APARTMENT OWNERS BEWARE: WHO PAYS?

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The recent Court of Appeal decision *Body Corporate S73368 v Otway* creates significant financial uncertainty for apartment owners, who could now be liable for repair costs to units other than their own. In Otway, the repair works to a few units was determined to affect the overall weathertightness of the whole apartment complex, meaning those costs were shared amongst all owners.

Otway concerned tower two of the Oceanside Apartments, a 12-storey commercial and residential building on the Mount Maunganui beachfront.

The first floor apartments have large decks that serve as roofs for ground floor retail units and the pedestrian walkway below. By 2009, the waterproof membrane on the decks had failed, causing them to leak.

The Body Corporate maintained the three first floor apartments owned the decks (**Deck Owners**) and were therefore responsible to repair them. The Deck Owners refused.

Under the old Unit Titles Act 1972, the Body Corporate was not empowered to repair the decks as they were contained within the Deck Owners' units. With the commencement of the Unit Titles Act 2010 (Act), the Body Corporate was able to carry out repairs to the decks and then levy the Deck Owners for that work under s138(4).

In 2014, the Body Corporate carried out a range of repairs to Oceanside, including replacing the membrane on the Deck Owners' decks and select joinery.

Some allocation of costs was uncontested (for example, the drainage). When it came to the decks and joinery, however, the Body Corporate argued that the Deck Owners should foot the bill for those repairs.

Round one: the High Court

The Deck Owners refused to pay, so the Body Corporate sought recovery in the High Court on three alternative bases:

1. The Deck Owners owned their decks and were wilful and negligent in their failure to repair and maintain them (allowing recovery under s127);
2. The Deck Owners owned their decks, but the decks were building elements that served or related to more than one unit (allowing recovery under s138(4)); or
3. The repair works benefitted the Deck Owners substantially more than the other units in the apartment block (allowing recovery under s126).

The High Court agreed with the Body Corporate that some of the joinery work benefitted the Deck Owners. However the High Court refused to award the costs relating to the replacement of the membrane because:

1. The Deck Owners were not wilful or negligent; the repairs were due to failures in the construction process (so the Body Corporate could not recover under s127);
2. The Deck Owners owned their decks but the decks formed part of the overall stormwater system (so s138(4) did not apply); and
3. The repair works did not benefit the Deck Owners substantially more than other owners as the repairs related to the stormwater system of the entire building (so s126 did not apply).

Otway apartments

Round two: the Court of Appeal

The Body Corporate appealed to the Court of Appeal.

The Court of Appeal rejected the Body Corporate's argument and upheld the High Court's decision, finding the repairs to the decks related to an "interlinked and indivisible" weathertightness issue.[1] This meant that the repair costs should be borne by all apartment owners.

It is clear the Court of Appeal was seeking a fair result consistent with classic "leaky building" cases concerning systemic issues in 1990's-constructed, plaster-clad buildings. In those cases, the Courts have traditionally shifted responsibility for repair costs from individual apartment owners to territorial authorities and parties involved in construction if there is evidence of any negligence. However, the Oceanside Apartment Complex was not a conventional "leaky building"; rather it is a building that needed maintenance and repair to some common property, and some individual property. In our view, the purpose of the Act is to distinguish between the two, and allow for some costs to be borne by apartment owners individually, and some costs to be shared amongst all apartment owners.

Partner Stephen Price, who acted for the Body Corporate, comments:

"*The Otway decision creates real uncertainty around who pays for repair costs perceived to be a weathertightness issue. An upshot of this decision is that costs of repairing the defect may be shared by all apartment owners – which might be good news if you own an apartment with defects seen to be a systemic weathertightness issue. On the flip side, if you own an apartment in a complex where another apartment has a "weathertightness issue", you may have to pay for something you never get to enjoy – like a deck attached to a unit you don't own.*"

What does this mean for apartment owners?

With the increasing popularity of apartments (and the Government's policy to encourage medium to high density housing), the impact of *Otway* is of particular importance.

For example, if you are considering purchasing an apartment, it may be wise to include a weathertightness assessment of the entire complex. As *Otway* has seemingly created a common responsibility for building elements contained within individual property, this is fraught with practical difficulties given that defects might be within private property to which you have no access.
As always, it's important to carry out thorough due diligence (including viewing Body Corporate minutes) and seek legal advice before purchasing an apartment. Body Corporate committees should also seek legal advice around cost apportionment given the lack of clarity that *Otway* creates.
We welcome your views and feedback on this decision and how it might affect you.
If you have any questions, feel free to contact one of our team.

End Notes

1. At [66]

ABOUT THE AUTHORS

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