

A photograph of a middle-aged man and woman smiling and looking towards the right. The man is wearing a dark t-shirt and has his arm around the woman's shoulder. The woman is wearing a white tank top and a necklace. They are framed by a large red circular border. In the top left corner, there is a blue circular badge with white text.

Spring
Issue
2009

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Welcome from Strata Choice Associates



The Education Seminars conducted by Strata Choice Associates for executive committee members are held regularly throughout the year. Attendees at recent events have provided feedback that suggests that the content is valuable either as a "refresher course" for experienced executive

committee members or as an opportunity to become better acquainted with the role for those who are newly appointed. The advertisement on the back page of this Spring edition of Strata Choice Associates provides you with all the information you need to participate.

The articles in this edition are provided by three strata law specialists and examine three very important areas of focus for the strata living community:-

► Colin Grace explores the recent amendments to the Home Building Act;

► David Le Page presents a useful summary relating to the legal expenses associated with the recovery of levies in arrears; and

► Ian McKnight provides a practical explanation on easements on common property.

As we look back on the end of another busy financial year we celebrate the successes that our strata managers have achieved by working closely with their executive committees. Over the coming year you will see a number of initiatives launched by Strata Choice Associates that we believe will lead to a closer collaboration between our firm and its clients.

Alastair Smith

Managing Director
Strata Choice Associates

Office Location

92 Chandos Street
St Leonards

Contact

Phone: (+61) 1300 322 213
Fax: (+61) 8424 9701
Email: info@stratachoice.com.au

Postal Address

Locked Bag 1919
St Leonards
NSW 1590

Strata Associates Pty Ltd trading as

stratachoice
Associates

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Home Building Act Amendment

The Home Building Act (HBA) regulates contracts for building work and provides for a range of requirements including home owners warranty provisions. The Office of Fair Trading (OFT) has amended the HBA concerning the provisions of home owners warranty, in particular the dealing with claims against insurers and builders.

On 19 December 2008 clause 63A was introduced into the *Home Building Regulation 2004* and provided that a claim under a contract of insurance must be made no later than 6 months after the beneficiary first becomes aware, or ought reasonably to have become aware, of the fact or circumstance under which the claim arises, or no later than 6 months after the end of the period of cover, whichever is the earlier.

Thankfully, on 19 May 2009 Clause 63A was repealed and replaced with section 103BA. For Owners Corporations or lot owners that have had claims denied because of the operation of clause 63A a “period of grace” has been provided, allowing such claims to be lodged. This amendment has created confusion.

The following issues arise from the new section 103BA:

- ▶ A greater degree of information is required to be given to insurers on notification under the HBA.
- ▶ Failure to provide notice of loss within the period of cover will result in the insurer being able to deny insurance cover.

The Amending Act has also amended section 103C of the Home Building Act, 1989 by allowing the Government to now introduce regulations providing for limitations on and reductions in liability of insurers with little public scrutiny.

Clause 58A was also amended to require beneficiaries to enforce action against others for breaches of statutory warranties, if they do not the insurer may reduce their liability on a claim.

The following issues arise from clause 58A:

- ▶ It is retrospective, so every claim needs to be assessed to see if the requirement applies and then determine what to do.
- ▶ Failure to enforce action is left to the insurer to decide, in its own self-serving assessment, whether a beneficiary has failed to take action.
- ▶ What does “enforce” mean? It appears to require legal action to be commenced seeking a Rectification Order through the OFT, or attempting to engage the builder in discussions concerning the rectification work may be insufficient.
- ▶ Will an insurer be able to reduce its liability?

Recommendations

- ▶ Claims or notifications should be reviewed to determine if further notification or information should be supplied to the insurer (section 103BA).
- ▶ Insurance policies should be reviewed to determine whether the provisions of section 58A are relevant. Action may need to be considered against those involved in the development (builder etc).

Urgent attention is required by Owners Corporation’s approaching the end of the period of HOW Insurance cover and this appears to apply to all schemes equally.

Colin Grace, Grace Lawyers

Easements: What Is It And What Are They?

Easements: what is it and what are they?

The purpose of this article is to explain what an entry of an easement which might appear in the Second Schedule of the common property certificate of title deed means and why it is important.

Before discussing the various types of easement, it is relevant to provide a definition of an easement. The High Court, as long ago as 1905, accepted the following: "An easement may be defined to be a privilege without profit, which the owner of one neighbouring piece of land has of another, existing in respect of their several pieces of land, by which the servient owner is obliged 'to suffer or not to do' something on his own land, for the advantage of the dominant owner."

The land over which the easement passes, or otherwise affects, is known as the "servient" tenement, whilst the parcel of land having the benefit of the easement is known as the "dominant" tenement.

An easement does not provide exclusive and unrestricted use of a piece of land, for if it did, the ownership of that land could not be in the ownership of the servient owner. There must be a dominant and servient tenement, as it is not possible to have an easement over one's own land.

The dominant and servient tenements need not be joined together.

An easement must accommodate the business carried out on the dominant tenement rather than the dominant tenement itself.

Types of easements

The right of way is the most commonly encountered type of easement. A right of way may be granted in general terms or may be of a limited nature. In the absolute discretion of the person granting the easement, the extent of the user may be restricted to certain persons or limited to a particular purpose. The real test is that it cannot be reasonable for the defendants to appropriate the plaintiffs' land and use it without the plaintiffs' consent as if it was their own.

Obstruction of a right of way

The issue of an obstruction of a right of way is one which will be encountered by persons living in strata and community scheme. A right of way may exist, for example, for access along a driveway to another complex at the rear of the first parcel of land. The easement, over the front parcel of land (called the servient tenement) is for the benefit of the parcel of land at the rear (called the dominant tenement). A question may arise whether the driveway may be obstructed by persons in the front block. The test would appear to be that, to cause an obstruction, there must be something done which would have the effect of hindering the passage of anyone wanting to pass. The obstruction must be substantial if it is to be actionable.

In strata land we often hear of vehicles continually being parked on an easement obstructing access by the dominant tenement.

Other forms of easements

Easements can take other forms. Examples of easement are rights to support; easement of light; easement of air; fencing easements.

Compulsory' easements

It is possible to compel another person to grant an easement. This is a complex area of law, and will be the subject of another article.

Conclusion

Care should always be taken in interpreting the terms of an easement. This is particularly so where there is an issue regarding repair, upgrade, obstruction or particular use. Advice should always be sought as soon as practicable rather than have an unnecessary dispute arise. Easements, as they are rights over other lands, give rights to separate land and the various rights need to be carefully perused and construed.

In the event that a dispute may arise your Strata Manager will obtain a copy of relevant easements affecting your scheme. Utilising their skill and ability they will be able to address your issues and seek expert professional advice where necessary.

Ian McKnight, Makinson & d'Apice Lawyers



Legal Expenses In Collecting Levies

Section 80 of the Strata Schemes Management Act 1996

This section of the Act was considered by the New South Wales Court of Appeal in *The Owners – Strata Plan No. 36131 –v- Dimitriou* [2009] NSWCA 27. The decision is important because it identifies certain limitations on the right of an Owners Corporation to recover expenses that it has incurred in recovering levies from owners, contrary to the broad interpretation of the section that Owners Corporations and Strata Managers generally have adopted.

Issues

Legal expenses

The “expenses” that may be recovered under s.80 include legal costs and disbursements.

These may include, in the Small Claims Division of the Local Court, legal costs which exceed the amount on costs that the Small Claims Division normally can award.

Limitation on legal expenses that can be recovered

If legal costs and disbursements are to be recovered, they must have been reasonably incurred, and be of a reasonable amount. To obtain judgment for its legal expenses, the Owners Corporation will have to prove ‘reasonableness’.

This will suggest to the prudent Owners Corporation a need to have regard to the particular debtor when considering whether or not to take legal proceedings; also, to ensure that the cost of the proceedings will be reasonable, having regard to the legal work done.

When can expenses be recovered?

The claim for expenses, including legal costs and disbursements, must be made in the same legal proceedings as the claim for levies to which the expenses relate. This is made clear by the words “together with” in s.80.

The fact that “together with” means “at the same time as” (rather than “as well as”) means that s.80 will not permit an Owners Corporation to take legal proceedings to recover its expenses only. For the Strata Manager, it means that an Owners Corporation, rather than the owner, will be responsible for the cost of letters of demand to the owner, unless legal proceedings (to recover the levies) are taken.

However an Owners Corporation may continue proceedings (to recover the expenses) although the levies, in respect of which the proceedings were commenced, have been paid after the commencement of proceedings.

David Le Page, David Le Page Solicitor



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Newsletter Q and A's

What functions does a caretaker/building manager perform for an owners corporation?

Answer: a) Managing the common property,
b) Controlling the use of common property by persons other than the owners and occupiers of lots,
c) Maintaining and repairing common property.

Can a lot owner make a complaint to the Office of Fair Trading about a building dispute involving common property. If so, how?

Answer: Yes. The owner can lodge a building dispute with the Office of Fair Trading and arrange for an inspection of building work in common areas.

Can an original owner use proxies received under a contract for sale?

Answer: No. A developer or a person connected with the developer cannot make use of a proxy voting appointment or power of attorney that was obtained as a condition in a contract for the sale of a strata lot or another related contract or arrangement.

Can a person with connections to the original owner or caretaker be elected to the executive committee?

Answer: Yes – but only if they disclose their connection before the election takes place and again at the meeting at which the election is to occur.

Who is responsible for repairs to ducting enclosing a sewer stack within a unit?

Answer: The owners corporation is responsible as the ducting encloses structural cubic space. Structural cubic space is automatically common property, even if it exists within the cubic space of a lot, unless the plan specifically states otherwise.

Structural cubic space means:

- ▶ cubic space occupied by a vertical structural member, not being a wall, of a building (eg column, post, pole, etc);
- ▶ any pipes, wires, cables or ducts that are not for the exclusive enjoyment of one lot; and,
- ▶ any cubic space enclosed by a structure enclosing any such pipes, wires, cables or ducts.





Executive Committee Seminars

Newsletter Q and A's (cont)

Who is responsible for repairs to Vermiculite ceilings within a unit?

Answer: The owners corporation is responsible, as the ceiling forms part of the common property.

Do two lot owners need consent from the owners corporation to swap title to car spaces?

Answer: No, providing there is no common property involved.

Is a by-law enforceable if it is inconsistent with any piece of legislation?

Answer: No. For example, a by-law cannot restrict the keeping of a dog on a lot where the animal is used as a guide or hearing dog by an owner or occupier. The by-law also cannot restrict the use of such a dog on a lot or common property.

Can a strata managing agent issue a notice to comply with a by-law?

Answer: Yes – but only if this function has been delegated to the strata managing agent.

Can a by-law prevent a dealing relating to a lot?

Answer: No. A by-law cannot prohibit or restrict a transfer, lease, mortgage or other dealing relating to a lot.

Executive Committee members are invited to attend an evening seminar, at no charge, to be held at Strata Choice St Leonards offices.

The presentation, delivered by the company education Consultant will provide participants with information regarding:

- | Meeting conduct;
- | The duties and obligations of the Executive Committee;
- | The powers of the Owners Corporation;
- | The role of the Strata Managing Agent;
- | Issues relating to risk management for Owners Corporations.

Yes I am interested in receiving EC Seminar dates

Name

Strata Plan Number

Email address

Phone.....



If you would like to attend an Executive Committee Education Seminar please direct your request to education@stratachoice.com.au