BROADLEY REES HOGAN

PRIVATE ELEVATOR LIFTS IN COMMUNITY TITLE SCHEMES

Who foots the bill?

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It is a common dilemma faced by many bodies corporate and lot owners alike: who has the financial obligation to maintain 'private' elevator lifts?

The Supreme Court has recently shed some light on this area of potential dispute in *JM Family Holdings Pty Ltd & Anor v Owltown Pty Ltd & Anor*, a case which turned largely on the statutory interpretation of the *Body Corporate and Community Management Act 1997* (Qld) (the **Act**).

Background

The Norwinn Commercial CTS consists of two buildings, comprising a total of 8 lots. Building A is a two-level building which contains lots 1–3. Building B is a two-level building to the south of Building A which contains lots 4–8.

The Applicant owned lot 8, the First Respondent owned lots 2 and 4, and the body corporate was the Second Respondent.

Each lot in Building B is accessible through common doors on the lower level, with an internal stairwell for access to the upper level. Lot 8 is unique from the other lots as it has an additional means of access through an external staircase and an external lift on common property.

Significantly, bathroom facilities are located near the lift foyer areas on both the upper and lower floors, with the foyer areas and bathrooms being common property and to be used by all lot owners. The roof of Building B is also accessible by a separate staircase close to the upper floor lift foyer.

The owner of lot 8 did not have exclusive use rights over the lifts, with evidence indicating that the lifts were also used by:

- other lot owners (to access the roof and lift foyer bathrooms);
- cleaners;
- tradespersons; and
- contractors.

The previous owner of lot 8 consented to pay the body corporate 'Exclusive Use Levies' for lift maintenance, despite no lawful grant of exclusive use. The lot then changed hands, and within one month of acquiring lot 8, the new owner proposed two motions which were passed by the body corporate in an annual general meeting:

> *Motion 17*
>
> *That the full cost of the lift be shared between all Lot Owners in accordance with the contribution entitlements.*
>
> *Motion 18*
>
> *That the Body Corporate rescind the Exclusive Use Levies for Lot 8 in relation to the shared Body Corporate Assets (the Lift).*

The First Proceeding

The First Respondent opposed the two motions on the basis that the lift was a "utility infrastructure", as it was a 'plant and equipment' by which lot 8 was supplied with "utility services", with the lift being "designed to improve the amenity, or enhance the enjoyment" of lot 8 – primarily by improving access between the upper and lower floors of lot 8. Accordingly, as the lot 8 owner was the party benefiting from the utility services provided by the lift, that lot owner alone should bear the cost of maintaining it.

In opposing the motions, the First Respondent relied upon s 115(3) of the Act, which states:

> (b) *the owner of the lot is responsible for maintaining utility infrastructure, including utility infrastructure situated on common property, in good order and condition, to the extent that the utility infrastructure* ***relates only*** *to supplying utility services to the owner's lot;*
>
> [emphasis added]

The matter went before an adjudicator appointed by the Office of the Commissioner for Body Corporate and Community Management. The adjudicator rejected the First Respondent's argument on the basis that the "utility services" afforded by the lift did not *exclusively* benefit the owner of lot 8, stating:

> *".. the lift has not been installed 'only' for the use of the owner of Lot 8, but for other lot owners, occupiers, body corporate agents, tradespersons and contractors to access the second level and for transportation of heavy items that may be required to be transported to the roof."*[1]

The adjudicator further stated the fact that the previous owner of lot 8 had agreed to exclusively cover the financial burden of the lift had no bearing upon the obligations of any new owner of the lot.

The adjudicator ruled that the motions were valid.

1 *Norwinn Commercial* [2016] QBCCMCmr 537 [39]

The QCAT Appeal

The First Respondent appealed the adjudicator's decision at the Queensland Civil and Administrative Tribunal (**QCAT**). The appeal tribunal considered whether "the elevator would be necessary for the use of lots 1 to 7 so that, if it were not for lot 8, the elevator need not exist", and stated that:

> "If lot 8 did not exist, there would be no need for toilet facilities on the [upper] floor of the building … The elevator is only necessary because of the design of lot 8 and the consequent requirement to have additional toilet facilities.
>
> …
>
> These facts demonstrate sufficiently to my satisfaction that the elevator does relate only to the supply of utility services to lot 8."[2]

The appeal tribunal found in favour of the First Respondent, and overturned the adjudicator's decision. As part of the appeal tribunal's decision, the Applicant was required to reimburse the maintenance costs that had been paid by the other lot owners, and to cover all future maintenance costs concerning the lift.

The Supreme Court appeal

The Applicant then appealed the decision of QCAT at the Supreme Court. The court's decision ultimately turned upon the interpretation of the following phrase within s 115(3) of the Act:

> *"…the owner of the lot is responsible for maintaining utility infrastructure … to the extent that the utility infrastructure* ***relates only*** *to supplying utility services to the owner's lot."*
>
> [emphasis added]

The court stated that for the purposes of s 155(3), the phrasing "relates only", having considered its ordinary dictionary meaning, required:

> "… a sole or exclusive relationship between the utility infrastructure [the lift] and its supply of utility services to the lot concerned such that, if the utility infrastructure also relates to the supply of the relevant services to common property or to lots other than the lot concerned, then it could not be said to "relate only" to supplying utility services to the lot concerned."[3]

So, while the court accepted that one of the functions of the lift was the supply of utility services to lot 8 through improving access to the lot, it was not the lift's only function. The lift further served the purpose of providing all lot owners with improved access to common property areas, such as bathroom facilities and Building B's roof.

As the lift was not used *solely* for the supply of utility services to lot 8, the court approved the adjudicator's determination and thus reversed QCAT's decision, rendering the original motions valid. The costs of the lift were, therefore, to be shared amongst all lot owners.

Summary

The decision confirms that 'utility infrastructure', such as elevator lifts, will only be the sole financial responsibility of a lot owner where that infrastructure exclusively provides a benefit or 'utility service' to that specific lot owner. In all other cases, the bill will likely need to be borne communally.

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2 *JM Family Holdings Pty Ltd & Anor v Owltown Pty Ltd & Anor* [2018] QCA 260 [39], [41]
3 *JM Family Holdings Pty Ltd & Anor v Owltown Pty Ltd & Anor* [2018] QCA 260 [78]

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