

SCA (NSW) Cases that Impact Legislation and Management

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Agenda

Building Defects and cases

Manager liability cases

S106 – where are we going



Home Building Act – time periods

Parkview v SP90018 (Court of Appeal – 2022)

1. 2/6 year period
2. Commenced action in time – tick
3. Added more items to claim
4. Court looked at the entire process of the legislation starting (parliamentary debates, first and second reading speeches etc)
5. Held that it was within the “heads of claim” and allowed additional items
6. Was there any prejudice??

Limited circumstances – reasonable excuse

- *immediate action is necessary to remedy an issue; and*
- *the issue is causing, or is likely to cause, damage to the building and:*
- *the inability to inhabit or use the building (or part of the building) for its intended purpose, or*
- *a risk to health or safety, or*
- *a risk of further damage to the building (or part of the building); and*
- *these impacts, or likely impacts, are serious in nature; and*
- *the work undertaken is limited to what is necessary to mitigate these impacts or likely impacts until further remedial building work can be undertaken.*

Not emergency

- *the work undertaken is designed to address the fundamental or underlying cause of the issue; and*
- *immediate action is not necessary to remedy an existing issue before it causes serious damage or further serious damage, or poses a serious impact relating to habitability, health and safety; and*
- *it is possible for statutory obligations (including but not limited to the DBP Act, SSM Act and EP&A Act) to be met prior to any serious damage or further serious damage being caused to the building and there is no serious impact relating to habitability, health and safety.*

What to do

- *Forms to fill out (reasonable excuse)*
- *Do the rest of the work under DBPA*

Non-residential DBPA?

Roberts v Goodwin Street Development (Court of Appeal – 2022)

1. Boarding house – developer vs builder
2. Dispute and work stopped and claim for defective work
3. Various claims but relevantly DBPA applied
4. Court looked at all of the circumstances surrounding the legislation
5. Also looked at the definitions of Building Work broadly
6. Held that it extended beyond just residential and included buildings under the EPAAct – therefore more expansive
7. Does this extend to commercial, retail and industrial – looks

- OC's are unlimited liability organisations (Paul Keating papers)
- Duty to repair and maintain (cant get around this) – this isn't just it – there is much more
- Insurers always look at the risks
- Documentation is the key



General obligations

- have a good knowledge and understanding of the legislation applicable to the scheme and the code that applies to their functions (code of conduct etc)
- act honestly, fairly and professionally in doing their job
- act in the best interests of the owners corporation/ association (if lawful to do so)
- not be fraudulent or misleading
- not unfairly influence the outcome of any decision
- keep records as required by the Act
- Undertake duties delegated to the manager

Notice – what is it

Types of notification

- Public Notice – Council order or the like
- Implied Notice – you should have known
- Actual notice – we told you
- Constructive notice – enough things to know

Some cases

- Borg v SP64425 2010 – someone slipped on tiles. OC blamed the Bld Mgr – 80% vs 20%
- Laresu v Clark 2010 – injury on stairs (no lights). Claim against OC and SMA. SMA given 60% liability. Indemnity in Agency Agreement did not apply as SMA acted outside of authority.
- Eastmark V SP74602 – Many disputes. Liability of BMC Agency Agreement challenged. Indemnity clauses held to be valid and enforceable in this case.
- November 2022 - Silberstein – Owner sued everyone including SMA/Bld Mgr - Duty to repair and maintain and water ingress. Appeal panel decided the NCAT has jurisdiction – wait and see if SMA responsible and to what extent

What can we do?

- Documentation is the key
- Document what comes in (emails, letters, reports)
- Set up the Red file
- What systems do you have to report and follow up
- Who does what in your office – how do YOU find out
- Keep notes of every conversation, meeting etc
- Notify the OC and keep a record – what advice did you get?
- Follow up – you cannot just say referred and do nothing else!
- You may have to report the client..... Safe Work or Council
- You may have to terminate Agency Agreement

S106 - Basics

1. Strict duty to maintain not just reasonable care – Seiwa (2006)
2. OC repair defect to original construction – Furney (1976)
3. Repair even if not benefit all owners – Blake (1986)
4. Even if OC didn't cause the damage – (Lubrano (1993)
5. Repair to restor CP to good and sound condition and keep operatable – Ridis (2005)

6. Replace CP where not operating properly or beyond repair – Glenquarry Park (2019)
7. Extends to removing unauthorised alterations and restore the CP – Krimbagianis (2014)
8. OC to decide what CP works are to be done – Lesley Swan (2012) & SP65340 (2015)
9. Can claim damages for breach 106(1) – Vickery (2020)

2 year limit in claims

Tezel v SP 74232 (2023)

- Claim for damages – NCAT said that 2 years was from 2 years and day by day (continuing breach) – 2016 water leak and did nothing for 4 years and tried to rent out – claimed losses
- Court held:
 - *Followed Vickery V SP80412 that NCAT can review S106 claims*
 - *2 years was from the date of awareness of damage*
- We should keep a record when notified of issue, get the expert, and do something

Juskey v SP62732 (2023)

- Breach 106 – fencing
- Looked at all of the principles
- Parties wanted different repairs done
- OC had complied with DBPA plans etc
- Owner refused access
- Dismissed application
- Alternatively order owner to give access to OC to do the work they wanted

Miroforidis v The Owners - Strata Plan No 75809 [2022]

- Owner v OC for breach and damages for lost rent and repairs
- Renovations by another owner caused water and slurry to enter into Lot
- Tenancy terminated
- OC's position was that the other owner was liable because the renovations caused the damage
- OC alleged the owner failed to mitigate their loss by refusing access for contractors to carry out some works (the owner did not believe the proposed works covered the entire damaged area) and failing to conduct repairs earlier than they occurred
- OC ordered to pay \$24K, do the repairs and any damage to lot property, OC responsible even though it didn't cause the damage, but it came through the CP
- OC were wrong that the dispute was solely between the 2 lot owners.
- Lot owner was reasonable to prevent access to other contractor to do the works

Closing on 106

1. NCAT and Courts will intervene
2. OC seems to have limited chances of defence
3. Damages seems to be extending but how far...
4. We need to be diligent in record keeping
5. OC need to move forward quicker and not wait

Thank You

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