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# NOVEL COMPENSATION CLAIMS AGAINST OWNERS CORPORATIONS -

## GOODBYE *THOO*

JS MUELLER & CO FORUM 31.07.18

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# NOVEL COMPENSATION CLAIMS AGAINST OWNERS CORPORATIONS – GOODBYE *THOO*

## Introduction

In *Owners v Strata Plan 50276 v Thoo* [2013] NSWCA 270, the NSW Court of Appeal ruled that a lot owner was not entitled to damages from an owners corporation for losses suffered by the lot owner caused by the owners corporation's breach of its strict statutory duty to repair and maintain common property under section 62 of the *Strata Schemes Management Act 1996*. However, the law changed on 30 November 2016 when the *Strata Schemes Management Act 2015* finally commenced operation. The new Act introduced a new section 106 which provides to the effect that a lot owner can now recover damages from an owners corporation for losses suffered by the lot owner caused by the owners corporation's breach of section 106.

So far, there are 3 reported cases on damages claims for breaches of section 106.[1] This paper will look at what those damages claims were and how the NSW Civil & Administrative Tribunal (**NCAT**) dealt with them.

## The new law

The relevant parts of section 106 in the new Act are:

> ***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.*
> *…*
>
> *(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.*

[1] *Rosenthal v The Owners – SP 20211* [2017] NSWCATCD 80; *Shum v Owners Corporation SP 30621* [2017] NSWCATCD 68, on appeal *The Owners Strata Plan No 30621 v Shum* [2018] NSWCATAP 15; and *Mullins v Owners Corporation SP 15342* [2017] NSWCATCD 97.

*(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.*

*…*

Section 106(1) and (2) simply re-state the law that was set out in section 62(1) and (2) of the old Act. Section 106(5) and (6) are new law.

Section 106(5) creates the new cause of action (or right to recover damages) for breach of the statutory duty in section 106. Importantly, only lot owners can sue and recover damages; occupiers cannot.

A lot owner must prove the following to recover damages:

- *Breach*: the owners corporation breached section 106.
- *Loss*: the lot owner suffered a loss.
- *Causation*: the breach caused the loss.
- *Reasonable foreseeability of loss*: the loss is reasonably foreseeable.

  Practically speaking, this means the kinds of losses for which damages could be awarded are: loss of rent, loss of outgoings (where the lot is tenanted), the costs of alternative accommodation/premises and relocation (where the lot is owner-occupied), loss of profit (where the lot is owner-occupied and a business is conducted from it), and damage or loss of lot property or contents. It also means there are limits to the types of losses that will be compensated and damages will not be awarded for far-fetched losses.

Section 106(5) only permits recovery of damages for losses that occurred on or after ***30 November 2016*** so if the loss occurred before 30 November 2016, section 106 does not apply.[2] For losses before 30 November 2016, a lot owner would have to sue at common law for the torts of negligence and nuisance.

Section 106(6) is a statute of limitations that creates a 2 year limitation period within which a lot owner can sue for damages. The limitation period commences when the lot owner first becomes aware of the loss.

[2] *The Owners Strata Plan No 30621 v Shum* [2018] NSWCATAP 15.

**NCAT's "power grab"**

In relation to section 106, the Tribunal has decided:[3]

- It has the power to award damages under section 106; and
- There is no limit on the damages it can award under section 106.

In coming to that decision, the Tribunal cast aside legal arguments against it having the power to award damages. This paper will not focus of those legal arguments because for the time being the position seems to be settled.

There is nothing in the new Act which expressly rules out a lot owner bringing their claim for damages under section 106 in a court, so even if the Tribunal is wrong, damages claims can still be made. There are no reported section 106 cases in any court (yet!) whereas there are the 3 reported NCAT cases on section 106 damages claims referred to above.

The following table sets out some differences between claiming damages in the Tribunal and claiming damages in a court:

| | NCAT | Court |
|---|---|---|
| Loss before 30 November 2016 | No damages under section 106. | Can award damages based on negligence or nuisance (ie common law). |
| Loss on or after 30 November 2016 | Can sue in NCAT under section 106. | Can sue in a court based on section 106 or common law. |
| Rules of evidence | Do not apply - easier, quicker and cheaper to prove. | Apply - more work to prove, take longer and cost more. |
| Expert witness code of conduct | NCAT code does not apply. However, report should make some attempt to comply. | UCPR code applies. |
| Case management | More informal and cheaper. Completion within 6 months. | More formal and expensive. Completion within 12 months. |
| Costs orders | Generally not made. Subject to some exceptions for claims over $30,000 or if special circumstances exist. | Generally the losing party is ordered to pay the winning party's legal costs. |
| Nuisance and negligence claims | No | Yes |
| Jurisdictional limits | None | Local Court - $100,000<br>District Court - $750,00<br>Supreme Court - none |

[3] *Rosenthal v The Owners – SP 20211* [2017] NSWCATCD 80; *Shum v Owners Corporation SP 30621* [2017] NSWCATCD 68 confirmed on appeal in *The Owners Strata Plan No 30621 v Shum* [2018] NSWCATAP 15.

| | Section 106 – statutory damages | Nuisance and negligence – common law damages |
|---|---|---|
| Limitation period | 2 years from when lot owner becomes aware of the loss | 6 years from when lot owner suffers the loss |
| Where to sue? | NCAT or court | Court |
| Evidence, cost | Easier to prove, less evidence required, cheaper | Harder to prove, more evidence required, more expensive |
| When the loss arises | Only applies to losses on or after 30 November 2016, and to losses occurring within 2 years before commencing proceedings | Does not matter as long as the loss occurred within 6 years before commencing proceedings |

***Rosenthal v The Owners – SP 20211* [2017] NSWCATCD 80**

This is a case where the Tribunal ordered the owners corporation to pay damages of $8,793.49 to Mr and Mrs Rosenthal.

In February 2015, the Rosenthals bought a 3 level penthouse apartment in a strata building in Goulburn Street, Sydney. Shortly after moving in, they noticed water leaking into their apartment and notified the strata manager. The owners corporation was already aware from a complaint made in 2013 by a former owner that water had been leaking into the apartment. The owners corporation took no steps to investigate the cause of the water leaks and took no steps to repair common property to eliminate the water leaks until after the Rosenthals commenced their case in the Tribunal in December 2016 (ie over 3 years since the water leaks were first reported!). The Rosenthals sought orders to compel the owners corporation to fix the water leaks and pay damages. The Tribunal made those orders.

On the issue of breach of section 106, the Tribunal did not seem too troubled in finding there had been a breach and said the following at paragraph 83 of the judgment:

> *The very fact of water ingress from outside the lot property into lot property in normal circumstances would therefore indicate that the water is coming from common property. Prima facie that conclusion would be indicative of some failure of the common property that has resulted in the water escaping into the lot property and from that point on would place the obligation squarely on the Owners Corporation to investigate with whatever expert assistance is necessary the cause of the water ingress and to correct it.*

Most of the contest in the Tribunal was whether the Tribunal had the power to award damages for a breach of section 106 (answer: Yes it does) and what were the scopes of the remedial works to common property that the owners corporation should be ordered to carry out. Unfortunately, the judgment does not reveal what losses the Rosenthals suffered or how they were caused by the breach of section 106 because the owners corporation conceded the losses had been caused by the water leaks and also conceded the amount of the losses.

Importantly for present purposes, along the way to finding that it did have the power to award damages, the Tribunal also found that there was no cap on the amount of damages it could award, that is in legal terms, it has unlimited jurisdiction to award damages (like the Supreme Court!). This is to be contrasted with the Local Court where the maximum damages it can award is $100,000, and the maximum in the District Court is $750,000.

Another thing the Tribunal had to consider was whether the water leaks were in common property (answer: Yes they were) and also whether there was a common property rights by-law on foot that transferred responsibility for repair and maintenance of that part of the common property that was leaking to the lot owner (answer: No there was not). There was a common property rights by-law however the definition of works in the by-law and plans attached to it describing the works lacked detail and the Tribunal member had to examine the plans with a magnifying glass to work out what they covered! Not surprisingly, the Tribunal member could not work out what works were covered by the by-law and therefore found the by-law had no role to play in transferring responsibility to the lot owner. That is a lesson for those providing instructions to draft and those drafting by-laws: precision about their subject matter is required if they are to be effective.

This and the next case highlight the obvious risk that water leaks and burst pipes represent in exposing an owners corporation to a damages claim and the need for owners corporation to address them as soon as they arise. These are not uncommon events and are likely to lead to claims such as loss of rent and outgoings (where a tenant vacates or gets a rent reduction), alternative accommodation (where the lot is owner-occupied and becomes uninhabitable), and loss or damage to lot property or personal contents.

***Shum v Owners Corporation SP 30621* [2017] NSWCATCD 68 confirmed on appeal in *The Owners Strata Plan No 30621 v Shum* [2018] NSWCATAP 15**

This is a case where the Tribunal (at first instance) ordered the owners corporation to pay damages of $55,943.24 to Mr Shum for losses occurring both before and after 30 November 2016. On appeal, the Appeal Panel confirmed that Mr Shum was entitled to damages but reduced the award to $28,034.11 because it held Mr Shum could only recover damages for losses occurring on or after 30 November 2016.

Mr Shum was a lot owner in a commercial strata in Military Road, Cremorne. The lot was tenanted. The common property roof leaked water into the lot causing the mould and bubbling paint. The tenant stopped paying rent and outgoings. Over the period January-December 2016, Mr Shum informed the owners corporation that the roof was leaking, the lot was tenanted and the tenant had stopped paying rent. Mr Shum commenced his case in the Tribunal in February 2017, the owners corporation having failed to do anything at that stage. The owners corporation finally fixed the leak in about May 2017. So the Tribunal found that the owners corporation had breached its section 106 duty.

Mr Shum claimed and was awarded damages for: loss of rent; part of the water rates, council rates and strata levies he had to pay (under non-residential leases, the tenant usually pays these as outgoings); and interest on the lost rent and outgoings. Any interesting thing to note here is that an owners corporation was ordered to pay damages to the lot owner made up of the strata levies that the lot owner is required to pay to the owners corporation because the tenant was required to pay them as an outgoing.

Mr Shum also sought and obtained interim orders (in February 2017) to compel the owners corporation to carry out works to fix the leaking roof. By the time of the final hearing (in May 2017), the owners corporation had complied, so the only issue for the Tribunal to decide was damages for breach of section 106.

The owners corporation appealed on the grounds that the Tribunal could not award damages (appeal dismissed on this point) and if it could, it could not award damages for losses occurring before 30 November 2016 (appeal upheld on this point).

There was some evidence that the tenant suffered a loss of profit due to the water leak. However while the Tribunal did not have to take this issue any further, it does allude to the possibility of a future case where an owner-occupier of a non-residential lot conducting business from the lot is unable to do so because of a breach of section 106. It is not difficult to imagine that such an owner could claim the following as its losses: loss of profits; relocation costs; and rent and outgoings for alternative premises. Damages for these items could be significant.

In both the *Shum* and *Rosenthal* cases, as part of its reasons for finding there had been breaches of section 106, the Tribunal referred to previous case law to the effect that the owners corporation's duty under section 106 is a strict one.

***Mullins v Owners Corporation SP 15342* [2017] NSWCATCD 97**

This is a case where the lot owner's claim for section 106 damages failed. It concerned a 14 lot residential scheme consisting of townhouses in Artarmon.

Ms Mullen bought her lot 14 in September 2014 and rented it out to her son. In May 2015, termite damage was identified in the building. In 2016 and 2017, Ms Mullen spent $38,068.04 removing and replacing floor boards and skirting damaged by the termites, and also $5,500 for painting and decorating and $4,774 to install glass balustrades and stainless handrails to a stairwell, both being repair of damage caused by termites. The total of these amounts was $48,342.04 and that is how much in damages she claimed from the owners corporation.

There was evidence that there was a previous termite problem in the building that was eradicated by 2003 but this action was taken by other lot owners and was not known by the owners corporation itself. Pest inspections by the owners corporation in 2009 and 2010 found no termites.

*Why did Ms Mullens lose?*

Ms Mullens lost because the Tribunal found that there was no breach of section 106 and also even if there had been a breach of section 106, that breach did not cause her loss.

While the evidence was to the effect that the damage to Ms Mullens' lot and property was due to termites that had entered through common property, the Tribunal found that the owners corporation was not in breach of section 106. This is because:

- The fact that the owners corporation was not aware of the 2003 termite problem.
- The fact that the 2009 and 2010 inspections did not detect termites.

Taking these factors into account, the Tribunal held that there was no defect or feature of the common property that made it vulnerable to termite attack.

In addition, the Tribunal said that even if there had been a breach of section 106 by the owners corporation, that breach would not have caused Ms Mullens' losses. This is because:

- Ms Mullens' case was that the breach by the owners corporation was the failure to carry out annual termite inspections.

- But more regular inspections of the building, while they may have uncovered the presence of termites, they would not in themselves have prevented the termites entering the building and causing damage.

The Tribunal also referred to the possibility (although it did not make a positive finding to this effect) that the termites may have been introduced to the building during the course of renovations to the lot decking and gardens carried out by Ms Mullens in early 2015 before the termites were discovered in May 2015.

Interestingly, Senior Member Bell who presided in this case noted the decisions in *Shum* (at first instance only) and *Rosenthal* to the effect that the Tribunal has the power to award damages for a breach of section 106, and then said at paragraphs 38 and 40 of the judgment:

> *I have doubts about whether the Tribunal does have jurisdiction to award damages … However it is not necessary for me to make a final determination [on this question] …*

The Appeal Panel's decision in *Shum* came after the decision in *Mullins*, so unless and until the Supreme Court rules otherwise, the Tribunal has the power to award damages for a breach of section 106. Even though there is the possibility the Supreme Court may over-rule *Shum* and *Rosenthal*, that would only have the effect of preventing the Tribunal hearing damages claims. It would not prevent courts hearing them, so the risk to owners corporations of damages claims for a breach of section 106 is not removed.

**Some practical tips**

- Common property needs to be repaired and maintained.

- Particular attention should be paid to fixing common property defects which could result in claims against the owners corporation if those defects are not fixed.

- Water leaks will probably be the defect that mostly likely results in damages claims.

- If a lot owner tells you their lot is tenanted and a defect is affecting their tenant, then the lot owner is probably setting up a damages claim. This puts the owners corporation on notice the tenant could quit or obtain a rent reduction, so making a loss of rent a reasonably foreseeable loss caused by a breach of section 106.

- Insurance may or may not cover the damages itself or the costs of defending a damages claim. It will depend on the circumstances and the terms of the policy.

- Respond to claims. In *Shum*, the owners corporation did not appear at all at first instance. It engaged lawyers for the appeal however on appeal there is little scope for disputing a first instance finding that there was a breach of section 106 or that losses were suffered because these are "*questions of fact*" and the Appeal Panel does not usually over-turn first instance decisions on those questions.

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Carlo is a lawyer of 20 years practicing in the areas of strata law, property law and litigation. Carlo is a well-respected practising lawyer who has experience working across commercial, civil and insurance litigation cases, property and strata law. He has worked for a number of well-known law firms across dispute resolution and litigation, including servicing clients in the property and strata law sectors. Carlo has presented and published papers on contribution between wrongdoers, proportionate liability and practice and procedure. He has also lectured on a range of legal subjects at Curtin University and The College of Law Australia.

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JS Mueller & Co has been servicing the strata industry across metropolitan and regional NSW for almost 40 years. We are a specialist firm of strata lawyers with in depth and unmatched experience in, and comprehensive knowledge of strata law and levy collection.

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