

CASE STUDY

OWNERS CORPORATION HAS NO RIGHTS



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BUILDERS NEGLIGENCE – OWNERS CORPORATION LOSES ALL RIGHTS

We reported recently on the Supreme Court of NSW case dealing with the problems experienced by Owners Corporation's in pursuing claims against builders and developers in the area of negligence (as opposed to any statutory right under the Home Building Act 1989) – Strata Plan No 72535 against Brookfield (Builder) and Hiltan (Developer) – the “Star of the Sea case”.

In this case you will remember it involved a building that was found to be a residential complex and as such had available to it the warranties under the Home Building Act (**HBAct**). Well the Court has again looked at the issue of negligent builders in a building that does not have the benefit of access to the HBAct and come to the same devastating conclusion for owners – the Builder **does not** owe any duty of care to the Owners Corporation.

The Facts

The Owners Corporation Strata Plan 61288 (**the Owners Corporation**) commenced legal proceedings against Brookfield Multiplex (**the Builder**) alleging defective work in the common property. It claimed against the Builder that the Builder owed the Owners Corporation a duty of care and breached that duty of care (**the Negligence Claim**).

The Builder relied upon the Star of the Sea case and said the builder did not owe the Owners Corporation any duty of care obligations.

The Building

The building was part of a stratum development with the strata scheme being a serviced apartment arrangement and run by a major management group. As such the Owners Corporation did not have the benefit of any statutory warranties or home owners warranty insurance under the HBAct.

The decision regarding the Negligence Claim

The Owners Corporation alleged that the Builder and Developer owed it a duty of care (in negligence). It submitted that it was vulnerable because the ownership of the common property was foisted on it without any opportunity for the Owners Corporation to consider whether it should accept the burden or not (being a similar argument in the Star of the Sea case but on a different set of facts and assumptions).

In this decision (the same judge as Star of the Sea) held that the Builder **did not owe the Owners Corporation a duty of care**. His Honour found that his reasoning in Star of the Sea was correct and that regardless of whether the Owners Corporation had access to the HBAct the Builder did not owe the duty to a party that it effectively did not have any relationship with.

Again, his Honour mentioned that this issue needed to be given greater judicial or legislative consideration as the concept of extending the duty of care to successors in title (an Owners Corporation in this case) should be resolved (but he was not willing to do so).

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Issues arising from the Brookfield Decision and the law generally

This decision now cements the shoes of an Owners Corporation and throws them in the river. It potentially leaves an owners corporation with no rights to enforce poor workmanship or defective work against anyone and may (in the writers view) be used by unscrupulous developers and builders to do whatever they like in the construction of their buildings without fear of retribution.

If you combine this decision with the Star of the Sea case and the slow erosion of consumer rights in the area of building construction the following is potentially the outcome:

- If an Owners Corporation has rights under the Home Building Act it needs to enforce them (but these are now limited to small residential complexes);
- “Residential Building Work” under the Home Building Act does not extend to cover all building work. For example, defects in commercial parts of a residential building and defects affecting lifts are not covered by the Statutory Warranties. How does an owners corporation claim compensation for such defects?
- Owners Corporations of larger **residential** strata schemes (above 3 storeys) are excluded from some of their rights in relation to Home Owners Warranty Insurance under the Home Building Act.
- Owners Corporations of commercial, retail and industrial have no rights against the builder for defective work.
- If a builder and developer do not owe an owners corporation a duty of care, it would seem inconceivable that a sub-contractor of the builder would owe an owners corporation a duty of care.
- How far will the concept be pushed, will certifiers, Councils and others involved in the construction/development also be excluded from any liability no matter how negligent their actions are?
- Owners (and potential owners) should seriously reconsider purchasing into any strata scheme that does not have the benefit of the Home Building Act.

What should Owners Corporation’s do?

As with a lot of these issues an Owners Corporation should not panic. The Owners Corporation should review their current position and consider whether this decision has an impact on any current claim or any potential claim. If it does then certain legal and other strategies will need to be considered. What the case does highlight is that Owners Corporation’s need to obtain proper advice on their rights early and consider the statutory time limits more closely.

There is some hope that this latest decision will be appealed.