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In a landmark ruling, NCAT has ordered an owners corporation to pay compensation to an owner for water damage to the owner's unit caused by defects in the common property. This ruling indicates that NCAT is able to resolve strata disputes by making compensation orders. But has NCAT got it wrong?

A History Lesson

In 1993, Mr Lubrano owned a unit in an apartment building in Woollahra, Sydney. Over many years, water leaked into Mr Lubrano's unit. The water leaks were caused by defects in the common property of the building which the owners corporation did not fix. The dispute between Mr Lubrano and the owners corporation ended up in the Supreme Court. The Court concluded that Mr Lubrano was entitled to paid compensation by the owners corporation as a result of the failure of the owners corporation to repair the defects in the common property that allowed water to leak into his unit in breach of the owners corporation's duty to properly maintain and keep in good repair the common property. The Lubrano case was the first of its kind. It was the first time a Court or Tribunal concluded that an owner was entitled to be paid compensation by an owners corporation as a result of the owners corporation's failure to keep the common property in good repair: see *Lubrano -v- Proprietors of Strata Plan No. 4038* (1993) 6 BPR 97, 457.

History Repeats Itself

After *Lubrano's* case, there were a series of cases in which owners successfully sued owners corporations for compensation. These cases all had a common theme. There were defects in the common property of a strata building which the owners corporation did not fix which allowed water to leak into and damage one or more units in the building over several years. In those cases, the Courts concluded that the affected owners were entitled to be paid compensation by their owners corporations to cover financial losses they suffered as a result of the failure of those owners corporations to comply with their duty to properly maintain and keep in good repair the common property. In those cases, the Courts awarded the owners compensation for:

- rental loss and the cost of carrying out repairs to damaged lot property and common property in the approximate sum of \$500,000: see *Janlz (No. 1) Pty Ltd -v- The Owners – Strata Plan No. 11011* (unreported, NSW District Court, Robison DCJ, Case No. 499/05, 7 November 2006);
- rental loss as a result of the unit becoming uninhabitable as a consequence of repeated water ingress in the approximate sum of \$150,000: see *Seiwa Pty Ltd –v- Owners Strata Plan 35042* [2006] NSWSC 1157;
- rental loss, cleaning costs and expenses of carrying out repairs to water damage that had affected a unit as a result of water leaks through the common property of approximately \$50,000: see *Trevallyn-Jones –v- Owners Strata Plan 50358* [2009] NSWSC 694;
- rental loss, carpet replacement costs and expenses to repair water damage to the unit of approximately \$100,000: see *Nicita -v- Owners of Strata Plan 64837* [2010] NSWSC 68.
- the costs of engaging lawyers and experts to convince an owners corporation to repair defects in the common property: see *Fligg -v- Owners Strata Plan 53457* [2012] NSWSC 230.

Everything Changes

On 22 August 2013, everything changed. On that date, the NSW Court of Appeal held that an owner was not entitled to claim compensation from an owners corporation for losses arising out of a breach by an owners corporation of its duty to properly maintain and keep in good repair common property: see *Owners Strata Plan 50276 -v- Thoo* [2013] NSWCA 270. By doing so, the Court of Appeal concluded that all of the previous cases, starting with *Lubrano's* case, had been incorrectly decided. The decision in the *Thoo* case put an end to compensation claims by owners against owners corporations arising out of defects in the common property which an owners corporation failed or refused to repair. Or, at least, that is what everybody thought.

The Rules of the Game Change (Again)

On 30 November 2016, the *Strata Schemes Management Act 2015 (2015 Act)* commenced. The 2015 Act is new legislation that was five years in the making after extensive community consultation by the NSW Government. Section 106(5) of the 2015 Act reversed the decision of the Court of

Appeal in the *Thoo* case. It says that an owner of a lot is now entitled to recover from an owners corporation (as damages for breach of statutory duty), any reasonably foreseeable loss suffered by the owner as a result of a breach by the owners corporation of its duty to properly maintain and keep in good repair common property. The first case to consider a compensation claim by an owner against an owners corporation under the 2015 Act was recently decided by the NSW Civil and Administrative Tribunal (NCAT): see *Rosenthal v The Owners - SP 20211* [2017] NSWCATCD 80. The decision of NCAT reinforces the old adage that “the more things change, the more they stay the same.”

NCAT’s Decision – Rosenthal’s Case

Mr and Mrs Rosenthal own a penthouse unit in a strata building. For several years, water has leaked into the penthouse unit through defects in the common property roof and adjacent areas. The owners corporation of the building did not fix those defects. On 22 December 2016, Mr and Mrs Rosenthal started legal action against the owners corporation in NCAT. In their case, the Rosenthals asked NCAT to order the owners corporation to repair the defects in the common property that are allowing water to leak into their unit and to pay compensation to them to cover the costs they incurred repairing damage to their unit as a result of that water ingress.

The Controversy

On 29 August 2017, NCAT upheld the Rosenthal’s claim, ordered the owners corporation to repair the defects in the common property and also ordered the owners corporation to pay Mr and Mrs Rosenthal compensation in the sum of \$8,793.49 to cover the expenses they incurred repairing damage to their unit caused by the water ingress. The compensation order made by NCAT generated considerable controversy. This is because up until the commencement of the 2015 Act, most strata disputes were resolved by Strata Adjudicators or NCAT who did not have power to make compensation orders. However, in the *Rosenthal* case, NCAT decided that it did have power to make compensation orders under the 2015 Act. Indeed, NCAT went so far as to say that its jurisdiction to make compensation orders is unlimited. In other words, there is no cap on the maximum amount of compensation NCAT is able to order an owners corporation to pay an owner arising out of a breach by the owners corporation of its duty to properly maintain and keep in good repair the common property in its building.

NCAT's Reasoning

The 2015 Act gives NCAT power to make an order to settle a strata dispute: see section 232. NCAT considered that this gave it power to make orders to resolve the dispute between the Rosenthals and the owners corporation about not just the repairs that the owners corporation needed to carry out to the common property to stop water leaking into the Rosenthal's penthouse, but also the dispute about the Rosenthal's claim for compensation. Indeed, NCAT considered that it was "clearly ... empowered by s232 to make an order in regard to that issue as well in order, to settle the dispute" about compensation.

A Post Script – Shum's Case

The day after the decision in *Rosenthal's* case was handed down, NCAT delivered its decision in *Shum's* case: see *Shum v Owners Corporation SP30621* [2017] NSWCATCD 68. In the *Shum* case, NCAT awarded an owner of a commercial lot in a strata building in Cremorne, Sydney compensation against an owners corporation in the sum of \$55,943.24 for rental loss, levies and rates and interest. Once again the *Shum* case concerned a leaking common property roof, which an owners corporation did not repair within a reasonable time, that allowed water to leak into and damage a lot. In this case, the tenant of the lot terminated its lease and ceased paying rent and outgoings under the lease in the form of levies and rates because water leakage through the roof made the lot uninhabitable. NCAT held that it was able to (and should) order the owners corporation to pay compensation to the owner to cover rental loss, outgoings not paid by the tenant and interest as a result of the owners corporation's breach of its duty to repair the common property roof.

Analysis

The reasoning of NCAT in relation to its power to make compensation orders is not convincing. NCAT concluded that if Parliament had not intended to give it power to make compensation orders, it would have said so in the 2015 Act (much like it did in the 1996 Act). This reasoning overlooks the fact that the 2015 Act contains a number of provisions which specifically empower NCAT to make compensation orders but only in very specific circumstances, for example, orders to require payment of compensation:

- to a party to a strata management agency agreement or building management agreement (section 72),
- by an owner for overdue levies, interest and recovery expenses (section 86);
- by a developer for raising inadequate levies during the initial period (section 89),
- to a lot owner when a common property rights by-law benefiting that owner is repealed (section 148), and
- to the owner of abandoned goods that are sold by an owners corporation (regulation 33).

If the 2015 Act gave NCAT power to make compensation orders to settle all strata disputes, there would have been no need for any specific provisions to be inserted into the 2015 Act to give NCAT power to make compensation orders in particular circumstances.

Additionally, in the *Rosenthal* and *Shum* cases, NCAT awarded owners compensation for financial losses they sustained before the commencement of the 2015 Act for periods during which compensation claims were not available to owners against owners corporations because of the decision in *Thoo's* case. In other words, NCAT gave section 106(5) of the 2015 Act retrospective effect (which is unlikely to have been intended by Parliament).

Finally, the notion that there is no restriction on the amount of compensation NCAT is able to award is difficult to accept. Does NCAT really have power to make multi-million dollar compensation awards when, for example, an owner complains that the value of his or her unit has diminished considerably as a result of water ingress through common property defects with an owners corporation has not fixed?

Conclusion

Compensation claims by owners against owners corporations arising out of common property defects have had a tortuous history. The current state of play is that an owner is entitled to claim compensation from an owners corporation to cover reasonably foreseeable financial losses the owner suffers as a consequence of a breach by an owners corporation of its duty to properly maintain and keep in good repair the common property. Any Court has the power to make a compensation order

and, if the decisions in the *Rosenthal and Shum* cases are correct, so does NCAT. However, the jury is still out on whether the *Rosenthal* and *Shum* case were correctly decided on that issue and will be followed in subsequent cases in NCAT. For that reason, it remains open to any owners corporation that is sued for compensation by an owner in NCAT to argue that NCAT does not have power to make an order for payment of compensation.

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