A win for commercial property managers in the Court of Appeal

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As solicitors for the REIQ Professional Indemnity Insurance Scheme (underwritten by QBE Insurance (Australia) Limited and brokered by Aon Risk Solutions), we are regularly involved in claims against real estate agents where credibility is in issue.

When faced with conflicting versions of events, courts often have to engage in a fact-finding process based upon the information and material which is put before them by the parties to the action before reaching a conclusion.

A recent example of this is the New South Wales Court of Appeal decision of *Kitoko v Mirvac Real Estate Pty Ltd* [2016] NSWCA 201, in which the court had to decide whose version of events it should accept when determining whether a visitor to a shopping centre could recover damages from the centre's property manager and a cleaning contractor after suffering a personal injury at the centre.

The facts

On 5 October 2010, Mr Kitoko **(the appellant)** was a visitor to a shopping centre, the Broadway Shopping Centre **(the centre)**, managed by Mirvac Real Estate Pty Ltd **(Mirvac)**, the first respondent to the claim. The cleaning contractor engaged to clean the centre, Access Group Solutions (Australia) Pty Ltd **(Access)**, was the second respondent to the claim.

The appellant alleged that he was injured when he collided with a glass pane at the centre. He maintained that as he was approaching some glass sliding doors to exit the centre, he slipped on a slightly transparent viscous material on the floor and struck his head on a glass pane with some force, causing it to shatter from top to bottom. The appellant denied that he had simply walked into the glass pane.

The exit from the centre to the car park consisted of two glass sliding doors, with a single fixed pane of glass on either side of the doors. The appellant claimed that his collision with the glass pane was the consequence of the negligence of Mirvac and Access in circumstances where the floor surface was slippery.

Mirvac denied liability and maintained that any duty of care that it might have owed to the appellant had not been breached. Significantly, it also denied that the plaintiff had been injured in the manner alleged by him and it produced CCTV footage, which it asserted contradicted the appellant's version of events in the following way:

- The appellant did not slip on any material on the floor;
- A number of people had walked over the area where the appellant allegedly slipped without any difficulty;
- The doors were not open before the alleged incident, rather they opened after it;
- The appellant walked into the glass pane because he was not paying attention; and
- The appellant's head was not the first point of contact with the glass pane, rather, it was his left knee.

As a result of the incident, the appellant maintained that he had suffered injuries to his head, neck and back. The appellant issued proceedings against Mirvac and Access in the District Court of New South Wales. He provided a Schedule of Damages exceeding $4 million, but advised that he would accept the jurisdictional limit of the District Court, which is $750,000.

The decision at trial

The trial judge, Elkaim SC DCJ, concluded that contrary to the appellant's version of events, the CCTV footage clearly demonstrated that he had simply walked into the glass pane.

The trial judge noted that the use of photographs and other material, such as CCTV footage, must be treated with a great deal of caution. However, he stated that in applying every measure of caution in this matter, no other conclusion for the incident could be reached.

The trial judge stated:

> *"The plaintiff [appellant] in giving his evidence did not strike me as an overtly dishonest person. I would be very reluctant to regard him as having made up his story. Notwithstanding this his version cannot overcome the CCTV footage. I can only conclude, giving him the benefit of the doubt,that his version is a rationalisation on his part of what had occurred following him walking into the glass pane and then reacting with shock and surprise, and searching for a plausible reconstruction of what may have happened."*[1]

The trial judge noted that the appellant did not contend that Mirvac should have placed a warning on the glass about its presence. He concluded that the events as they unfolded on the CCTV footage did not support the allegations of negligence being articulated by the appellant against Mirvac and Access.

In those circumstances, the trial judge dismissed the appellant's claim.

Notwithstanding the fact that the trial judge had dismissed the appellant's claim and found in favour of Mirvac and Access, he went on to assess the damages that would have been awarded in the event that the claim was successful. The trial judge came to the conclusion that the total quantum of the claim amounted to $121,750.

The appeal

The appellant filed a Notice of Appeal in the NSW Supreme Court, in which he argued that the trial judge:

- Had erred in rejecting his factual account as to what occurred;
- Should have found that Mirvac and Access were negligent; and
- Had erred in his assessment of the damages.

Mirvac and Access submitted that the trial judge was correct in his assessment as to how the incident occurred and in concluding that that there was no evidence of a breach of duty by them.

Furthermore, Mirvac and Access argued that the CCTV footage was wholly inconsistent with the appellant's version of events, as it clearly demonstrated that the appellant had not slipped before colliding with the glass pane, and that the incident was entirely the appellant's own fault.

At the appeal, the appellant attempted to adduce further evidence including a letter he sent to Mirvac 3 months after the incident informing it of the incident and stating that it had caused him personal injury and ongoing disability. The Court of Appeal stated that the letter was not a truly contemporaneous statement given at or about the time of the incident giving rise to the claim, and was therefore irrelevant and inadmissible.

This case demonstrates that the importance of agents preserving all evidence, electronic or otherwise, so that it is available in the event that a claim is made against them.

The Court of Appeal viewed the CCTV footage and determined that the trial judge's conclusion that the appellant *"simply walked into the pane of glass" was correct. The Court of Appeal concluded that the appellant did not slip and "there is no reason to conclude that there was any explanation for the appellant's collision with the fixed glass pane other than his own inattention".*[2]

On that basis, the Court of Appeal found that the appellant had not demonstrated any error in the trial judge's conclusion that there was no negligence on the part of Mirvac or Access. It therefore dismissed the appeal and ordered the appellant to pay Mirvac's and Access' costs.

Best practice tips

This case demonstrates that the importance of agents preserving all evidence, electronic or otherwise, so that it is available in the event that a claim is made against them.

If agents are aware that a person has suffered personal injuries at a property managed by them, they should immediately preserve their file (including any CCTV footage, as well as printing off all material held on their file including the POA Form 6 Appointment, inspections reports and supporting photographs, maintenance requests, work orders, invoices, files notes, diary entries, ledgers, console notes, correspondence including SMS messages, emails, facsimiles and letters, and computer records pertaining to the property), prepare a chronology of events, and obtain signed statements from key staff and any witnesses while the events are still fresh in their memories.

Claims are often made long after an incident is alleged to have taken place, and often at a time when the parties' recollections of events is limited and third party witnesses (including former employees) can no longer be located. A plaintiff may have up to 6 years to issue a claim against an agent (depending on the nature of the claim), so it is imperative that all property management files (including electronic and telephone records) be retained for at least that period of time before being disposed of.

Conclusion

While maintaining comprehensive written and electronic records may seem time-consuming, a well-documented file provides agents with their greatest level of protection when faced with the prospect of litigation. Documentary evidence plays a critical role in defending allegations made against agents and, by implementing these best practice recommendations, agents will significantly increase their prospects of successfully defending any claims which may be brought against them.

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[1] *Kitoko v Mirvac Real Estate Pty Ltd* [2015] NSWDC 152 at para 28.

[2] *Kitoko v Mirvac Real Estate Pty Ltd* [2016] NSWCA 201 at para 51.