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Owners Corporation & Work Flow – Part 1

Judges just don't write like this any more:

> *The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damnified without any fault of his own …*
>
> *Rylands v Fletcher* [1868] UKHL 1, per Lord Cairns (surely a fan of Charles Dickens)

Rylands v Fletcher was about an English mill owner, Fletcher, who built a reservoir on his land and filled it, but water broke though into disused mineshafts underneath his land and flowed underground from there to Rylands' working mine nearby, flooding it. Although Fletcher was not negligent, he was liable for the damage.

In Victoria, the law in this area is now codified by the *Water Act* 1989. Section 16 provides that if there is a flow of water from land on to other land, and the flow is not reasonable and causes damage, the person who caused the flow is liable.

How is this relevant to Owners Corporations?

The 2012 VCAT case of *Penniall Enterprises Pty Ltd v OC RN4160667X* [2012] VCAT 943 shows how.

This case concerned an apartment complex in Clifton Hill, in which water ingress to apartment 21C damaged the ceiling, causing the owner to lose rental income and pay compensation to the tenant for loss of amenity.

The Tribunal examined the course of the water into Apartment 21C. It found that rainwater had entered through a defectively fixed aluminium sliding door frame, flowed behind a balcony membrane into the wall cavity, and ran along structural beams until it reached Apartment 21C.

As is common, the Plan of Subdivision provided for interior face boundaries – that is, the space inside the interior faces of the walls was on the apartment title, and the space outside the interior faces was common property, owned by the OC. The door frame, the membrane, the wall cavity and the beams were common property. It followed that the water had entered Apartment 21C from the OC's land.

The Tribunal commented that section 16 of the Water Act *"is concerned with the fact that a flow of water has occurred, and the question of fact over whether the flow was "not reasonable".* Section 16(1) does not concern itself with whether the particular respondent land owner had been negligent. It is not a question of whether the Owners Corporation has some moral blameworthiness". It held that *"The flow of water from the common property into 21C, in sufficient quantity to cause physical damage and the loss of the tenants, was not reasonable".*

The Owners Corporation was liable for the damage, even though it was not negligent.

This means that no matter how careful an OC and its manager are, the OC may still be liable for water flows from common property. A big risk.

"Risk" suggests "insurance".

What do standard Owners Corporation insurance policies say about water ingress?

Stay tuned for the next bulletin.

Roland Burt
Partner

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