Section 106 of the *Strata Schemes Management Act 2015*:
leaky apartment blocks and consequential costs

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Claims for consequential costs

The facts of *Shum v Owners Corporation SP30621* [2017] NSWCATCD 68 are illustrative and were as follows

- Albert Shum was the owner of a tenanted home unit at 16/332 Military Road Cremorne;

- Mr Shum notified the Owners Corporation (the Owners) by email dated 12 January 2016 of a leak to the common area roof;

- 15 February 2017 the Tribunal received the application made by Mr Shum seeking interim orders under section 231 to request the Owners to rectify defects to the common property roof, windows and interior of Lot 16;

- On 24 February 2017 orders were made by consent that the Owners were to repair the common property roof to the extent necessary by 17 May 2017 to prevent water penetration into Lot 16 caused by rust, debris and defective ridge capping;

- On 24 May 2017 the Tribunal heard Mr Shum's further application, which was to the effect that the Owners had failed to rectify defects in the common property roof in a timely manner in accordance with its statutory duty under the SSM Act, that this delay constituted a statutory breach causing damage to the interior of Lot 16 as a result of water penetration causing mould and bubbling paint, and that the alleged damage to the interior of Lot 16 had caused the Applicant to suffer loss and damage in the form of *inter alia* lost rental income due to the Applicant's lessee terminating the lease dated 16 October 2015 over Lot 16 (the amount claimed being $55,923.24).

The Tribunal, in an *ex parte* decision, and by reference to the decision of Brereton J in *Seiwa Pty Ltd v Owners Strata Plan 35042* [2006] NSWSC 1157 found that

- by failing between January 2016 and May 2017 [presumably February 2017] to rectify the common area roof in breach of the statutory duty imposed by section 106(1) to repair and maintain the common property;

- on the evidence, the failure caused Mr Shum's claimed loss; and

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- the loss was reasonably foreseeable in the sense of being 'on the cards' (reference having been made to the well-known decision of *Koufos v C Czarnikow Limited (The Heron II)* [1969] 1 AC 350).

The legislation

Section 106 of the *Strata Schemes Management Act 2015* (the SSMA), says this:

> **106 Duty of owners corporation to maintain and repair property**
>
> (1) An owners corporation for a strata scheme must properly maintain and keep in a state of good and serviceable repair the common property and any personal property vested in the owners corporation.
>
> (2) An owners corporation must renew or replace any fixtures or fittings comprised in the common property and any personal property vested in the owners corporation.
>
> (3) This section does not apply to a particular item of property if the owners corporation determines by special resolution that:
>
> (a) it is inappropriate to maintain, renew, replace or repair the property, and
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> (b) its decision will not affect the safety of any building, structure or common property in the strata scheme or detract from the appearance of any property in the strata scheme.
>
> (4) If an owners corporation has taken action against an owner or other person in respect of damage to the common property, it may defer compliance with subsection (1) or (2) in relation to the damage to the property until the completion of the action if the failure to comply will not affect the safety of any building, structure or common property in the strata scheme.
>
> (5) An owner of a lot in a strata scheme may recover from the owners corporation, as damages for breach of statutory duty, any reasonably foreseeable loss suffered by the owner as a result of a contravention of this section by the owners corporation.
>
> (6) An owner may not bring an action under this section for breach of a statutory duty more than 2 years after the owner first becomes aware of the loss.
>
> (7) This section is subject to the provisions of any common property memorandum adopted by the by-laws for the strata scheme under this Division, any common property rights by-law or any by-law made under section 108.
>
> (8) This section does not affect any duty or right of the owners corporation under any other law.

The predecessor to the SSMA was the *Strata Schemes Management Act 1996*. Section 62 of that Act said this:

> **62 What are the duties of an owners corporation to maintain and repair property?**
>
> (1) An owners corporation must properly maintain and keep in a state of good and serviceable repair the common property and any personal property vested in the owners corporation.
>
> (2) An owners corporation must renew or replace any fixtures or fittings comprised in the common property and any personal property vested in the owners corporation.
>
> (3) This clause does not apply to a particular item of property if the owners corporation determines by special resolution that:
>
> (a) it is inappropriate to maintain, renew, replace or repair the property, and
>
> (b) its decision will not affect the safety of any building, structure or common property in the strata scheme or detract from the appearance of any property in the strata scheme.

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It had been thought the duty of an owners corporation under s 62 was owed to each lot owner, and that its breach gave rise to a private cause of action under which damages may be awarded to a lot owner for breach of statutory duty: *Seiwa Pty Ltd v Owners Strata Plan 35042* [2006] NSWSC 1157. But in *The Owners Strata Plan 50276 v Thoo* [2013] NSWCA 270 it was held that a breach of statutory duty did not sound in damages.

The effect of s 106 is to make clear that a breach of the obligation to properly maintain and keep in a state of good and serviceable repair the common property will sound in damages. And it has been held that the New South Wales Civil and Administrative Tribunal (NCAT) has the right to award damages for breach of the duty: *Rosenthal v The Owners - SP 20211* [2017] NSWCATCD 68.

What is the content of the obligation and when will the Owners Corporation have breached it, giving rise to a potential liability to damages?

Common property memorandum

Section 107(1) of the SSMA introduces the concept of a 'Common Property Memorandum'. The Common Property Memorandum is a document that may be adopted by strata scheme by-laws. It specifies whether the owners corporation or the lot owners are responsible for the repair and maintenance of identified parts of the building. Regulation 27 of the *Strata Schemes Management Regulation 2016* identifies the Common Property Memorandum, and a copy can be found at the attached link.

http://www.fairtrading.nsw.gov.au/biz_res/ftweb/pdfs/Tenants_and_home_owners/Common_Property_Memorandum.pdf

Ridis v Strata Plan 10308 (2005) 63 NSWLR 4

John Ridis was an occupier of one of the units in a building at 206A, Victoria Road, Bellevue Hill (the building), when he sustained an injury to his right arm. The injury occurred when he was entering the building via the front door and put out his hand to prevent the door from closing and locking on him. The glass pane in the door shattered and severely lacerated his right forearm. He sued the owners corporation having the management and control of the building claiming, amongst other things, damages for breach of its statutory duty under s 62 of the *Strata Schemes Management Act 1996*.

The claim was rejected in the Court of Appeal, which comprised McColl and Hodgson JJA, Tobias JA dissenting.

McColl JA said this, at 171:

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> … subs 62(1) and (2) do not impose an obligation on the respondent to insert new glass in a door which, as in the present case, was relevantly operating as intended (and, therefore, did not require maintenance or repair) – let alone an obligation to procure experts to assess the premises to determine whether any of the materials of which the common property was constructed could be made safer.

Tobias JA said that an obligation to maintain and repair *was* imposed, because because s 62(3) required an owners corporation considering not to effect an act of maintenance etc., to resolve that that decision is appropriate (to reverse the language of s 62(3)(a)) and will not (inter alia) "affect safety".

McColl JA disagreed. She said that the obligation on the owners corporation to maintain the common property and to keep it in a state of good and serviceable repair and renew or replace any fixtures or fittings which have fallen into disrepair is not attracted by a glass door which was otherwise in good repair and operating as intended, albeit that the glass in it did not accord with that used in contemporary buildings: the subsections of 62(3) were directed to circumstances where something in the common property is no longer operating effectively or at all, or has fallen into disrepair, and an owners corporation was not obliged to conduct or procure the conduct of an expert assessment of every possible source of danger in the common property and, if so advised, to upgrade the materials in that property to accord with contemporary, albeit non-binding Australian Standards.

Seiwa Pty Ltd v Owners Strata Plan 35042 [2006] NSWSC 1157

Seiwa claimed damages for breach by the owners corporation of its duty under s 62, properly to maintain the common property, in particular the rectangular steel uprights which provide the framework enclosing a balcony that forms part of Seiwa's unit, and the waterproofing membrane that seals the floor of its external patio so as to prevent water from the surface of the patio entering into the unit. The owners corporation said that it had taken all reasonable steps to comply with its duty under s 62, and that Seiwa had caused the damage by its own negligent failure to notify defects to the owners corporation at an appropriate time.

Brereton J said that 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 s 62 duty. He also said that the strict nature of the owners corporation's duty made whether or not it took all reasonable steps irrelevant, if ultimately it failed at any time to meet the strict requirements of the s 62 duty, and that contributory negligence was no defence to an action for breach of statutory duty. Similarly, because of the strict nature of the s 62 duty, it was unnecessary to resolve whether the owners corporation attended to the defects with due diligence and expedition

Seiwa claimed for the cost of undertaking works to rectify a defect in the common property: it sought to be permitted to perform the requisite repairs to the common property which the owners corporation ought to have done, and to recover damages for to the cost to it of doing so. This was held to be in the nature of a claim for the costs of abatement. Brereton J said that by analogy with the position relating to abatement of a nuisance, in his opinion such damages were not recoverable. His view

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was that the damages to which Seiwa is entitled comprise the diminution in the value of its unit occasioned by the continuing defect, and the consequential loss of the use of the unit since August 1994.

Trevallyn-Jones v Owners Strata Plan No 50358 [2009] NSWSC 694

Ms Trevallyn-Jones was the owner of unit 7 in a block of units. The tiled floor of the outside balcony of Unit 7, the external wall of Unit 7 located between the interior and the balcony and a wall dividing the interior of Unit 7 from the adjacent unit, together with the parquetry flooring inside Unit 7) form part of the common property of the Strata Plan.

Ms Trevallyn-Jones alleged that the Owners Corporation was in breach of its statutory duty in that it failed properly to maintain and repair the balcony floor and walls so as to prevent rainwater from penetrating into the interior of Unit 7 and failed to repair damage to the parquetry floor of Unit 7 which had resulted from water penetration into Unit 7.

After rectification works had been completed Ms Trevallyn-Jones sought as damages the rent which could have been obtained had Unit 7 been leased for the period from 13 May 2007 to February 2009.

The evidence was, in summary, that it took a period of almost seven years from the initial complaint by Ms Trevallyn-Jones in relation to water penetration until the problem was finally fixed by contractors engaged by the Owners Corporation; it had taken three and a half years (ie until August 2005) for the Owners Corporation to do any work at all and then there was a gap of almost two years before further work took place, which work then stretched over a period of seven months and for another year before it was finally completed; during which period orders were made by the CTTT on 16 January 2007 and amended on 9 February 2007 (which were breached by the Owners Corporation given that, far from completion of the work by 31 March 2007 as ordered, the work did not even commence until late May 2007).

The Owners Corporation submitted that insofar as the duty under s 62 was a duty "properly" to maintain and keep in good and serviceable repair the common property, an element of reasonableness is imported into any examination of the scope of the duty. It was submitted that an interpretation of strict liability would place an onerous burden on the Owners Corporation in the situation where any defect, whether latent or recently discovered, or any damage caused by the actions of third parties despite the Owners Corporation carrying out reasonable attempts to effect repair, would be a breach which permitted an action for damages.

Her Honour rejected the submission. After reviewing the authorities, and in particular what was said in *Seiwa* and *Ridis*, she said this:

> In my view, in ascertaining the scope of the requisite degree of maintenance or repair, the use of the word "properly" imports a balancing exercise, namely to determine what in all the

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> circumstances is "properly" to be done, in terms of maintenance. I see the word "properly" as referable to the ambit or scope of maintenance works required to be carried out by the Owners Corporation, *not* as a qualification of what is required in order to satisfy the obligation once the scope of the requisite works has been determined. Once the ambit of the necessary works ("properly" to effect maintenance) has been ascertained, the fact that the Owners Corporation may have taken reasonable steps to effect those works (but has been incapable for whatever reason of so doing) does not mean that there is no breach of the statutory duty.

Her Honour said that, on any view of things, the obligation "properly" to maintain and to keep in a state of good and serviceable repair the common property must encompass attending to actual problems of water penetration and the repair of parquetry flooring which had buckled, as had the flooring in Unit 7, to such an extent that even the expert valuer called for the Owners Corporation considered that at least some basic repairs were necessary before the unit would reasonably be able to be offered for rent. There was, therefore a clear breach by the Owners Corporation (however well intentioned it may have been) in failing to rectify the problems to the common property in Unit 7 over a period of some six and a half to seven years.

Stolfa v Hempton [2010] NSWCA 218 (2 September 2010)

The facts were that the certain works at a block of home units and at the cost of the owners corporation. It was held by Brereton J at first instance that the works were required under s 62 and therefore did not require a special resolution even if they had involved an improvement or enhancement to the common property, and this finding was upheld by Allsop P (as His Honour then was) in the Court of Appeal.

The Owners Strata Plan 50276 v Thoo [2013] NSWCA 270

In Thoo, the Court of Appeal, in addition to determining that a breach of statutory duty did not sound in damages, also considered whether or not there had been a breach of s 62(2).

The facts of the case were that Dr Thoo was the owner of three commercial lots in a strata scheme that were to be leased as shops for selling hot food. They required n adequate exhaust ventilation system to extract cooking fumes and vapours. Dr Thoo wanted the Owners Corporation to provide the ventilation system.

At first instance Slattery J had said that an important element of the content of the duty to "renew or replace" emerges when s 62(2) is applied to a discrete system within common property, which has the function of providing services to lot owners in the strata scheme. If the system is not operating efficiently/effectively/adequately or it does not have the capability to serve the (reasonable) needs of the lot owners who wish to make use of the system, then the Courts have consistently found a breach of s 62(2).

But, as Tobias JA pointed out [at 98] the authorities in relation to a "discrete system" do not apply where no complaint is made that the existing system should have been

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designed with a larger capacity than was adopted at the time of its construction. The complaint made in *Thoo* was that a system which had an appropriately designed capacity at that time it was constructed was now deficient because it could not adequately service lots which, as far as one knows, were not contemplation as requiring access to the system at the time of its design.

His Honour identified the extent of the duty at [130] as follows:

> … common property fixtures or fittings must be renewed or replaced under s 62(2) only when they are no longer operating effectively or have fallen into disrepair to the point where their renewal or replacement is called for as they can no longer be kept in a state of good and serviceable repair pursuant tos 62(1). Once it was found, as his Honour did, that the system had not fallen into disrepair but was operating according to its original design capacity, there could be no breach of s 62(2) by reason of the refusal of the Owners Corporation to replace the system. Accordingly, in my respectful opinion the statement by his Honour at [115] of his reasons that there was a specific duty on the Owners Corporation under s 62(2) to keep common property operating efficiently so it could be used and enjoyed by all lot owners, subject only to the passing of a special resolution for its exclusive use, is too broad.

Tobias JA also considered the decision of Gzell J in *Lin v The Owners - Strata Plan No 50276* [2004] NSWSC 88. Lin also involved access to a ventilation system by shop units in a strata scheme. But the applicant was not seeking an extension to the capacity of the existing system, rather, it was seeking that the owners corporation pay for range hoods and ducting so that it could access the existing system. Gzell J said this:

> 52 The plaintiffs, in common with other lot owners, have a right to use and enjoy the exhaust ventilation system. The only way in which that can be done in all but one of the shops in the lots owned by the plaintiffs is to install a hood in or below the ceiling of the lots and to install ducting in the common property connected to the existing ducting of the system. That is the way in which the defendant has provided access to the exhaust ventilation system to other lot owners. To suggest that the defendant is under no duty to provide such access because it involves additions to the common property is specious.
>
> 53 The cost of such a connection might be charged by an owners corporation to the lot owner concerned, but to deny access is not only in breach of the *Strata Schemes Management Act 1996*, s 62(2) under which the duty to renew or replace extends to the addition of new parts, but it also infringes the proprietary right of a lot owner to have possession of the common property.
>
> 54 In my opinion, the defendant had a duty to add new ducting, fans and risers to the exhaust ventilation system in the Hunter Connection to increase its capacity to service all lot owners in the Food Court area who might seek reasonable access to the system. And the defendant had a duty to have installed additional ducting in the common property to link new hoods in those lots to the exhaust ventilation system.

Tobias JA doubted whether the denial of access to an existing system involved a breach of s 62(2). He said this, at [112]:

> It is apparent from Gzell J's remarks at [53] of his reasons that he considered that the Owners Corporation's duty under s 62(2) to renew or replace extended to the provision of new ducting, fans and risers sufficient to enable a lot owner to access the common property, which it had a

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> proprietary right to do. I have some doubt as to whether s 62(2) can be used for that purpose. I can accept that a lot owner has a proprietary right to access the relevant part of the common property, in the present case the exhaust system. But that is not as a consequence of the Owners Corporation's duty under s 62(2) to renew or replace the common property, but rather is an exercise of a lot owner's proprietary right which the Owners Corporation cannot deny.

Discussion

It is suggested that the following propositions can be drawn from the authorities:

- the duty does not oblige the Owners Corporation to modify or enhance or improve the common property beyond the original design, although proper repair and maintenance may in fact modify or enhance the common property;

- a breach arises as soon as something in the common property is no longer operating effectively or at all, or has fallen into disrepair;

- the word "properly" is referable to the ambit or scope of maintenance works required to be carried out by the Owners Corporation, *not* as a qualification of what is required in order to satisfy the obligation once the scope of the requisite works has been determined;

- the fact that reasonable steps have been taken to effect repairs necessary to properly repair and maintain the common property is not a defence to a claim for breach if those the work has not been carried out;

- contributory negligence is no defence to a claim for breach of the obligation.

It would seem, therefore, that an owners corporation may be liable for damages for breach of statutory warranty in circumstances where neither it nor a lot owner is aware that the common property has fallen into disrepair, provided that a claim is made within 2 years of the claimant lot owner becoming aware of the loss.

It would also seem that an owners corporation may find itself liable despite acting with reasonable diligence. Once informed of a defect, it will of necessity take time to call meetings, pass resolutions, call for tenders and approve them, and then have the work carried out, but if, in the meantime, the owners is, for example, suffering from a loss of rent, this will be claimable from the owners by way of damages.

Special resolution pursuant to 106(3)

The requirements of s 62(3), which is in the same terms as s 106(3) were considered by the Court of Appeal in *Thoo*. Tobias JA said this, at [161]:

> In my view, it is clear that s 62(3) does not, either expressly or implicitly, require as a pre-condition to an owners corporation making a determination that it specifically form an opinion as to the two matters referred to in sub-clauses (a) and (b).

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He went on to say, at [162], that:

> the exercise of a statutory discretion such as that in s 62(3) by an owners corporation may be challenged on administrative law grounds such as *Wednesbury* unreasonableness (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] EWCA Civ 1; [1948] 1 KB 223 as recently discussed by the High Court in *Minister for Immigration and Citizenship v Lin* [2013] HCA 18), the failure to take into account a relevant consideration or the taking into account of an irrelevant consideration.

His Honour went on to discuss what might be encompassed within the word "inappropriate". He said [at 166] that it was not confined to a situation where the relevant renewal or replacement is unnecessary, and expressly agreed [at 166] with what was said by McColl JA in *Ridis*, at [174]:

> I do not accept that the s 62(3) requirement that an owners corporation considering not to take action under either s 62(1) or s 62(2) determine by special resolution that that decision is "inappropriate" and "will not affect the safety of any building, structure or common property in the strata scheme..." impose the duty for which the appellant contends. Considering whether an action is "inappropriate" requires the owners corporation to determine, in the circumstances, that it is unsuitable to undertake an item of maintenance etc. Considerations relevant to this decision may include the expense of the item of maintenance or repair.

It may be argued in some circumstances that the passing of a special resolution may constitute a 'fraud on the minority'. Slattery J set out the applicable principles in *Thoo* at first instance.

> 177. The legal principles that define the application of the doctrine of fraud on a power and *Gambotto v WCP Limited* [1995] HCA 12; (1995) 182 CLR 432 (" *Gambotto's Case* ") principles to strata schemes may be shortly stated.
>
> 178. First, the doctrine of fraud on a power and the principles of *Gambotto's Case* apply to bodies corporate formed under *the 1973 Act* and to the powers of the proprietors exercisable at general meetings: *Houghton & Anor v Immer (No. 155) Pty Limited & Anor* (1997) 44 NSWLR 46, at 53 per Handley JA.
>
> 179. Second, the formal validity of an exercise of a power is a pre-condition for the grant of equitable relief against its fraudulent exercise; if the attempted exercise of a power was void, adequate relief was available at law, and there was no occasion for equity to intervene: *Houghton & Anor v Immer (No. 155) Pty Limited & Anor* (1997) 44 NSWLR 46 at 52 and *Sugden on Powers*, 5 th Edition 1831, at 415.
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> 180. Third, fraud on a power does not require conduct amounting to fraud in the common law sense or conduct that is dishonest or immoral; in this context a fraudulent exercise of power is constituted if it is exercised for a purpose with an intention beyond the scope of the power: *Vatcher v Paull* [1915] AC 372, at 378 and *Lin v The Owners Strata Plan 50276* [2004] NSWSC 88 at [86]. The conclusion of the fraudulent exercise of a power may be inferred without analysis of the individual motives and intentions of the persons voting: *Lin v The Owners Strata Plan 50276* [2004] NSWSC 88 at [86].
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> 181. Fourth, the doctrine of fraud on a power was developed long before the earliest legislation dealing with companies. The doctrine applies to the exercise of powers (to alter by-laws) conferred on a majority or a special majority of shareholders at a

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general meeting "like other powers must be exercised bona fide, and having regard to the purposes for which they are created, and to the rights of persons affected by them": *British Equitable Assurance Co Ltd v Baily* [1906] AC 35 at 42 and *Houghton & Anor v Immer (No 155) Pty Limited & Anor* (1997) 44 NSWLR 46 at 53.

182. Fifth, the doctrine of fraud on the minority is capable of application in relation to the contemplated expropriation of minority rights to a shared used of the relevant part of common property: *Young & Anor v Owners Strata Plan No 3529* [2001] NSWSC 1135 at [45] and *Lin v The Owners Strata Plan 50276* [2004] NSWSC 88.

183. Fifthly, the principles in *Gambotto's Case* apply not only to the "expropriation" of rights in the sense of the compulsory taking of the rights or property of another to oneself by transfer, but also to the compulsory destruction of rights: see *Heydon v NRMA Limited & Ors* [2000] NSWCA 374; (2000) 51 NSWLR 1, per Ormiston AJA at 206 [577] and *Young & Anor v Owners Strata Plan No 3529* [2001] NSWSC 1135; (2001) 54 NSWLR 60, at 74[52].

In *Thoo* Tobias JA said [at 196] that in his opinion the structure of s 62 leaves very little room for the operation of the doctrine of fraud on the minority:

> The negative impact that such a determination may have upon the minority, if otherwise the resolution is valid, is, at least inferentially, contemplated by s 62(3) itself, as it has the effect of negativing what would otherwise be a breach of duty on the part of an owners corporation in declining to renew or replace an item of common property that would no doubt benefit lot owners otherwise entitled to its use and enjoyment. But that is the nature of the legislation.

That is not to say that a special resolution passed specifically for the purposes of defeating a claim for damages would be upheld. In such circumstances, the inference may be drawn that the power had not been exercised in good faith having regard to the purposes for which it was created.

Deferring compliance

Section 106(4) enables compliance to be deferred 'If an owners corporation has taken action against an owner or other person in respect of damage to the common property'.

The manner in which the section might operate may best be discussed by reference to an example.

Let it be supposed that a lot owner experiences leaks from the balcony of his unit. He asks the owners corporation to fix it and claims damages for loss of rent because he loses his tenant.

On the principles discussed above, the claim would have to be brought within 2 years of the lot owner first being aware of the loss of rent.

Let it then be supposed that, a year after proceedings have commenced, and two years after the loss of rent commenced, the owners corporations resolves to take

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TEL: 9221 4533 FAX: 9221 4951 MOB: 0418 288 591 DX: 247

proceedings against another person, for damage to common property, including the damage that caused the leak to the lot owners unit.

After the proceedings against the other person starts, the owners corporation 'may' presumably by resolution of the strata committee, defer compliance.

But the deferral can only be until the proceedings against the other person are 'completed', at which point, presumably, the obligation resumes.

A number of questions arise, including the following:

- what happens to the lot owners 'action' once the decision to defer compliance is made?

- Can the lot owner still claim for the loss until the date that compliance is deferred?

- Does the lot owner's loss continue to accrue, despite the deferral of the obligation?

- What happens when the proceedings against the other person are 'completed'?

What happens to the lot owners 'action' once the decision to defer compliance is made?

It seems unlikely that it was the intention of the legislature that existing claims would be extinguished once a decision to defer compliance has been made. The notion that compliance is 'deferred' pre-supposes an existing obligation, and the word 'deferred' means to put off to a later time, rather than to permanently bring to an end. There has still been a breach, and there still exists a claim for damages. Moreover, if the owners corporations' proceedings were commenced and then, shortly after, withdrawn because, for example, they were misconceived, or out of time, then the consequence might well be that the lot owners' claim if, brought again, would also be out of time.

Accordingly, it is suggested that an existing claim will remain on foot, even if the owners corporation chooses to defer compliance.

Can the lot owner still claim for the loss until the date that compliance is deferred?

If the suggestion above is correct, and the claim is not extinguished, then it would seem that the lot owner would still be able to claim for loss, at least until the date of deferral.

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Does the lot owner's loss continue to accrue, despite the deferral of the obligation?

As a matter of basic principle, the answer would seem to be that such losses would not continue to accrue. It is hard to see how damages can be said to accrue as a result of a failure to perform an obligation that does not have to be performed because it has been deferred.

But if that is correct, then it raises further issues.

In *Strata Plan 79215 v Nazero Constructions Pty Ltd* [2016] NSWSC 231 (15 March 2016), Meagher JA, sitting as a judge at first instance, said this, in relation to a claim (that in the event was not pressed) for consequential losses incurred by lot owners:

> 20. There is one remaining question raised by Mr Madden's assessment. That is whether the plaintiff is entitled to the consequential costs claimed. Notwithstanding that after the hearing was concluded the plaintiff indicated that it no longer pressed this claim, I will address it briefly. The claim brought by the plaintiff as owners' corporation is not one in which it is said that the owners of the lots in the strata scheme are jointly entitled to claim against the defendants: cf *Strata Schemes Management Act 1996* (NSW) (Strata Schemes Act), s 227. Accordingly its claim must be dealt with on the basis that it is confined to the first defendant's liability to the owners' corporation for loss or damage suffered by it.
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> 21. The costs of moving furniture and finding alternative accommodation are not costs which in the ordinary course would be incurred by the plaintiff as distinct from the owners or occupiers of the residential units. Unless the plaintiff is liable on some basis to incur those costs, or to reimburse or indemnify those owners or occupiers for incurring them in the carrying out of work to repair the common property, it is not entitled to recover them by way of damages. No statutory provision was relied on by the plaintiff as giving rise to such a liability in the owners' corporation. The costs would not be incurred in respect of "any damage to a lot or any of its contents caused by or arising out of the carrying out" of the proposed rectification work. Accordingly the owners' corporation would not liable for them under s 65(6) of the Strata Schemes Act.
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> 22. The basis on which the plaintiff initially contended that it could be liable to reimburse the unit owners for those costs was as damages for breach of its obligation under s 62 of the Strata Schemes Act to maintain and repair the common property. The relevant breach was said to be the existence or continuance of the defects which are the subject of the claim against the first defendant. However the existence of those defects was not the result of any breach by the plaintiff and their continuance, which could only involve delay in the performance of any obligation to repair, does not in this case give rise to the need for the owners or occupiers to vacate their units. Had it been pressed, I would have rejected this claim for consequential costs.

It may be argued that because s 106(5) has the effect that a plaintiff owners corporation 'is liable … to reimburse … those owners or occupiers for incurring [consequential costs] … in the carrying out of repair work to common property' or for 'delay in the performance of an obligation to repair', then reasonably foreseeable consequential costs which would be claimable by lot owners against the owners corporation can be claimed by the owners corporation in claims for damages for breach of a statutory warranty.

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But if the decision to defer the obligation to properly repair and maintain the common property has been made, then, arguably, losses accruing after that decision are not reimbursable and therefore not claimable from the 'other person'.

Another issue may arise where a lot owner becomes aware of damage to his or her lot at a time when the obligation to repair and maintain the common property has been deferred. It would be possible for the 2 years limitation to expire before the proceedings were completed, after which any claim brought by the lot owner would be out of time.

It may be relevant that s 106(8) says that the section does not affect any duty or right of the owners corporation under any other law. The Court of Appeal, in *McElwaine v The Owners – Strata Plan 75975* [2017] NSWCA 239 have said that the existence of the statutory right to take proceedings (if not claim damages) under s 62 of the *Strata Schemes Development Act 1996*, does not necessarily preclude a party from making a claim for common law nuisance against an owners corporation. It is possible that while damage for contravention of s 106 will not accrue, damages for nuisance may continue.

What happens when the proceedings against the other person are 'completed'?

The word 'completed' means, presumably having settled, or otherwise determined by a court or tribunal. It does not appear to mean the time when the damage to the common property is ultimately repaired or maintained.

At completion the obligation to repair and maintain the common property will resume and the owners will become potentially liable to lot owners for any damages arising from the contravention of that obligation.

In circumstances where there has been, for example, loss of rent because of water ingress, this may well be the same loss that occurred before the now-completed proceedings against the other person commenced, in which case the lot owner may find that he (or she) is out of time to commence new proceedings for recovery of damages.

It is suggested that where an action for contravention of the obligation have been commenced by lot owners before the decision to defer the obligation has been made, and where the losses claimed continue to accrue, the correct approach is to stay the action pending completion of the proceedings.

The limitation period

Section 106(6) says that an owner may not bring an 'action' for breach of statutory duty under s 106 more than 2 years after the owner first becomes aware of the loss. An issue that may arise is the identification of the 'loss' referred to.

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By way of example, a lot owner may incur a loss because of a damp carpet caused by a leaky balcony, but decide not to make any claim until his tenant quits because of the damp. If the lot owner sues for loss of rent and only for loss of rent, the question is whether the loss occurs when he first becomes aware of the loss of rent, or when he first becomes aware of incurring a loss because of a damp carpet.

It is suggested that the 'loss' when s 106(6) is read with s 106(5), is the reasonably foreseeable loss that the lot owner seeks to recover: in the example above, the loss of rent.

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