

# FIXING WATER LEAKS

The Duty of an Owners Corporation to Repair Common Property

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Adrian Mueller | BCOM LLB FACCAL | Partner | JS Mueller & Co Lawyers

# Agenda

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  - The Nature and Scope of the Duty
- Statutory Attempts to Waterdown the Duty to Repair
  - Avoiding the duty
  - Deferring the duty
- Remedies for a Breach of the Duty to Repair Common Property
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- Proving Your Case
- Defence Strategies for Owners Corporations

# Duty to Repair Common Property

- An owners corporation must:
  - Properly maintain common property,
  - Keep in a state of good and serviceable repair common property, and
  - Where necessary, renew or replace fixtures or fittings comprised in the common property.
- This is a statutory duty imposed on every owners corporation in NSW by section 106 of the *Strata Schemes Management Act 2015* (NSW).
- The duty to maintain and repair common property has existed since 1 July 1961.
- The duty has existed in generally the same form since 1 July 1974.
- The duty to maintain and repair common property is one of the fundamental duties of an owners corporation.

# Duty to Repair – A History Lesson

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- There is considerable jurisprudence concerning the nature and scope of the duty to repair common property.
- These cases often involved disputes about whether the duty required the owners corporation to act or whether the owners corporation could be relieved from the duty.
- In almost all of the cases, the litigation was precipitated by water ingress affecting one or more lots in a strata building.

# Duty to Repair– A History Lesson

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- One of the first reported strata title cases involved a claim by a lot owner for a declaration that an owners corporation was responsible for clearing out weep holes in a cavity wall to prevent water ingress affecting a lot: *Allen v SP2110* (1970) NSWLR 339.
- The next reported strata case involved an unsuccessful attempt by an owners corporation to foist onto a group of owners the responsibility to repair the common property associated with their townhouses: *Jacklin v SP2795* (1975) 1 NSWLR 15.

# Duty to Repair– A History Lesson

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- Then in 1976 it was confirmed that an owners corporation is responsible for repairing defects in the original construction of common property that which permit penetration of water to affect various lots: *SP6522 v Furney* (1976) NSWLR 412.
- In 1986 it was confirmed that the duty of an owners corporation to repair common property is mandatory, not optional, and an owners corporation could not elect to discontinue maintenance of an air-conditioning system: *SP159 v Blake* (1986) CCH Titles Cases 30-068.
- In 1993 a lot owner made the first successful reported claim for damages against an owners corporation for breach of duty: *Lubrano v SP 4038* (1993) 6 BPR 97,457
- Since 2006, there has been an explosion in the number of reported cases brought by owners against owners corporations for breach of duty.

# Duty to Repair – Its Nature and Scope

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- The duty to maintain and repair common property:
  - a) is compulsory, not optional: *Seiwa Pty Ltd v SP35042* [2006] NSWSC 1157;
  - b) is absolute and is not a duty to use reasonable care to maintain and repair common property or to take reasonable steps to do so but a strict duty to maintain and keep in repair: *Seiwa*;
  - c) extends to require remediation of defects in the original construction of the common property: *SP6522 v Furney* (1976) 1 NSWLR 412;
  - d) requires preventative maintenance to keep the common property in proper order by acts of maintenance before it falls out of condition: *Ridis v SP10308* [2005] NSWCA 246; *Seiwa*;

# Duty to Repair – Its Nature and Scope

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- The duty to maintain and repair common property:
  - e) extends to require the maintenance and repair of common property which is not for the benefit of the owners of a whole or even a majority of them and only benefits a minority of owners or a single owner: *SP159 v Blake* (1986) CCH Strata Titles Cases 30-068;
  - f) must still be fulfilled even if the owners corporation did not cause the damage to the common property which needs to be repaired: see *Lubrano v SP4038* (1993) 6 BPR 13, 308;
  - g) is owed to each owner and a breach of the duty entitles an owner to recover from the owners corporation, as damages for breach of statutory duty, any reasonably foreseeable loss suffered by the owner as a result of that breach.



# Duty to Repair – The Wash Up

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- As soon as something in the common property is no longer operating effectively or at all, or has fallen into disrepair, there has been a breach of the duty to maintain and repair the common property: *Seiwa*.
- Actual or constructive knowledge of the defect nor lack of care need be shown to establish breach - the owners corporation is in the position of an insurer: *Drexel London(a firm) -v- Gove (Blackman)* [2009] WASCA 181.

# Limiting the Duty to Repair

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- Inspired by unsuccessful attempts by owners corporations to relieve themselves from the duty to repair common property, the NSW Parliament has amended the strata legislation to create a number of ways for an owners corporation to relieve itself from or defer compliance with the duty to repair common property.
- There are four primary ways for an owners corporation to relieve itself from or defer compliance with the duty.

# Avoiding the Duty to Repair

- a) Pass a special resolution that it is inappropriate to maintain or repair an item of common property (s106(3)):
  - (i) limited to a specific item;
  - (ii) can only be done if the decision will not affect safety or detract from the appearance of the common property;
  - (iii) arguably cannot have a standing determination: *Ridis*.
- b) Create a common property rights by-law to make one or more owners responsible for repairing a specific part of the common property: s144(3). This requires the written consent of the owners who will be conferred with special rights.
- c) Make a by-law to adopt the common property memorandum: s106(7). That only applies to some items of common property.

# Deferring the Duty to Repair

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- a) Take “action” against a person who has damaged the common property: s106(4)
  - (i) not clear what “action is required – probably legal action: see s132;
  - (ii) only applies if there is no safety risk;
  - (iii) still involves cost.

# Remedies for a Breach of Duty

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There are three remedies available to an owner:

- a) An injunction to compel the owners corporation to repair common property;
- b) Damages for reasonably foreseeable loss;
- c) Appointment of a compulsory strata manager.

# Injunction

- NCAT can make a work order to compel an owners corporation to repair common property: ss232 and 241.
- The work order must be specific and inform the owners corporation precisely what it is required to do: *Glenquarry Park Investments Pty Ltd v Hegyesi* [2019] NSWSC 425.
- This normally requires expert evidence and a scope of works.
- An order for the owners corporation to investigate common property defects can also be made: *SP2661 v Selkirk* [2024] NSWSC 760
- An order for the owners corporation to repair consequential damage to lot property can also be made: *Mastellone v SP87110* [2021] NSWCATAP 188

# Damages

- NCAT can award damages to an owner: s232.
- There is no limit on the quantum of damages than can be awarded by NCAT: *Vickery v SP80412* [2020] NSWCA 284
- Damages are awarded for reasonably foreseeable loss which includes:
  - a) rental loss: *Seiwa; SP30621 v Shum* [2018] NSWCATAP 15; *Huang & Giang v SP65865* [2021] NSWCATCD 15;
  - b) alternate accommodation expenses: *Carli v SP56120* [2018] NSWCATCD 55;
  - c) costs to clean and carry out repairs to an apartment including to repair consequential damage: *Trevallyn-Jones -v- SP50358* [2009] NSWSC 694; *Rosenthal v SP20211* [2018] NSWCATAP 243;
  - d) legal costs: *Nicita -v- SP64837* [2010] NSWSC 68; and
  - e) experts' fees: *Fligg v SP53457* [2012] NSWSC 230.

# Compulsory Strata Manager

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- A persistent failure or refusal to repair common property can demonstrate that an owners corporation is dysfunctional.
- NCAT can appoint a compulsory strata manager to perform repairs to common property or to exercise all of the owners corporation's functions: s237.



# Proving Your Case

- An owner needs to prove the following:
  - a) They are an owner of a lot – former owners cannot seek relief in NCAT
  - b) The owners corporation breached its duty to repair common property:
    - (i) Identify the defect in the common property;
    - (ii) Proving the signs or symptoms of the breach is not enough
  - c) There is a specific scope of work that should be performed to repair the common property:
    - (i) This will likely require expert evidence;
    - (ii) There is often a dispute between experts on the appropriate scope of works

# Proving Your Case

- An owner needs to prove the following:
  - d) They have suffered reasonably foreseeable loss:
    - (i) quotes and tax invoices for:
      - (A) repairs to lot property (e.g. new carpet);
      - (B) cleaning lot property;
      - (C) rent paid previously (including tenancy agreement and rent ledger)
      - (D) rent paid to live elsewhere
    - (ii) expert evidence
      - (A) rental valuation report;
      - (B) report from building consultant or quantity surveyor on repair costs for lot property damage
  - e) The claim for damages is made within 2 years of the owner first becoming aware of the claimed loss: *SP74232 v Tezel* [2023] NSWCA 35

# Owners Corporation Defence Strategies

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- It is a strict duty to keep in good repair.
- The moment there is a defect in the common property there has been a breach of duty.
- Hard to dispute a breach of duty.
- Hence these claims can be difficult for an owners corporation to defend.
- Sometimes you need to see the writing on the wall and an acceptable surrender is the preferred (and a better) outcome.

# Owners Corporation Defence Strategies

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- Owners corporation's sometimes fasten onto technical flaws in the owner's claim.
- Often the form of orders sought by the owner is defective.
- Often no cause of action is disclosed in the owner's application: *Quo Warranto Pty Ltd v Goodman* [2022] NSWCATAP 315.
  - But NCAT does not like technicalities
- Sometimes an owner will not prove the existence of the defect or that the defect is common property (e.g. the owner proves water leaks but not the cause of them): *Stanton v SP60724* [2010] NSWSC 175.

# Owners Corporation Defence Strategies

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- Sometimes the work the owner wants the owners corporation to perform goes too far:
  - The owners corporation is only responsible for doing the minimum necessary to achieve compliance with its duty to repair common property: *Glenquarry Park Investments Pty Ltd v Hegyesi* [2019] NSWSC 425
- Often the owner will not rely on expert evidence that is credible or any expert evidence.
- This allows the owners corporation to argue that:
  - a) the owner has not provided an appropriate scope of works;
  - b) the owner has not proved that s/he has suffered any loss

# Owners Corporation Defence Strategies

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- The loss must be suffered “as a result” of the breach of duty, not because of some other cause: *Selkirk*.
- Often the owner will not prove that the claimed loss was caused by the breach of duty.
- Unreasonable conduct by an owner or a failure to mitigate can disentitle the owner to an award of damages where, for example:
  - Owner does not allow access to enable common property repairs to be performed
  - Owner makes no effort to rent the lot at a lower rental when the lot is still habitable
  - Owner moves out when the lot is still inhabitable
    - The owners corporation can try to prove that the unit was still habitable

# Q & A

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# Thank You!





# Thank You

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Adrian Mueller | Partner | BCOM LLB FACCAL

[adrianmueller@muellers.com.au](mailto:adrianmueller@muellers.com.au)

02 9562 1266

Follow us: LinkedIn | X

[www.muellers.com.au](http://www.muellers.com.au)

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