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OWNERS CORPORATIONS, COMMON PROPERTY REPAIRS AND INSURANCE — A TRICKY RELATIONSHIP

Warwick van Ede
Lawyer
BEc LLM Acc Spec (Property)
[Email](#) | [LinkedIn](#)

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Introduction

Owners corporations are not uncommonly faced with the need to repair common property. Cracked walls and failing waterproof membranes are two of the common issues which owners corporations have to deal with. Particular difficulties may arise where, if the owners corporation takes no action, there may be further consequences in terms of damage to other common property, damage to particular lots, and damage to the property of lot owners.

An example of what can happen is where there is water penetration to a lot caused by a cracked or insufficiently sealed roof, and because of an owners corporation's failure to rectify the water penetration issue, the entire ceiling located beneath the roof in question collapses, and in the course of doing so, destroys all the furniture in rooms of the relevant lot.

For some owners corporations, the backing of an insurer can be a "life saver" in a situation like this – but what should the owners corporation do if their insurer declines coverage or otherwise refuses to pay for all or part of the damage which the owners corporation (or a lot owner) is seeking to have fixed?

It is important that owners corporations understand that there may be a difference between their strict obligations under the *Strata Schemes Management Act 2015* (the Act), and the rights (if any) they may have to recover the costs of meeting those obligations from their insurer.

Owners Corporations and Common Property – A Strict Obligation

Section 106 of the Act imposes on owners corporations a strict obligation to maintain and repair common property. Owners corporations need to understand that this obligation is not optional, and nor is it simply a duty to "do your best".

Where there is a failure of common property (such as the failure of a waterproofing membrane in bathrooms) the owners corporation has already breached the duty imposed by section 106 of the Act. That is, the failure of the waterproofing membrane (in this instance) is evidence of the failure of the owners corporation to meet its obligations pursuant to section 106. Once again, the duty imposed by section 106 is not merely a duty to "do your best", or to "take reasonable steps" – it is a strict

responsibility [see for example the decision of the Supreme Court of NSW in *Seiwa Pty Ltd v Owners Strata Plan No. 35042* [2006] NSW SC 1157].

Failure of Common Property and Subsequent Damage

Very often, the first time that an owners corporation may become aware of the failure of certain common property is when a lot owner reports evidence of that failure, for example, evidenced by water leaking into a lot from an upstairs bathroom. At this point, a breach of the owners corporation's duty under section 106 has already occurred, and the owners corporation needs to take swift action.

The reason that the owners corporation needs to take swift action is because of the potential liability it has pursuant to section 106 (5) of the Act. Section 106(5) makes it possible for a lot owner to recover from the owners corporation (monetary) damages which the lot owner suffers as result of the failure of common property.

At this point, it is natural for owners corporations to seek advice from their insurer as to whether the owners corporation is covered by the insurer for the costs of rectifying the damage.

Insurance Coverage?

Whether the owners corporation is covered by its insurance, either in relation to any repairs required to common property, and/or in relation to any consequential damage, will depend upon the terms of the insurance policy which the owners corporation holds. It is possible that the insurance policy will cover part but not all of the costs of works which need to be done, both in relation to the failure of the common property, and in relation to any consequential damage.

What are the owners corporation's responsibilities in such a situation, where there is only partial insurance coverage?

The Owners Corporation is not "off the hook"

The strict responsibility referred to above which the owners corporation has under section 106 of the Act, is not lessened merely because the owners corporation's insurer will not cover the total costs of works required to common property, or to other damage caused by the failure of common property.



We have seen incidents where owners corporations had suggested to lot owners that because the owners corporation's insurance will not cover the total cost of repairs, the lot owner is responsible for the balance of those costs – such a suggestion is incorrect. If the damage is caused by the failure of common property, and therefore a breach of section 106 of the Act, the owners corporation cannot avoid its responsibility for the rectification and repair.

If the owners corporation is fortunate, it will have appropriate insurance to cover the costs of rectification. However, that is not always the case.

If the owners corporation refuses to take responsibility for repairs to common property (and consequential damage), then a lot owner who is affected is likely to be successful if they bring proceedings at the NSW Civil and Administrative Tribunal (NCAT) seeking an order requiring the owners corporation to rectify common property. An action of this kind is a relatively common type of action in NCAT which is brought by individual lot owners.

If such an action is commenced by a lot owner, then the owners corporation will, in addition to having to pay for any works which are its responsibility, need to obtain legal advice, and possibly have representation and pay for that in the NCAT proceedings. There is also the remote possibility that an owners corporation which has acted unreasonably in refusing to carry out works which are its responsibility, may be ordered to pay the legal costs of a lot owner who brings such an action.

There is also the possibility that the owners corporation may be responsible to pay monetary damages to a lot owner. For example, the lot owner may lose a tenant, or be unable to get a new tenant, if there is a persistent and unresolved issue with common property (for example, water leakage). The loss of rent may be something which the owners corporation has to pay for.

The question as to whether NCAT has the power to award monetary damages to a lot owner for breach by an owners corporation of a statutory duty to maintain and repair the common property in accordance with section 106 of the Act is now well established (see for example, *The Owners – Strata Plan No. 30621 v Shum* [2018] NSWCATAP 15).



What Should an Owners Corporation do?

When an owners corporation becomes aware that there is a failure of common property, or that there may be a failure which will occur, the owners corporation should immediately take steps to have that issue assessed. In some instances an insurer may assist with this process, but if they do not then the owners corporation should still take prompt responsibility for doing so.

The best outcomes are achieved where the owners corporation works together with the lot owner and the insurer to work out the most efficient means of rectifying the issue. Avoiding the issue, or delaying an owners corporation response to it, will almost always lead to unhappiness, and may leave the owners corporation significantly worse off financially.

Warwick van Ede

Lawyer | BEc LLM Acc Spec (Property)
warwickvanede@muellers.com.au

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JS Mueller & Co Lawyers 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.

02 9562 1266
enquiries@muellers.com.au
www.muellers.com.au



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