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# RAIN, RAIN AND MORE RAIN... REVISITING THE BASICS OF RESPONSIBILITY TO MAINTAIN COMMON PROPERTY

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REVISITING THE BASICS OF RESPONSIBILITY TO MAINTAIN COMMON PROPERTY**

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Australia recently had its wettest November in 122 years. March and April 2022 have seen unprecedented rainfall in New South Wales. Extensive rainfall events test the patience of every strata manager because they result in numerous complaints about water leaks into strata lots.

Faced with apparently endless demands, owners corporations need to be very clear about their responsibilities, and it is timely to revisit some of the “fundamentals”.

**Step 1 - Common Property – It’s the Owners Corporation’s Responsibility!**

The primary responsibility of the owners corporation in relation to common property is that the owners corporation is required, pursuant to s106 of the *Strata Schemes Management Act 2015 (Act)*:

- (a) to properly maintain and keep in a state of good and serviceable repair the common property;
- (b) where necessary, to renew or replace any fixtures or fittings comprised in the common property.

It is well established in cases decided by the Supreme Court that this duty of the owners corporation is compulsory and is absolute – that is, it is not a duty to use “best efforts” or “take reasonable steps” (*Seiwa Pty Ltd v Owners – Strata Plan 35042 [2006] NSWSC 1157*).

With very few exceptions, the roof of a building together with associated structures and weatherproofing elements will be “common property”.

The exceptions to this rule will be few and far between and will generally be either:

- where there are specific notations on the strata plan to the contrary (for example, in a townhouse development this sometimes occurs); or
- where it has been appropriately determined by the owners corporation (including through an appropriate by-law under the Act) that the responsibility for the maintenance and repair of a particular item of common property has transferred to the lot owner.

However, these are exceptions, and generally an owners corporation should work on the basis that keeping buildings “water tight” is an owners corporation responsibility. That can be challenging in conditions of the kind which we are currently facing.

### **Step 2 - If It Leaks, then the Common Property has Failed**

The cases also remind us that as soon as the common property is no longer operating effectively, then it has fallen into a state of disrepair (*Seiwa*). That means that if the roof is leaking, the owners corporation has breached its statutory duty pursuant to s106 of the Act.

Sometimes owners corporations delay dealing with repairs or maintenance to common property because they look for excuses. How often do we hear strata committees (looking to avoid the expense of common property repairs) make various suggestions about why there is a water leak including (I have heard all of these!):

- “It’s condensation from inside – the lot owner has their heater turned up too high and has to open their window!”;
- “The lot owner needs to close their balcony doors or windows – that is what is letting in the water”;
- “It’s happening because the property next door has changed their drainage/garden/retaining wall”.
- “I don’t know why the Insurer won’t cover it – do we really need to spend that much money?”

In the end, the owners corporation has to face up to the need for repairs and maintenance. Owners Corporations will do well to remember that:

- (a) the section 106 duty may involve repairing fixtures or fittings which have deteriorated, which are damaged, or are operating inadequately (*Ridis v Strata Plan 10308* (2005) 63 NSWLR 449); and
- (b) the duty to repair may require the owners corporation to replace items of common property (as opposed to repairing them) where it is reasonably necessary to do so (for example where an item has reached the end of its service life: see *Glenquarry Park Investments Pty Ltd v Hegyesi* [2009] NSWSC 425).

The lesson here for owners corporations is that there is no time for blame-shifting or prevarication. Owners Corporations should obtain expert advice at the earliest possible moment for their own protection, because one of the consequences of failure of common property is the owners corporation’s potential obligation to pay damages.

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### **Step 3 – Damages payable by the owners corporation for common property failures**

Where an owners corporation has breached its duty pursuant to s106 of the Act (e.g. where there is a failure of common property resulting in water ingress) then pursuant to s106(5) of the Act the owners corporation may be required to pay to a lot owner any reasonably foreseeable loss suffered by the owner, as damages for breach of that statutory duty.

Again, there is no grace period during which the owners corporation can claim that it is “doing its best” to repair. The owners corporation is potentially liable from the moment that the common property fails. Damages which have been found to be recoverable by a lot owner against an owners corporation include:

- (a) Rental loss (*Seiwa v SP35042*) and alternate accommodation expenses (*Carli v The Owners - Strata Plan No 56120* [2018] NSWCATCD 55)
- (b) Costs to clean and carry out repairs to an apartment (*Trevallyn-Jones v Owners Strata Plan 50358* [2009] NSWSC 694);
- (c) Legal costs (*Nicita v Owners of Strata Plan 64837* [2010] NSWSC 68);
- (d) Experts’ fees (*Fligg v Owners Strata Plan 53457* [2012] NSWSC 230).

An owners corporation should move as quickly as possible to properly rectify any failure of common property (such as water ingress) so that the potential losses to the owners corporation pursuant to s106(5) are minimised.

### **Conclusion**

It is critical for owners corporations to obtain advice from appropriately qualified persons at an early stage. Ideally, an owners corporation should engage in a process of preventative maintenance where that is possible. For example, it is a “no brainer” for an owners corporation to pay for regular roof maintenance such as the removal of leaves from gutters and valleys rather than waiting until a significant rain event which results in water ingress to the lots below.

Just as critical for an owners corporation is obtaining appropriate advice once common property fails in order to minimise the owners corporation’s potential liability to pay damages pursuant to s106(5) of the Act, and to avoid the additional expense of being involved in proceedings in the NSW Civil and Administrative Tribunal.

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JS Mueller & Co Lawyers has been servicing the strata industry across metropolitan and regional NSW for over 40 years. We are a specialist firm of strata lawyers with in depth and unmatched experience in, and comprehensive knowledge of all strata law inclusive of by-laws, building defects and levy collections.

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