# LIABILITY FOR BREACH OF STATUTORY DUTY!

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# 2 SUCH SIMPLE QUESTIONS!

- Who may be held liable for breach of statutory duty in the strata-title context (owners, committee members, OCs?).
- What risks are borne by owners and what control do they have over those risks?
- A comparison of those jurisdictions with express statutory provisions re liability for damages, and those without.
- In the time available a comprehensive review is impracticable, but we will cover the main principles and some key cases, unsurprisingly, about….
- Water ingress.

# 3 WHAT IS "BREACH OF STATUTORY DUTY"?

- We are not here concerned with duties which arise under statutes generally, of which strata legislation contains many.
- Breach of statutory duty is a type of tort, in which the statute not only imposes a duty, but also [can and often does] gives rise to a cause of action in tort, sounding in damages:
  *Vickery v The Owners Strata Plan 80412* (2020) 103 NSWLR 352; [2020] NSWCA 284 at 375[85] per Leeming JA. Also see:*Stuart v Kirkland-Veenstra* (2009) 237 CLR 215; [2009] HCA 15 at [50] and [110]; *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 424; *British American Tobacco Exports BV v Trojan Trading Company Pty Ltd* (2010) 90 IPR 392 at 397[26]
- Easy to say, but "*[t]he question of an individual's right to sue for breach of some statutory duty imposed generally upon another has proved troublesome for a long time now*" and "[*i]t is often said that it is just not possible to reconcile the multitude of cases in which the question of an individual's right to sue for breach of statutory duty has been considered*:"
  *Gardiner v Victoria (Gardiner)* [1999] 2 VR 461 at 467[21]

# 4 COMMON CLASSES OF STATUTORY DUTY

- Industrial and workplace safety
- Dangerous premises
- Breach of copyright
- Discrimination
- Strata title common property maintenance

# 5 NARROW APPROACHES TO STATUTORY DUTY

- In *Kebewar Pty Ltd v Harkin* (1987) 9 NSWLR 738 a plaintiff complained about loss of support to a building to be erected but the statutory duty upon which the plaintiff relied was directed to the prevention of the collapse of the walls of an excavation and damage to existing buildings and not the protection of adjoining land. McHugh JA (with whom Samuels and Priestley JJA agreed) said at 745: "*Before a plaintiff can succeed in an action for damages for breach of statutory duty, he must prove that the damage suffered was of a kind which the statute was designed to prevent: Gorris v Scott (1874) LR 9 Exch 125*"

- In *Gorris v Scott*, the defendant, a shipowner, undertook to carry the plaintiffs' sheep from a foreign port to England. On the voyage some of the sheep were washed overboard by reason of the defendant's neglect to take a precaution enjoined by an order of Privy Council, which was made under the authority of the Contagious Diseases (Animals) Act, 1869, s. 75. The plaintiff's claim was dismissed because the statute was designed to protect against contagious disease and not perils of the sea!

# 6 PUFLETT V PROPRIETORS OF STRATA PLAN NO 121 (1987) 17 NSWLR 372

- The lessee of a proprietor of a home unit subject to the Strata Titles Act 1973 was injured when she alighted from a lift in the building which had stopped some 12 inches above the floor level, the cause of the accident giving rise to the injury being found to be insufficient lighting in the lift and in the adjacent lobby.
- Regulation 67 of the Construction Safety Regulations 1950 relevantly provided:
- "(1) Every lift and all parts thereof shall be maintained in conformity with these Regulations and in safe and proper working condition and in accordance with the following provisions:
- (2) It shall be the **duty** of the owner of the lift or of the conveyor, as the case may be, to observe the provisions of this Regulation."
- Judgment for the Plaintiff for breach of the duty. (Damages award not reported)

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Samuel Taylor Coleridge

Water, water, everywhere, And all the boards did shrink; Water, water, everywhere, Nor any drop to drink.

AZ QUOTES

# 8 VICKERY V OWNERS - STRATA PLAN NO 80412 (2020) 103 NSWLR 352

- The facts: The Vickery's apartment leaked from water penetrating through the building's common property. He said that the owners corporation had breached its obligation to maintain the common property, and claimed damages of $97,000 in lost rent.
- But for the decision in *The Owners Strata Plan 50276 v Thoo* (2013) 17 BPR 33,789, Mr Vickery could have claimed damages even without s.106(5) of the Strata Schemes Management Act 2015.
- *Thoo* departed from obiter comments that damages could be awarded in an appropriate case in *Seiwa Pty Ltd v Owners Strata Plan 35042* (2006) 12 BPR 23,673 at [6]; *Nicita v Owners of Strata Plan 64837* [2010] NSWSC 68 at [13]

# 9 VICKERY V OWNERS - STRATA PLAN NO 80412 (2020) 103 NSWLR 352 (2) - LEEMING JA (DISSENTING)

- Called for legislative amendment - 103 NSWLR 352 at 371[65] – not yet heeded by the NSW Government. (White JA agreed with that recommendation : (2020) 103 NSWLR 352 at 396[190])
- [*66] It is clear that courts have power to order an owners corporation to pay damages to an owner who suffers loss caused by a breach of the owners corporation's duty to maintain common property. The* ***policy choice*** *is whether NCAT should also have power to do so. If yes, should that be subject to any maximum amount? If no, then what orders can be made to "settle a complaint or dispute" between a lot owner and the owners corporation concerning a failure to maintain common property, and in particular do those orders extend to orders involving payments of money?*
- *[67] …* ***NCAT is able to make orders which include monetary payments for compensation****…*

# VICKERY V OWNERS - STRATA PLAN NO 80412 (2020) 103 NSWLR 352 - LEEMING JA (DISSENTING)

- Leeming JA would have ruled that s.106(5) does not refer to the Tribunal as opposed to a court ordering the damages, and s.232 uses the word "settle" which "*speaks of dispute resolution by means other than the principal remedy known to the common law, namely, payment of damages*:" (2020) 103 NSWLR 352 at 388 [142], and at [155]

# VICKERY V OWNERS - STRATA PLAN NO 80412 (2020) 103 NSWLR 352 - THE MAJORITY

- White JA ruled that "settle" in s.232 means "resolve" because otherwise the Tribunal could settle only part of a dispute where a lot owner seeks an order for repairs and damages: (2020) 103 NSWLR 352 at 394[173].
- Basten JA said: "*The terminology adopted in s 232 should be understood to cover claims and disputes with respect to any of the matters identified in subs (1), which are themselves in terms clearly intended to cover the full range of an owners corporation's functions in operating, administering and managing the strata scheme, and exercising or failing to exercise any function under the Act, or the by-laws of the strata scheme.*" (2020) 103 NSWLR 352 at 363[28]
- White JA, like Basten JA, avoided the proposition that if a lot owner wanted both a work order and damages, the lot owner could go to court, but if only a work order was sought, then a lot owners could go to the Tribunal.

# 12 WHY VICKEY WAS NOVEL

- In McElwaine v The Owners of Strata Plan No 75975 [2017] NSWCA 239) the Court of Appeal held that s 226 of the Strata Schemes Management Act 2015 preserved the right of a lot owner to sue for common law nuisance, but the decision says nothing about whether the Tribunal could hear a claim in common law nuisance (as opposed to s.153).
- White JA said at [70]: "*The fact that an adjudicator and the Tribunal cannot make an order for the payment of damages indicates that Parliament did not intend the scheme under the SSM Act [1996 Act] to exclude a lot owner's common law right to sue the owner's corporation for negligence or nuisance in respect of its management or control of the common property.*"
- Nuisance for the purpose of s 153(1)(a) of the Strata Schemes Management Act 2015 is akin to common law nuisance: Owners Strata Plan No 2245 v Veney [2020] NSWSC 134, at [46]

# 13 COMMON LAW RIGHTS PRESERVED

- The existence of a statutory cause of action, generally based on strict liability, does not **exclude** liability for breach of a common law duty of care unless the statute provides otherwise: *Hirst v. Jessop*, (1962) 63 SR (N.S.W.) 15 at 21.; *Bux v. Slough Metals Ltd*, [1974] 1 All ER 262 at 268, 272-273; followed: *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 49 per Mason J
- On this view, the breach of a statutory duty may both (a) itself give rise to a separate cause of action, and (b) be evidence of negligence at common law: *Sibley v. Kais*, (1967) 118 CLR 424 at 427.
- And the exercise of a statutory power can give rise to a common law duty, absent an immunity being provided for in the statute: *Caledonian Collieries Ltd. v. Speirs* (1957) 97 CLR 202 at 220.

# 14 THE BALLOON IN NSW CONTINUES TO EXPAND, WHEN IT WILL BURST NO ONE KNOWS (PART 1)

- S.232(1) provides as follows:
- **(1)Orders relating to complaints and disputes**
- The Tribunal may, on application by an interested person, original owner or building manager, make an order to settle a complaint or dispute about any of the following:
- **(a)**the operation, administration or management of a strata scheme under this Act,
- **…**
- **(e) an exercise of, or failure to exercise, a function conferred or imposed by or under this Act or the by-laws of a strata scheme**,
- **(f) an exercise of, or failure to exercise, a function conferred or imposed on an owners corporation under any other Act.**

# 15 THE BALLOON CONTINUES TO EXPAND, WHEN IT WILL BURST NO ONE KNOWS (PART 2)

- s.232(2) provides as follows:
- (2)**Failure to exercise a function**
- For the purposes of this section, an owners corporation, strata committee or building management committee is taken not to have exercised a function if:
- (a) it decides not to exercise the function, or
- (b) application is made to it to exercise the function and it fails for 2 months after the making of the application to exercise the function in accordance with the application or to inform the applicant that it has decided not to exercise the function in accordance with the application.
- s. 229 in relevant part empowers the Tribunal to make: an order or decision that provides for **any ancillary or consequential matter** the Tribunal thinks appropriate.

# 16 THE BALLOON CONTINUES TO EXPAND, WHEN IT WILL BURST NO ONE KNOWS (PART 3)

- There is no provision in the Act which enables a lot owner to require the owners corporation to repair lot property as opposed to common property.
- Repair and maintenance of lot property simply is not an obligation of an owners corporation except (a) insofar as windows may be lot property, s 118 requires an owners corporation to do work to ensure that there are complying window safety devices for all windows by 13 March 2018; and (b) to fix damage to a lot or any of its contents caused by or arising out of the carrying out of any work, or the exercise of a power of entry under s 122.
- So what, says the Tribunal…..

# 17 THE BALLOON CONTINUES TO EXPAND, WHEN IT WILL BURST NO ONE KNOWS (PART 4)

- In *Mastellone v Owners of Strata Plan No 87110* [2021] NSWCATAP 188 at [26] an appeal panel decided by reference to *Vickery v The Owners – Strata Plan No 80412* (2020) 103 NSWLR 352 that: "*the breadth of the meaning of the language "make an order to settle a complaint or dispute" in s 232 adopted by Justices Basten and White supports, rather than detracts from, the position that the Tribunal does have the jurisdiction to make the orders sought by the appellant*."
- The Appeal Panel in *Owners of Strata Plan No 77559 v* ***Touma*** [2022] NSWCATAP 186 elected to follow *Mastellone* [2021] NSWCATAP 188. It did so on the basis that this was a dispute which s 232(1) of the *Strata Schemes Management Act 1996* empowered to settle, **even if it did not relate to** the "operation, administration or management of a strata scheme" or "an exercise of, or failure to exercise, a function conferred or imposed by or under this Act or the by-laws of a strata scheme" or "an exercise of, or failure to exercise, a function conferred or imposed on an owners corporation under any other Act".

# 18 THE BALLOON CONTINUES TO EXPAND, WHEN IT WILL BURST NO ONE KNOWS (PART 5)

- In *Silberstein v Strata Choice Pty Ltd* [2022] NSWCATAP 375 at [30], an appeal panel ruled that the Tribunal has authority under s 232 to determine a claim in negligence or otherwise under the general law.
- In *Quo Warranto Pty Ltd v Goodman* [2022] NSWCATAP 315 at [71] an appeal panel said: "*A cause of action that enlivens the Tribunal's power to make orders under s 232(1) may be found elsewhere in the SSMA Act, in the strata scheme's by-laws, in other statute law or in the general law.*"
- The Tribunal now considers that it has an **unlimited jurisdiction** to decide negligence suits brought against owners corporations subject to a 6 year limitation period rather than the 2 year period specified in s.106(6).
- And sometimes the merits are well served. For example, the case of Phillip Baigent who waited 10 years and eventually got very detailed consent orders to address a leaky apartment: SMH February 2024 (with thanks – Amanda Farmer).

# 19 AN UNTESTED RISK AREA STRATA INFORMATION CERTIFICATES SS.184-185

- Since 1984, and items added in 2015, pursuant to s.184(3), the certificate no longer relates solely to outstanding contributions. See: Sch 1 Form 4 of the *Strata Schemes Management Regulation 2016*.
- Thus, if the owners corporation negligently certifies, for example, that an insurance policy is in force for a particular amount and this proves incorrect and a fire occurs soon after a purchaser acquires an interest in a lot, there may be a hefty claim for damages.
- Further, the terms of s 185 are so clear as to militate against any argument that the purchaser may be guilty of contributory negligence for failing to independently check the facts as set out in the certificate.
- The only comfort for owners corporations would seem to be the fact that since 1984 no case appears to have arisen where an action for negligence based on the certificate has reached the courts.

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# AUSTRALIAN CAPITAL TERRITORY

## *HICKS V THE OWNERS - UNIT PLAN NO 94 (CIVIL DISPUTE)* [2023] ACAT 78

- Resolves prior inconsistent decisions: *Castro v Owners Unit Plan No 246* [2016] ACAT 111 (no damages for failure to repair and maintain) and *Bennett v Owners Unit Plan 932 (Unit Titles)* [2016] ACAT 57 (ordered the Owners to reimburse plumbing expenses and to pay loss of rent by reason of a breach of the duty to maintain the common property.)
- Pursuant to section 129(1)(d) of the Unit Titles (Management) Act 2011, Owners ordered to pay the lot owner $1,000. At [49]:
- "*This tribunal, on the other hand, is empowered under section 129(1)(d) to order a payment to "someone",* ***not exceeding $1,000****. In my view, the tribunal has power to award damages to that extent, but not more. I think this reflects a legislative intention that, as a units plan houses a community of common interests,* ***there is benefit in providing a disincentive to it becoming a litigious battleground****."*

# 21 VICTORIA

- OWNERS CORPORATIONS ACT 2006
- 46 Owners corporation to repair and maintain common property
- An owners corporation **must repair and maintain**—
- (a)the common property; and
- (b)the chattels, fixtures, fittings and services related to the common property or its enjoyment

- WATER ACT 1989
- 16 Liability arising out of flow of water etc.
- (1) If—
- (a) there is a flow of water from the land of a person onto any other land; and
- (b) that flow is not reasonable; and
- (c) the water causes—
- (i) injury to any other person; or
- (ii) damage to the property (whether real or personal) of any other person; or
- (iii) any other person to suffer economic loss—
- the person who caused the flow **is liable to pay damages** to that other person in respect of that injury, damage or loss.

# 22 VICTORIA

- 165 What orders can VCAT make?
- (1) In determining an owners corporation dispute, VCAT may make **any order it considers fair** including one or more of the following—
- (a) an order requiring a party to do or refrain from doing something;
- (c) an order for the payment of a sum of money—
- (i) found to be owing by one party to another party;
- (ii) **by way of damages (including exemplary damages and damages in the nature of interest);**
- (iii) by way of restitution
- VCAT hears claims for damages suffered by lot owners for breach of an owners corporations duty to repair. See e.g, *Owners Corporation Plan No. RP00086 v Kokke (Owners Corporations)* [2023] VCAT 383

# 23 **VICTORIA** - (WITH THANKS: TIM GRAHAM)

- *Hill v Owners Corporation PS524229U (Building and Property)* [2022] VCAT 494 - Proceedings commenced in 2019 for damages in respect of water damage. Tribunal agrees at [126] that Section 16(1) of the Water Act is one of strict liability. At [212]-[214] not so s.46 Owners Corporations Act 2006: Following *Sevenco Pty Ltd v Victoria Body Corporate Services* -[2012] VCAT 374 at [4]:
- "*In my view, section 46 imposes a* ***statutory duty of care*** *on the owners corporation, so that it may be liable for any loss or damage caused to a lot owner by its failure to carry out that duty. The manager's duty is to carry out its functions with due care and diligence. Similarly, a breach of that duty would expose the manager to liability for loss and damage caused to a lot owner by the breach. In order to succeed in most of its claim, the applicant company needed to show that either the owners corporation or the manager (or each of them) had breached its duty and that the breach had caused loss or damage to the applicant.*"
- Many heads of damages awarded including loss of amenity.

# 24 **QUEENSLAND** - (WITH THANKS: FRANK HIGGINSON AND PETER HUNT) - BODY CORPORATE AND COMMUNITY MANAGEMENT ACT 1997 - SECT 281

- (1) If the adjudicator is satisfied that **the applicant has suffered damage to property because of a contravention of this Act** or the community management statement, the adjudicator may order the person who the adjudicator believes, on reasonable grounds, to be responsible for the contravention –
- (a) to carry out stated repairs, or have stated repairs carried out, to the damaged property; or
- (b) to **pay the applicant an amount fixed by the adjudicator as reimbursement for repairs** carried out to the property by the applicant.
- Example - A waterproofing membrane in the roof of a building in the scheme leaks and there is damage to wallpaper and carpets in a lot included in the scheme. The membrane is part of the common property and the leak results from a failure on the part of the body corporate to maintain it in good order and condition. **The adjudicator could order the body corporate to have the damage repaired or to pay an appropriate amount as reimbursement for amounts incurred by the owner in repairing the property.**

# 25 **QUEENSLAND** - (WITH THANKS: FRANK HIGGINSON AND PETER HUNT) - BODY CORPORATE AND COMMUNITY MANAGEMENT ACT 1997 - SECT 281

- (2) The order cannot be made if –
- (a) for an order under subsection (1)(a) - the cost of carrying out the repairs is more than **$75,000**; or
- (b) for an order made under subsection (1)(b) the amount fixed by the adjudicator would be more than **$10,000**.
- See e.g. *Columbia Tower* [2010] QBCCMCmr 295 - rreimbursement for the cost of replacing the water damaged carpet; claims for damage to gyprock ceiling and wall linings resolved by ordering the body corporate to repair them.
- Note s.284(1): "(1) The adjudicator's order may contain ancillary and consequential provisions the adjudicator considers necessary or appropriate."
- **Worse yet, a lot owner has to await dismissal by an adjudicator (for large claims) before commencing in court!**

# QUEENSLAND - (WITH THANKS: FRANK HIGGINSON AND PETER HUNT)
## *MAGOG (NO. 15) PTY LTD V THE BODY CORPORATE FOR THE MOROCCAN* [2010] QDC 70

- Successful claim for $230,042.00 for loss of rent after the lot owner had to reduce the rent for a Prada shop ( to convince Prada to exercise option) after 4+ years of water ingress inadequately addressed by a body corporate.
- Also, successful claim for $12,628.12 costs of mitigation (interim repairs to lot property after leaks into lot)
- Based on **both** negligence and breach of two statutory duties:
- (1) to to administer, manage and control the common property reasonably and for the benefit of lot owners: Body Corporate and Community Management Act 1997, s.152; and
- (2) to maintain common property in good condition, including, to the extent that common property is structural in nature, in a structurally sound condition: Body Corporate and Community Management (Standard Module) Regulation 1997, s109(1)
- [2010] QDC 70 at [74]-[75]