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Case Studies and Risk Management Tips
For Property Managers

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A

Case Study A: Duty of Care and Balconies

Do you understand your duty of care with regard to balconies at a property? Do you know what a lay test entails?

The following case example illustrates the obligations of property managers to ensure the safety of the premises they manage.

Case details

Ms Wu was the tenant of a unit in Hurstville. The owners of the unit had contracted with an agent to manage the rental of the unit. Under the relevant agency agreement the agent agreed to undertake inspections and complete condition reports. The agent was also given authority to lease the unit, sign tenancy agreements and authorise certain repairs.

Ms Wu sustained significant injuries when a wooden railing on the unit balcony gave way, causing her to fall to the ground. Amongst others, Ms Wu sued the owners of the unit and the managing agents.

The agent argued that it did not owe a duty of care to Ms Wu and, instead, only owed a duty to the owners of the unit. The Court disagreed, finding the real estate agent owed a duty to Ms Wu by reason of its undertaking to inspect the unit and complete a condition report. The Court concluded that the agent owed a duty to identify and warn Ms Wu of the hazard posed by the defective balcony.

Interestingly, the Court also held that the real estate agent was under an obligation, when inspecting the unit, to perform a "lay test" of the balcony. This required:

a. gripping the top of the rail firmly with two hands and shaking it vigorously. If the railing moved or separated from the mounting, it would have clearly indicated the railing was not sound; and/or

b. striking the inner face of the rail firmly near the end points with the heel of the agent's hand. Again, any movement or separation of the mountings would have indicated that the railing was not sound.

Lessons learned

The two things to take away from this case example are:

a. Agents can owe a duty of care to lessees of premises.

b. That duty may require the agent to themselves undertake tests to determine the existence of any hazards.

Recommendations

> Ensure that inspections of the rental property are conducted regularly. Prepare detailed condition reports during or following each inspection.

> Balconies and balustrades should be examined for any signs of weakness, rotting or loose or rusted fastenings. Balustrades can be shaken to determine stability, whilst not putting the inspector at risk by leaning on structures.

> If there is any concern that a balcony or balustrade may be a risk, that concern should be reported to the owner of the property in writing.

> If a balcony is more than 20 years old, it may be worthwhile recommending, in writing, to the owner that an expert examine the balcony. If recommendations are made verbally then the conversation should be recorded in a file note.

> All complaints made or requests for repairs or maintenance should be recorded.

> Ensure that any requests for repairs or maintenance are attended to as soon as possible.

> Keep a record of quotes, invoices and receipts for payment for repairs and maintenance work.

> Only use properly qualified and insured tradespeople.

B

Case Study B: Duty of Care and Glass

Do you check the qualifications of every tradesperson you engage to work at a property? What about your handyman? He might do odd jobs and property maintenance for you including cleaning, mowing, painting, concreting, plumbing ...but is he qualified?

The following example shows why you should always ensure you retain appropriate contractors to undertake repair works.

Case details

Mr Hunt was a lessee of a residential property in Ashfield. The owner of the property, the Roads and Traffic Authority, had contracted with an agent to manage the property. The management agreement empowered the agent to determine the work to be carried out on the premises. The agreement also made the agent responsible for engaging (and supervising) suitably qualified contractors to carry out the work.

Mr Hunt injured himself when he tripped and fell whilst walking up stairs towards the entrance of the premises. Mr Hunt's right hand and forearm hit a glass panel in the entrance door, penetrating and shattering the glass (the glass was not safety glass). Mr Hunt brought proceedings against the owner and the managing agent.

Interestingly, the agent again tried to argue that it did not owe a duty to Mr Hunt as it was merely a 'conduit' to the owner and it had an insufficient relationship with Mr Hunt to give rise to a duty of care. The Court rejected this argument given the agent's responsibilities under the management agreement, particularly those relating to repairs and the selection and supervision of contractors.

The Court found that the agent breached its duty of care by failing to engage a suitably qualified contractor some years prior to replace a glass panel which broke in a bedroom door in the premises (the agent engaged a "handyman cleaner with experience in the building industry"). The Court held that if a glazier had been engaged, they would likely have identified non-safety glass in other doors (including the door on which Mr Hunt was injured) and recommended replacement with safety glass.

Lessons learned

The decision is interesting for a number of reasons:

a. First, it illustrates the importance of engaging properly qualified contractors to undertake repairs. An agent may find themselves exposed to a finding of liability if they merely engage a 'handyman'.

b. Second, the decision seems to run counter to previous decisions which held that an owner/occupier did not breach its duty of care to a tenant for failing to identify infrastructure which, while compliant with relevant standards at the time of building, was not compliant with current non-retrospective standards.

C

Case Study C: Reserves and Settlements

Why would an insurer consider paying a six figure settlement to a plaintiff in a case where they believe you have a 75% chance of winning in court?

The following example illustrates the manner in which insurers set reserves and the commercial considerations that come into play in resolving proceedings prior to hearing.

Case details

Dr Black was the tenant of a house in Vaucluse. The owners of the house had contracted with an agent to manage the rental of the house. Under the relevant agency agreement the agent agreed, amongst other things, to inspect the property.

The agent noticed, when undertaking an inspection, that there was a raised edge at the entrance to the kitchen which was a tripping hazard. The agent warned Dr Black to be careful and arranged for the edge to be marked with safety tape.

Dr Black sustained injuries when he tripped on the edge. He subsequently commenced proceedings against the agent seeking compensation for loss allegedly suffered, including substantial loss of income that he would have earned from his practice as a plastic surgeon but was unable to do so whilst recuperating.

The agent notified its insurer who promptly granted indemnity for the claim against the agent and appointed solicitors to defend the proceedings. It was then necessary for the insurer to set a reserve.

A reserve is the amount of funds an insurer sets aside to meet a claim made against its insured. There are two types of reserve - a claims reserve and a costs reserve. The former represents the amount that may be paid to the plaintiff in compensation, as well as the plaintiff's legal costs. The latter represents the legal costs the insurer will incur defending the proceedings.

The insurer considered there to only be a 25% chance the agent would be found liable to Dr Black. The insurer also considers that if Dr Black was successful he would be awarded $500,000 (after taking into account contributory negligence), plus legal costs. The insurer considered Dr Black would incur legal costs of approximately $100,000 through to the conclusion of a hearing. In light of this, what reserve should the insurer set?

Whilst different insurers take different approaches, the insurer of the agent set its reserve purely on the assessment of chance. That is, to reflect the fact that there was:

a. a 75% chance the insurer would have to pay nothing; and

b. a 25% chance the insurer would have to pay $600,000.

This resulted in a claims reserve of $150,000. Unless the matter settled, there was a 100% chance the insurer would incur legal costs of $100,000 defending the proceedings and, for this reason, it set a costs reserve of $100,000 to reflect likely costs. In total, a combined reserve of $250,000 was set.

Dr Black's solicitors contacted the solicitors for the insurer and advised that, in order to avoid the stress, uncertainty and cost of proceedings, Dr Black was willing to resolve his claim for an amount of $140,000. Should the insurer accept this offer? In theory, yes, because this represents a lesser amount than the assessed value of the claim. Settlement at a higher amount may even be justifiable, given the defence costs that will be incurred and not recovered even if the agent succeeds in the proceedings (even if Dr Black loses, his assets are in his wife's name and he cannot personally satisfy the costs order).

Lessons learned

Setting reserves and settlement amounts is a numbers game. Though it seems unfair at the time, some plaintiffs with apparent weak cases can end up with substantial settlements where this represents a good commercial decision for the insurer.

D

Case Study D: Notification

You might know you should, but do you really inform your insurer of every possible claim? What about incidents where you believe another party is clearly at fault? What about those where no legal action has been threatened?

The following example shows why notifying your insurer of every circumstance that might give rise to a claim is so important.

Case details

Ms Smith was the lessee of a residential property in Smithfield. The owner of the property contracted with an agent to manage the rental of the property. Under the relevant agency agreement the agent had authority to arrange repairs to the property costing no more than $200.

Ms Smith informed the agent in May 2010 that a wooden stair at the entrance to the residence was decayed and in poor condition. The agent inspected the stair and decided that it was dangerous and needed to be replaced.

Replacement of the stair was likely to cost more than $200 and, in light of that, the agent sought authority from the owner to arrange a contractor to replace the step. The owner told the agent that she would herself arrange replacement of the step.

This did not occur and, in June 2010, the step collapsed, causing Ms Smith to fall and suffer injuries. Ms Smith informed the agent who, in turn, informed the owner. The owner then arranged replacement of the step.

The agent did not notify its then professional indemnity insurer, AB Ltd, as it did not think it was at fault for Ms Smith's injuries. After all, the owner said she would replace the step.

In August 2010 the agent's policy with AB Ltd expired and the agent took out insurance with a new insurer, CD Ltd. The agent did not disclose to CD Ltd Ms Smith's injuries for the same reason.

In May 2011, Ms Smith commenced proceedings against the owner and the agent in the District Court of New South Wales.

The agent notified CD Ltd. CD Ltd denied indemnity to the agent for non-disclosure and by reason of the operation of a prior known circumstances exclusion in the policy issued by CD Ltd. The exclusion operated to exclude from cover claims which arose out of circumstances which might give rise to a claim and which were known to the agent prior to policy inception. The incident involving Ms Smith did constitute circumstances of this type - whilst the agent did not think it had a liability to Ms Smith, this did not mean that Ms Smith would not bring a claim.

The agent then notified AB Ltd. As with all professional indemnity policies, the policy issued by AB Ltd responded to claims made and notified during the policy period. No claim was made nor notified during the period of AB Ltd's policy and, therefore, indemnity was denied.

Lessons learned

The agent was left uninsured and exposed. What should the agent have done?

Simply, the agent should have notified AB Ltd of circumstances at the time it became aware of Ms Smith's injury. Had it done so, the *Insurance Contracts Act* 1983 (Cth) [s40(3)] would have operated to prevent AB Ltd from denying indemnity by reason of the fact that a claim based on those circumstances was made after expiration of its policy.

Risk Management Tips for Property Managers

Be selective in the properties you choose to manage - not all business is good business.

Periodic inspections.

When conducting, recording and following up on periodic inspections imagine sitting in a courtroom witness box, being questioned about a periodic inspection that occurred three years prior with every detail under scrutiny.

- Conduct thorough and regular inspections.
- Ingoing report should be given great attention with all issues attended to with a sense of urgency.
- Include photographs - the more the better, particularly of potentially hazardous areas/items. Images can be used to show landlords any defects but they can also be helpful in monitoring potential problems (such as whether mould is worsening over time).
- Do you have adequate system in place to follow up the return by the tenant of the ingoing report?
- Do you conduct a pre-vacation inspection? This gives you the chance to identify problems which can then be addressed and resolved before they leave.
- Are smoke alarms tested on each inspection (do you outsource maintenance of these)?

Keep file notes of conversations.

This is critical. Confirm material conversations you have had with either a tenant or landlord in writing to them. Good record keeping can be the difference between winning and losing a case.

Keep detailed and dated records. In the event of a dispute, accurate contemporaneous records are the most persuasive evidence.

Follow your clients instructions.

Failure to act in accordance with direct instructions is a breach of your obligations under the Management Agency Agreement, a breach of your fiduciary duty and can expose you to a negligence claim.

Repairs and maintenance.

- Act with a sense of urgency to all requests from tenants for repairs and maintenance.
- Work with tradespeople that "get it" - that understand the liability potential that can arise if things are not attended to promptly.
- Do you have an induction process for new tradespeople where you set your expectations?
- Only use licensed and insured tradespeople:
  - Do you hold copies of tradespersons licenses and insurance certificates of currency?
  - Do you have a process to monitor the renewal of these licences and certificates?
- Do not issue any work orders where you do not hold evidence of the contractors insurance.
- Be wary of property owners who say they will fix the problem or get their mate to - depending on the nature of the maintenance required this could be fraught with danger.
- Once repairs are completed, do you check with the tenant that their concerns have been satisfactorily addressed?
- Are completed repairs inspected?
- What systems are in place to ensure all outstanding repairs are followed up?
- Do you continue managing the property if you have a difficult landlord who refuses to rectify issues where safety is a concern?

Building safety health checks.

- Examine your rent roll.
- How many properties do you have that have hazardous features such as decks, verandas, balconies, staircases etc?
- How old are those properties; over 20 years?
- Consider writing to the owners of all such properties recommending they have the property undergo a safety health check for hazard identification purposes so as to minimise their own exposure (and in turn yours) to bodily injury claims.
- This is a proactive step to deal with potential issues prior to any injury (or worse still death) occurring.
- Do this annually, and if the owners refuse, you will at least be able to show that you have made appropriate recommendations.
- If you do have concerns over the safety of the property and the owner ignores those recommendations then its time to reassess the value of that client and the risk it poses to your agency.

Pool safety.

Encourage landlords to carry out regular maintenance by a pool professional so as to ensure the pools of your managed properties meet safety standards.

Watch out for the following common problems:

- Pool latches that do not latch properly.
- Gates that are not self-closing.
- Articles such as outdoor tables or chairs left near the pool fence enabling kids to climb over.
- Low-hanging tree branches that children could use to climb the fence.
- Poor or out of date signage.
- Signage that is not visible from the pool area.

Clandestine drug manufacturing.

Even the most solid tenant selection processes may not identify illegal drug manufacturers.

Signs to watch for include:

- Reports of persons coming and going from premises at all hours.
- An unusually higher level of security surrounding premises e.g. cameras, dogs, fencing.
- Strange smells emitting from the building such as acetone, ammonia or methylated spirits.
- Windows covered or blackened out.
- Powerful lighting frequently on at all hours.
- Unusually higher usage of power and water or signs that electricity sources have been tampered with.
- Numerous discarded empty packets of cough and cold tablets and methylated spirit containers indicates premises could be used for Pseudoephedrine extraction (a process used in methyl amphetamine manufacturing).

Insurance.

Do you recommend property owners carry a minimum of $5,000,000 public liability insurance, or better still, do you recommend they take out a Landlord Insurance Policy which usually includes $20,000,000 of public liability cover along with rent default cover, malicious damage cover etc.

Maintain a strict follow up system for everything.

Experience the Coverforce Difference

As Australia's largest privately owned insurance brokers, we have been giving quality insurance advice and risk management solutions to organisations nationally and overseas since 1994. We have offices in Sydney, Melbourne, Brisbane, Perth and Adelaide, employing over 120 staff with a strong and diverse skillset.

Coverforce can assist you to protect against the full scope of risks faced by property professionals today. Our typically recommended coverage for your industry includes:

- Professional Indemnity Insurance
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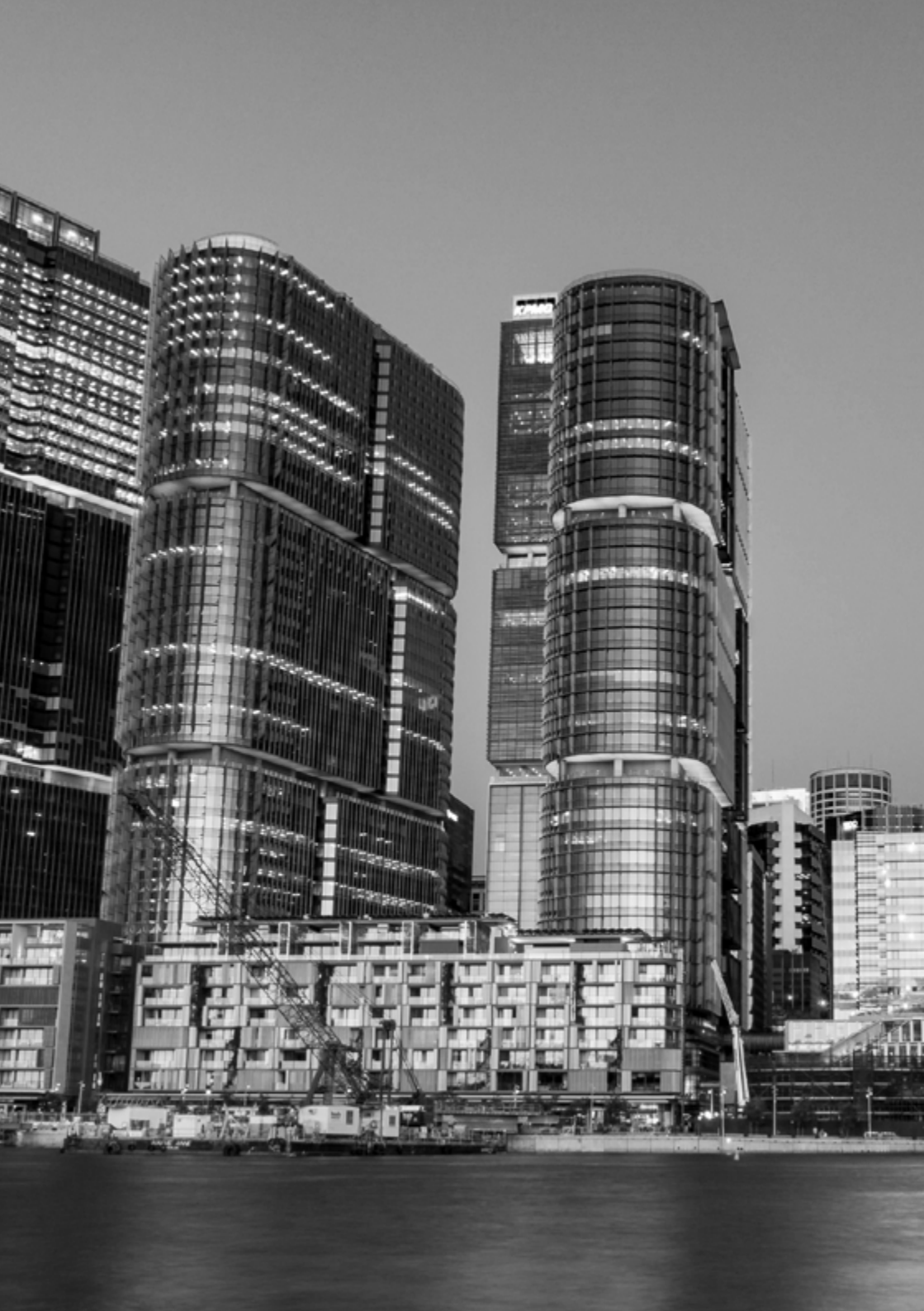
- Workers Compensation Insurance
- Management Liability
- Public Liability
- Cyber Insurance

Our team deliver great value cover tailored to your individual needs. As a client you are provided with direct contact details to your broker who is on hand to provide professional risk advice throughout the year. In the event of a claim our experienced in-house claims team will work with the insurer on your behalf to expedite your claim and ensure you receive your maximum entitlement.

Coverforce can customise your insurance to provide you with the best possible value. This is because Coverforce is a respected insurance professional with access to the best local and international insurance markets.

If at any time you have any queries about potential claims, your insurance needs, or ways to manage your risk more effectively, please do not hesitate to contact us.



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