preceded it. Further, the repairs and maintenance may only be to the benefit of one or more lot owners, and not to the

essence and nature of these changes are. In Stolfa's case, for instance, it was the enclosure of a verandah.

The case also demonstrates the need to ensure that minutes carefully reflect the decisions which were taken. Care needs to be taken with respect to the preparation and, ultimately, acceptance of such minutes as to their accuracy and truth. It was apparent in Stolfa's case that the consent required by section 65A could be made through resolutions passed at several meetings.

The limitations of by-law 5 should also be borne in mind. It is clear that the by-law relates to a lot owner and only relates to damage or defacing common property and not with repairing it.

The decision of the Court of Appeal in *Stolfa v Hempton* (2010) NSWCA 218 will be discussed in the next issue of Common Property.

totality of the lot owners in the strata scheme. With respect to alterations and additions, the essence of such changes needs to be carefully distilled and the consequences of such changes considered to determine whether they fall within section 65A. It would seem that the purpose of the works undertaken will be of importance. In most cases, it will be apparent what the purpose,

Class Rights

**“The court
jealously
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rights
attaching to
separate
classes of
shares in the
company
title context”**

Interference with or, at least, allegations of interference with class rights of shareholders in company title buildings continue to give rise to disputes and litigation.

On 28 January 2011, the Supreme Court delivered a decision in the matter of *Currawinya Pty Limited v Adam* [No. 2] [2011] NSWSC 1 in which, in a very lengthy judgment, the Court held that certain resolutions passed by a company of rural company title scheme did not modify any rights of a class of shares of which the defendants were the sole members. The hearing occupied a day and cost both parties a considerable amount of money.

The Court gave consideration to the 2005 Court of Appeal judgment in *Wilson v Meudon Pty Limited* [2005] NSWSC 448 on the class rights issue in an inner city apartment building context.

We are presently acting in a dispute between shareholders and the company over a proposal by the company to raise funds to meet a fire order and other upgrades of the building by carrying out a development which would impact adversely on the class rights of the shareholder by blocking windows and light. This case has the potential to be lengthy and expensive if it cannot be settled.

The Court jealously guards rights attaching to separate classes of shares in the company title context and each share group which entitles a shareholder to occupy a particular space in a company title building is regarded as a separate share class. Consequently the rights attaching to that class cannot be altered without the consent of the holder of those shares. It is important for boards of company title schemes to ensure that their proposals for use of common property do not adversely impact upon the class rights of any of their shareholders and, if they are likely to do so, the board must obtain the consent of the affected shareholders to the proposed changes. In default of such consent, the Court will strike down any action of the company which adversely impacts upon the class rights involved.

Apart from the uncertainty, ill-will and expense generated by such litigation, the whole exercise has a detrimental effect on the attractiveness of the building to potential purchasers and may have an adverse impact on price.

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Common Property

Issue 6

Legal news for the strata and company title management industry

February 2011

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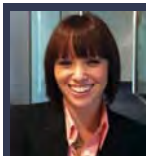
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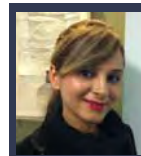
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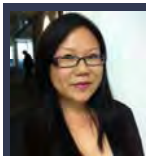
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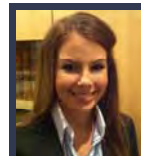
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All issues of *Common Property* are available online at www.makdap.com.au. Articles in the last issues included:

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- Company constitutions and forfeiture of shares
- Defamation: what is it and how may it arise?
- Levies: can they be determined retrospectively?
- Cases observed

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- How much authority do you have?
- Changes to company title constitutions
- Easement: what is it?
- Cases observed
- By-laws: what are they and what rights do they give?

Please feel free to circulate this newsletter to others who may be interested. If you would like to receive future issues of *Common Property* via email, please register at http://www.makdap.com.au/resources_registration.cfm.

Disclaimer: This publication is a non-comprehensive general outline of the law as at 18 February 2011. You should not act upon or rely on any information contained in this newsletter without obtaining specific legal advice.

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