CAN A LOT OWNER CLAIM FOR DAMAGES IN EQUITY AND NEGLIGENCE ARISING FROM A BREACH OF SECTION 62 AFTER *THOO* AND *BROOKFIELD MULTIPLEX*?

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INTRODUCTION

Section 62 of the *Strata Schemes Management Act 1996* (NSW) establishes the strict liability of an Owners Corporation to maintain and repair its common property. The ability of a lot owner to sue for damages has been limited in the light of the decision of the New South Wales Court of Appeal in *The Owners—Strata Plan 50276 v Thoo* [2013] NSWCA 270 (*Thoo*).

Thoo reiterated the principle that an Owners Corporation holds the common property on trust for lot owners. It is also authority that a lot owner is not entitled to damages for breach of an owners corporation's statutory duty under section 62 to maintain and repair common property. The High Court approved this decision by refusing special leave to appeal in *Thoo v Owners—Strata Plan No 50276 & Ors* [2014] HCASL 79.

THE THOO EFFECT—OTHER AVAILABLE CLAIMS FOR LOT OWNERS

Thoo left the possibility open that a lot owner may make a claim in negligence against an Owners Corporation for its failure to maintain and repair its common property. This ability to claim in negligence was considered in the recent Supreme Court of New South Wales decision of *McDonough v The Owners—Strata Plan No. 57504* [2014] NSWSC 1708 (the recent case), as was the ability of a lot owner to make a claim for equitable compensation for a breach of trust.

The claim in the recent case arose out of a levy recovery action commenced by an Owners Corporation in the Local Court of New South Wales. The lot owner cross claimed for damages for loss caused by an alleged breach of section 62 arising out of the owners corporation's failure to

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repair common property adjacent to the lot and the matter was transferred to the District Court of NSW. As Thoo prevented the lot owner from continuing their claim for damages for breach of statutory duty, the lot owner in the recent case sought to amend the cross claim.

Essentially, the proposed amended damages claim was that the lot owner's loss was due to:

(1) the owners corporation's negligence in failing to maintain and repair the common property; and / or

(2) a breach of trust by the Owners Corporation in that either:

(a) section 62 was a term of the trust requiring the Owners Corporation to maintain and repair the common property and that this trust term was breached; or

(b) the Owners Corporation breached its fiduciary duty as a trustee by preferring its own interests over those of lot owners or that it had a conflict of interest in pursuing the builder for damages to try to avoid the need for a special levy.

The question of whether the District Court of New South Wales had jurisdiction to hear the matter was raised and the question was referred to the Supreme Court of New South Wales.

Interestingly, in respect of the claim for negligence, the Owners Corporation sought to rely on the recent decision in *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* [2014] HCA 36 (*Brookfield Multiplex*) as authority that the lot owner could not claim for economic loss as they were not vulnerable in the relevant sense.

His Honour Justice Brereton in determining whether the District Court had the jurisdiction to determine the proposed amendments to the claim in the recent case held that:

(1) in respect of the negligence claim:

(a) the lot owner's claim for damages in negligence was not doomed to failure, that if the District Court did not have jurisdiction (which it did) the proposed amendments would have been allowed by the Supreme Court;

(b) a lot owner who bought a lot from a previous owner (and not the body corporate) may not be in a position to adequately protect itself by contract from the acts or omissions of the Owners Corporation and therefore they may be vulnerable; and

(c) the lot owner's claim was not just based on economic loss but was also based on loss caused by physical damage to the lot;

(2) in respect of the claim in equity for breach of trust, it was held to be untenable because:

(a) as the Owners Corporation was a bare trustee, it had no relevant active duties to perform, and '[t]he statutory obligation to maintain common property under section 62 is not a term of the trust, and no breach of trust is involved in breaching that duty'; and

(b) the failure to maintain the common property could not be a conflict of interest by the Owners Corporation as a trustee, as it is not an aspect of its trust obligations.

The Supreme Court ultimately held that the District Court did have jurisdiction to hear the negligence claim and the lot owner's application to amend their cross claim will be determined in the District Court, with that court no doubt taking note of the Supreme Court's reasoning.

As the ability to claim in negligence against an Owners Corporation was not ultimately decided, the possibility for a lot owner to make a claim in negligence remains open following *Thoo*. Given the reasoning by Justice Brereton in the recent case, it seems likely that a negligence claim can be established in certain circumstances, even if a *Brookfield Multiplex* argument is raised in relation to the degree of vulnerability of the lot owner making the claim.

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