

Welcome to our latest edition of **GD NEWS** that brings to you information on new trends and issues that impact on the insurance market in Australia. In this month our feature article deals with the NSW Court of Appeal's recent decision concerning obligations of an owner's corporation in a strata unit complex. We can be contacted at any time for more information on any of our articles.

Occupiers Liability - Owners Corporations Liability for Common Property

The property boom in New South Wales led to a substantial increase in the number of unit dwellings throughout New South Wales. The common property of a unit complex is owned and managed by an Owners Corporation. Purchasers of units will obtain rights to use common property of the complex for example access to stairs and corridors in the complex. What happens when an owner of a unit is injured whilst using common property? What obligations are owed by the Owners Corporation to owners of units?

In New South Wales the Strata Scheme Management Act contains provisions which specify obligations for Owners Corporations. Are those obligations imposed by the Act more onerous than obligations generally imposed on landlords?

On 1 August 2005 the New South Wales Court of Appeal delivered a judgment in *John Ridis -v- The Proprietors of Strata Plan 10308* which considered the obligations imposed upon Owners Corporation pursuant to the Strata Schemes Management Act in New South Wales.

Ridis was an occupier of one of the units in a building and the Proprietors of Strata Plan 10308 were the Owners Corporation having the management and control of the common property of the block of units. Ridis was injured when entering the building via the front door when he put out his hand to prevent the door from closing and locking on him. The glass pane in the door shattered and severely lacerated his right forearm. The door had been installed in the building in or about 1939. The door had the original glass which is now known to shatter into dangerously sharp shards when impacted upon. Contemporary safety standards require the installation of safety glass in front doors of new buildings although the standards do not apply retrospectively. The standards require that if existing glass is to be replaced it must be replaced with safety glass.

Ridis argued that the Strata Scheme Management Act imposed on the Owners Corporation an obligation to inspect and remove dangers or defects of which it was aware or ought to have been aware. Ridis lost the case before the original trial judge and on appeal to the Court of Appeal, the Court Appeal upheld the trial judge's decision to dismiss the claim in a 2 to 1 decision.

The majority judges concluded that an Owners Corporation acting reasonably should have a system in place for monitoring the maintenance and state of repair of the common property but the evidence in the case did not establish that inspections would have brought home to the Owners Corporation the risk concerning the glass.

Justice McColl who was also in the majority did not accept the argument of Ridis that the Owners Corporation was obliged to conduct or procure an expert assessment of every possible source of danger in the common property, any personal property vested in it and fixtures and fittings comprised in that common property and in personal property vested in it and, if so advised, to upgrade the materials in that property to accord with Australian standards.

In her judgment Justice McColl noted the primary judge's findings that there was no evidence that:

- the Owners Corporation had been aware of any danger with regard to the glass pane;
- there had been any earlier problems with regard to the glass;
- there was any factor which should have led the Owners Corporation to have had the doors inspected by a glazier;
- an expert glazier would have recommended the replacement of the glass;

We thank our contributors

David Newey dtn@gdlaw.com.au
Michael Gillis mjg@gdlaw.com.au
Amanda Bond asb@gdlaw.com.au
Cameron Cuffe cqc@gdlaw.com.au

August 2005
Issue

Inside

Page 1

Owners Corporations
Liability for Common
Property

Page 2

Legal Cost Increases in
NSW

Page 3

To Deliver the Pizza or
not

Page 4

Building Accidents Lead
to Multiple Fines

Page 4

Caltex fined \$240,000

Page 5

Individual Fined \$9,000
for Breach of OHS
Legislation

Page 5

Death Leads to Fines
Totalling \$173,000

Page 5

Uniform Rules in NSW

Page 6

How to avoid a wasted
appeal

**Gillis Delaney
Lawyers**
Level 6,
179 Elizabeth Street,
Sydney 2000
Australia
T +61 2 9394 1144
F +61 2 9394 1100
www.gdlaw.com.au

- suggested that an Owners Corporation would have inspected the glass doors regularly or at all.

Justice McColl did not accept that the Strata Scheme Management Act imposed a duty on the building owner that was greater than the duty generally imposed on landlords by the common law.

Justice Hodgson who was in the majority in his judgment noted that although the Strata Scheme Management Act imposed a statutory obligation of maintenance and repair it did not impose an obligation to upgrade to contemporary building standards glass in the door which was undamaged and in working order.

Justice Hodgson's view differed from that of Justice McColl as he found that the Strata Scheme Management Act did impose duties on the Owners Corporation however found that the words "where necessary" or "where appropriate" should be implied in the statutory duties imposed which were duties to renew or replace any fixtures or fittings comprised in the common property and any personal property vested in the Owners Corporation and to properly maintain and keep in a state of good and serviceable repair the common property and any personal property vested in the Owners Corporation.

Justice Hodgson concluded that an Owners Corporation acting reasonably should have a system in place for monitoring the maintenance and state of repair of the common property and the system should be such that particular regard be had to safety issues associated with maintenance and the state of repair of common property. Justice Hodgson however found that it does not mean that the Owners Corporation must from time to time hire specialists to inspect every aspect of the common property that could possibly give rise to safety issues. Justice Hodgson stated:

"if it has reason to believe that any such aspect could be dangerous such as electrical wiring then it should engage the appropriate expert. But in the absence of any such reason, in my opinion an Owners Corporation, acting reasonably would have in place a system of periodic inspection by someone with appropriate general skills, such as an experienced managing agent or a person with general building maintenance skills, and need not in any event have a system involving regular inspections by more specialised experts."

Hodgson JA concluded that had the Owners Corporation been aware that the glass in the door was such that it could shatter into dangerous shards then the exercise of reasonable care would have required precaution such as those taken after the accident, namely replacing the door with safety glass.

Justice Tobias in the dissenting judgment however concluded that had the Owners Corporation inspected the glass panes of the front doors, observing that the closing mechanism would from time to time result in the door closing quickly upon someone entering, it would have realised the necessity of replacing what were clearly unsafe glass panels with safety glass which complied with current Australian standards. Justice Tobias in effect found that the Strata Scheme Management Act imposed a higher duty on the Owners Corporation than the duty imposed at common law on a landlord.

The New South Wales Court of Appeal has delivered three quite different judgments. Although Ridis lost his appeal it is apparent from the judgment of Justice McColl that the evidence marshalled by Ridis did not come up to scratch according to the trial judge and it was deficient in a number of aspects. At least two of the Court of Appeal judges were inclined to accept that the Strata Schemes Management Act imposed a higher duty on an Owners Corporation than that imposed by the common law although Hodgson JA did temper that view by watering down the extended duty by implying words "where necessary" or "where appropriate" into the statutory obligations.

Plaintiff's lawyers are likely to find comfort in the Ridis judgment despite Ridis' failure. No doubt plaintiffs will continue to argue that the Strata Scheme Management Act imposes obligations on Owners Corporation that are greater than normal common law obligations. Unfortunately the Court's decision in this case has not delivered final resolution to this interesting issue.

Legal Cost Increases in Civil Liability Claims in New South Wales

In New South Wales the new legislation to govern legal practitioners, the Legal Profession Act 2004, is due to commence on the same day as corresponding new legislation in Victoria. It is expected that this will be no later than 1 October 2005.

Caps on legal costs were originally imposed in New South Wales in May 2002 but those caps will be raised somewhat. Under the current legislation if a claimant's damages are less than \$100,000 then a plaintiff is limited to recovering from the defendant \$10,000 or 20% of what the claimant recovers, whichever is greater, for professional costs including counsel's fees. \$10,000 is not much to recover for a five day re-hearing in the District Court where liability is in issue and a plaintiff recovers \$50,000. The scenario gets worse for claimants in an appeal as no more costs are payable unless the claimant can convince a Court that the matter should be exempt from the general costs provisions. For defendants the scenario is not so bad - claimants generally claim the jurisdictional limit and so if a defendant successfully defends a claim then the defendant's costs are unlimited.

Under the new Act there is provision for claimants to recover an additional amount for costs if a matter proceeds from arbitration to re-hearing and/or if a matter proceeds to appeal. Pursuant to the new Act if a matter which attracted an award of less than \$100,000 proceeds to re-hearing from arbitration then claimants can recover an additional \$7,500 or 15% of the amount recovered, whichever is greater.

If a matter proceeds to appeal from a hearing then the same increase in fees applies. If a matter proceeds from arbitration to rehearing and then to appeal a claimant can recover the additional amount twice. Where a claimant was limited to \$10,000 for costs for a \$50,000 claim they can now recover \$17,500 by proceeding to arbitration then a rehearing.

For example, a claimant runs a case at arbitration and recovers \$90,000. Costs are limited to \$18,000. A limited re-hearing is filed by a defendant in relation to liability only. The claimant is again successful in relation to liability at the re-hearing. The claimant is entitled to recover a further 15% of the judgment - a further \$14,000 in costs.

The new legislation will provide some relief for plaintiffs and their solicitors in relation to cost recovery in smaller claims. Whether or not the new provisions will make a difference to the volume of litigation remains to be seen. Arbitrations followed by rehearings may come into vogue.

To Deliver Or Not To Deliver The Pizza

Recently the New South Wales Court of Appeal upheld the finding of trial Judge McLoughlin that the actions of an employer had unreasonably exposed an employee to a risk of injury through robbery by not aborting a delivery.

The Facts

Mr Bing Cheng, otherwise known as Ken, and his wife, Stephanie, owned a Pizza Haven franchise at Bankstown. A substantial part of their Pizza Haven business was taken up with deliveries. Pizza orders for delivery generally were made by phone. When a customer called the pizzeria the number of the call was displayed on a computerised phone system. Where the call was made from a landline the address of the landline would be displayed on the system. When the phone call was made by a mobile the address of the caller was entered manually. Once the order had been made a receipt was printed and given to the delivery drivers which indicated the address for delivery, order and amount.

Mr Michel Youssef Heloui was an employed pizza delivery driver for the Pizza Haven franchise. He was aged in his 40s and had migrated from Lebanon in 1999.

On 7 March 2001 Ken received a phone call from a male person who he described as "not old" and "not too young". The caller had phoned on a mobile. The customer ordered a number of pizzas to a delivery address in Punchbowl, NSW. It is relevant to note that the mobile number called on and the mobile number given by the customer as a return number were different numbers.

Soon after the order was made Michel set out from Pizza Haven to deliver the pizzas to Punchbowl. On his way he became lost and could not find the address. Ken received a phone call from a person whose voice was similar to that of the customer who ordered the pizzas for Punchbowl, indicating he had not received his pizzas and that they were late. Ken subsequently rang Michel to indicate that he should hurry up and deliver the pizzas.

Ken subsequently rang back both numbers given as a contact detail for the mobile and was told both mobiles were switched off. Importantly, Ken did not call back Michel and indicate to him that he had tried to call the customer and received no answer.

Eventually Michel arrived at the given address in Punchbowl which was a three storey block of home units. Upon knocking on the door of the given address a man in pyjamas who looked sleepy appeared and told Michel that he had not ordered a pizza. Michel began to walk back to his car when a man appeared behind him with a hand gun and ordered him to follow him out to the back of the building to the car park. At the rear of the building in the car park two other men with hand guns ordered Michel to give him the money he had and his mobile phone. Michel gave the men the money, a paltry \$200.

Michel was upset at what had happened and received some assistance from one of the residents of the building. The Police were called and Ken attended the scene.

The Evidence

Apart from the evidence of both Ken and Michel, the Trial Judge heard evidence from Mr Mohab Maggar, Senior Business Development Manager for Pizza Haven and Mr Richard Jennings, Security Consultant.

Mr Jennings gave evidence indicating that the Bankstown area had a high crime rating, which was more than twice the average State level and in relation to robberies, had an "extremely high record being in the top half dozen crime rates in the State". Further to this evidence Mr Maggar indicated the Bankstown area, amongst others, was known to Pizza Haven as "a rough area".

Ken, in evidence, indicated that if a phone call was made from a public phone he would not deliver a pizza because "it probably meant trouble". For the same reasons he would not deliver a pizza to a public park. When asked about the similarities between a mobile phone and a public phone delivery, Ken suggested that he did not consider there to be any difference at all in relation to being able to lock in a delivery address.

In relation to the Pizza Haven training, Mr Maggar stipulated that no deliveries were to be made to public phones or parks. In relation to taking an order from a mobile phone where it was a new customer, their details would be entered into the computer and they were to be called when the delivery was to take place.

Considerations

Ultimately the Court considered the weight of the evidence provided by Mr Maggar and Mr Jennings in relation to the known dangerous status of Bankstown and whether in light of this evidence Ken ought to have, in the circumstances aborted the delivery.

Ultimately the Judge had to consider Ken's duty as employer to Michel as employee and determine whether reasonable members of the community in Ken's position would think the risk of robbery significantly great to abort the delivery. This was put as:

"After taking into account the probability of the risk occurring, the gravity of the damage that might arise if the risk occurs, the experience, difficulty and inconvenience of avoiding the risk and any other responsibilities that the [employer] must discharge."

Ultimately the Judge considered that there was clear evidence from Mr Maggar and Mr Jennings that people in the pizzeria industry working in the location in which Ken ran his business from recognised that there existed an inappropriately dangerous practice to allow pizza orders made by mobile phone to be delivered where the customer is unable to be notified. The Court ultimately considered Ken's inaction of allowing Michel to deliver the pizza was a reasonable lack of care for the safety and wellbeing of his employee, as it would have been a viable option to abort the delivery at minimal cost to avert the risk of injury. The Court considered:

"... a reasonable employer [in Ken's] position should have undertaken the cancellation of the order or at least had in place a system that when [Michel] or [Ken] made the phone call to which there was no answer, [Michel] should have been told to abort, cancel and return to the base with the pizza undelivered."

Conclusion

It is interesting to consider the Court's reasoning within this matter, as the duties of the employer to their employee were considered not only to encompass the dangers foreseeable within the confines of the employment environment but also the relevant dangers of the employer's external workplace environment, over which they have no control.

Building Accidents Lead to Multiple Fines

The New South Wales Industrial Relations Commission has handed down a series of fines to a developer and a form work company and a director of the development company as a consequence of an incident on 21 October 2002 when an overhead crane struck a chimney whilst maneuvering a 1200kg bag of sand from the street to the top of the unit building under construction. A pre-cast concrete chimney on the roof was struck resulting in two sections of the chimney being dislodged falling onto the roof of the building and landing in the courtyard area below. No-one was struck by the concrete but two workers were injured in their attempts to avoid being struck by the falling material.

Angelucci was the licensed builder and was the sole director and shareholder of a development company Jarret Street Developments and a director of A & G Formworkers Pty Limited. The crane was operated by an employee of A & G Formworkers. The lift was carried out when the employee could not properly view the maneuvering of the load. There was a lack of a safe work method statement and failure to ensure the dogman had certificates of competency and also a failure to provide instruction, training and supervision. The project manager on the site Andrew Pierce was fined \$8,000 for his involvement in the incident. Angelucci was prosecuted in his capacity as director of the two companies and he was also fined \$8,000. Jarret Street Developments was fined \$50,000 and A & G Formworkers were fined \$40,000. The Commission was critical of the obvious risks of operating a crane without a qualified dogman and moving a load when the movement of the load was not visible to the operator. There were simple and straight forward measures that could have been taken to avoid the incident.

The penalties imposed on the two companies and Angelucci were reached after applying a 25% discount to the penalty. The maximum discount available is 35%. Pierce however only received a 15% discount of his penalty in light of his late plea of guilty.

Caltex Fined \$240,000.00 for Breach of New South Wales Occupational Health and Safety Legislations

The Industrial Relations Commission recently imposed a fine of \$240,000 on Caltex Petroleum Distributors Pty Limited for a breach of the Occupational Health and Safety Legislation in New South Wales. WorkCover alleged that Caltex failed to provide and maintain a safer system of work in relation to transfer of fuel from underground tanks in road tank trucks as such that employees were not exposed to the risk of fuel explosion during the transfer process. An employee was injured from an explosion which occurred whilst diesel was being pumped into a tank. Caltex pleaded guilty.

The Industrial Commission noted that notwithstanding Caltex's general commitment to occupational health and safety, it failed, as did other corporations involved in this most dangerous of industrial operations to ensure that a work method was devised for this particular recognised dangerous risk. It was noted there was no risk assessment of the task of fuel transfer such that would have warned against diesel fuel being pumped into a tank before an assessment was made that the tanker had been thoroughly cleared of petrol. The Court found the offence was a serious one. The maximum penalty for the offence was \$550,000. The Court found that the penalty imposed should be discounted by 25% due to the early plea of guilty and mitigating factors with the end result being a fine of \$240,000.

Individual Fined \$9,000 for Breach of Occupational Health and Safety Legislation

The New South Wales Industrial Relations Commission in Inspector Connolly and David Daniel Clarke has imposed a penalty of \$9,000 on an individual for a breach of the Occupational Health and Safety Legislation in New South Wales. Clarke was a self-employed person whose place of work was a building site for a complex of townhouses. Clarke was the principal contractor on the site and the site foreman responsible for the day to day running of the site. A sub-contractor was engaged to erect roof frames. The sub-contractor in turn sub-contracted Nicola Boric as a carpenter to undertake roofing works. Boric was on the roof of one of the townhouses cutting rafters when he fell from the height of about 5.1 metres and suffered serious injuries including a broken elbow and hip. The maximum penalty for Clarke, an individual was \$55,000. Clarke pleaded guilty. The judge despite finding that it was not apparent that there was any meaningful act or expression of contrition or remorse by Clarke imposed a fine of \$9,000. A Court has a discretion to discount the penalty by up to 35% and in this case only discounted the penalty by 17.5%. With evidence of contrition the penalty imposed may well have been decreased by up to \$2,000 more. Notwithstanding the penalty imposed did not appear to be substantial having regard to the gravity of the breach.

Death Leads to Occupational Health and Safety Fines Totalling \$173,000

Boral Australian Gypsum Limited ("Boral") was recently fined \$95,000 by the New South Wales Industrial Relations Commission following a fatality at a building site. In December 2001 Masterbuilt Pty Limited contracted Boral to supply and fix internal linings at a construction of a two storey house. Sydney Saunders was a self-employed contractor engaged in the business of fixing cornices once plastering work had been completed. One Saturday a passer-by saw Mr Saunders laying unconscious in the stairwell on the ground floor and he later died from his injuries. A post-mortem found that he suffered a fractured skull. In essence Boral was charged under Occupational Health and Safety Legislation based on allegations that both Masterbuilt and Boral failed to provide handrails, safety fences or other forms of physical barriers capable of preventing the fall of persons in the vicinity of the stairway void. The void was not covered when Mr Saunders accessed the first floor and the Industrial Relations Commission was critical of this issue.

Masterbuilt had previously been fined \$78,000 for its involvement in the incident and the Commission noted that Boral had similar obligations to provide fall protection to persons working at the site although there was a much closer supervisory relationship between Boral and its sub-contractor compared to Masterbuilt and the contractor. Boral's penalty of \$95,000 was not substantially more than Masterbuilt's penalty when one considers that Masterbuilt had an exposure to a maximum penalty of \$550,000 whereas the maximum penalty for Boral was \$825,000 as this was the second offence for Boral under the New South Wales Occupational Health and Safety Act.

The Uniform Rules in NSW

Last month one of our feature articles discussed the new legal era in NSW - one set of rules and forms for the Local, District and Supreme Courts. At this stage the rules are still scheduled to come into effect on 15 August 2005. Draft versions of the forms are already online. The forms are certainly much simpler than their predecessors and all newly admitted legal practitioners must breathe a sigh of relief at having only one set of rules to be familiar with. The forms are also easy to complete and the rules need only to be substantially rather than strictly complied with in order for the forms to be filed. The forms have been specifically designed to meet requirements of electronic filing of court documents - a concept which must disturb some traditionalists.

It will remain the case that proceedings will be commenced with a statement of claim or summons, and interlocutory matters dealt with by a Notice of Motion.

What are the notable features? Last month we discussed at some length what is probably the main change - the power of the Court to limit the length of a hearing, limit the number of witnesses a party may call and the like.

Another development is the introduction of preliminary discovery. Prior to the commencement of the rules, preliminary discovery was not available in the Local Court and in the District and Supreme Court was limited to situations where a plaintiff was trying to identify a defendant. Now there is "cause of action discovery" which includes discovery of documents from a prospective defendant to obtain sufficient information to decide whether or not to commence proceedings. This is welcome news for plaintiff's lawyers given the costs penalties contained in the Legal Profession Act 1987 which expose claimant's lawyers to potential obligations to pay costs in unsuccessful claims although will probably result in defendants having to engage lawyers at an earlier stage to assist with this discovery process. Defendants will be put to considerable cost and will be required to compile a list of relevant documents to produce to a claimant with the actual documents.

Another new aspect of the rules is a change in relation to rules relating to offers of compromise. Under the new rules it will be possible to make an offer of compromise at any stage of the proceedings up until the time the trial judge commences to sum up or give reasons. Cost penalties will also be assessed on an indemnity basis if a party betters an offer of compromise.

Specialist Courts such as the Court of Appeal will still have their own "local" rules which will prevail but incorporate the new rules to the extent that they are not inconsistent. The Supreme Court and District Court will still have their own practice notes governing procedures.

What effect will the rules have on litigation in New South Wales? The intention is to simplify litigation for all involved and also move the procedural aspects of litigation into the 21st century. Time will tell just how successful these changes are in reducing the cost of litigation and delivery affordable justice to New South Wales litigants.

How to avoid a wasted appeal

Only too often, one party or another will be unhappy with a judgment. Often liability will be a hot issue and a defendant's legal representatives will be of the opinion that the Judge got it wrong. The defendant will proceed with an appeal, and sometimes, the Court of Appeal will overturn the judgment. What happens when the judgment is overturned but the judgment monies have already been paid to the plaintiff and by the time the appeal has finished the plaintiff has squandered the judgment monies on the holiday of a lifetime? When the defendant tries to recover the judgment monies, the plaintiff has no assets.

A solution to this problem for defendants is to apply for a stay of execution of judgment rather than pay the judgment monies to the plaintiff. Judges in the past have been in two minds on what to do with such applications - on one hand a plaintiff is entitled to the fruits of their winnings and on the other, a defendant ought to have the guarantee that if their appeal is successful they will be able to get back the money paid out.

The NSW Court of Appeal has recently dealt with a situation where part of the judgment monies were paid out to a plaintiff as the trial judge granted a stay on payment of a portion of the judgment. This has often been seen as a solution to the dilemma by some judges and plaintiffs will often consent to that approach on the basis that a portion of the judgment monies are paid out.

In *Lockhart Shire Council -v- King*, the Court of Appeal commented that such arrangements may not be appropriate where liability is in issue and part payments may be more appropriate where the only issue is quantum. In the case the Court of Appeal made an order against Mr King to repay to the Council monies that the Council had paid pursuant to the original judgment which had been set aside by the Court of Appeal. The Court of Appeal was critical of the trial judge's order requiring part of the judgment to be paid despite an application for a stay of the entire judgment. It was noted by the Court of Appeal that the trial judge should not have made the order which effectively required part payment of the judgment despite an appeal.

If a defendant appeals a decision where there is a real risk to the defendant that an appeal will be worthless in the sense that moneys will not be able to be recovered from the plaintiff then a stay of execution of judgment should be applied for. If liability is in issue then a total stay should be sought. This prevents a plaintiff from being able to enforce the judgment. If ultimately an appeal is unsuccessful or only partially successful then interest will have to be paid on the unpaid judgment monies. This is a small price to pay given the risk to a defendant of not being able to recover the judgment monies paid out pursuant to the original judgment. The approach of the Court of Appeal brings comfort to defendants who can now expect to receive a more favourable hearing in stay applications where an appeal has been pursued and liability is a real issue in the appeal.

GD NEWS

Warning. The summaries in this review do not seek to express a view on the correctness or otherwise of any court judgment. This publication should not be treated as providing any definitive advice on the law. It is recommended that readers seek specific advice in relation to any legal matter they are handling.

Gillis Delaney Lawyers is a progressive medium sized law firm based in the Sydney CBD. **GD** also has offices in Newcastle and Ballina. **GD** delivers business solutions to small, medium and large enterprises, private and publicly listed companies and Government bodies that conduct business in Australia. **GD** provides legal services to a wide range of clients throughout Australia with a focus on clients in the insurance and construction industries. **GD** are specialists in insurance law, OH&S and employment law.

You can contact **Gillis Delaney Lawyers** on 9394 1144 and speak to David Newey or email to dtn@gdlaw.com.au . Why not visit our website at www.gdlaw.com.au.

