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POURING BUT YOU
STILL NEED TO FIX IT!

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Introduction

New South Wales has experienced unprecedented wet weather this year. This has resulted in strata managers being run off their feet dealing with complaints about water ingress in apartment buildings. It has also resulted in delays finding contractors who are available to fix defects that are the cause of water ingress. Do those delays provide owners corporations with a lawful excuse from the need to repair defects that are causing water leaks? What about if the defects are caused by the actions of a tenant? And is there any way an owners corporation can avoid its duty to repair common property defects? In this article we take a closer look at the responsibility of an owners corporation to repair common property.

The Duty to Repair

Section 106 of the *Strata Schemes Management Act 2015 (Act)* imposes on an owners corporation a duty to:

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

This duty requires an owners corporation to fix any defects in the common property that are allowing water to leak into a lot.

The Nature of the Duty to Repair

The duty of the owners corporation to maintain and repair common property has been considered in a number of cases.

In those cases, the Supreme Court and NCAT has said that the duty to repair common property:

- (a) is compulsory;
- (b) is absolute; and
- (c) is not a duty to use reasonable care to maintain and repair common property or to take reasonable steps to do so but a strict duty to maintain and keep in repair.

This means that an owners corporation cannot delay any repairs that need to be carried out to fix defects in the common property that are causing water to leak into a lot. Even if it is impossible to find contractors who are available to repair those defects, that does not provide an owners corporation with a lawful excuse for delaying any necessary repairs to common property.

Other Aspects of The Duty to Repair

There are other aspects of the duty to repair common property that are often overlooked particularly in the case of new buildings or where a tenant damages common property.

The Supreme Court and NCAT have held that the duty to repair common property:

- (a) extends to require the remediation of defects in the original construction of the building;
- (b) must still be fulfilled even if the owners corporation did not cause the damage to the common property which needs to be repaired.

This means that, in general, an owners corporation cannot blame an original builder or developer for defects in the common property and refuse to fix them. However, if the owners corporation takes legal action against a builder or developer in respect of defects in the original construction of the common property, then the owners corporation can put on hold its obligation to repair common property defects. Further, the cases say that even if a person damages the common property, in general, the owners corporation must still repair that damage, even though it may have a right to recover the cost of that repair from the offender. Alternatively, under section 132 of the Act, the owners corporation can apply to NCAT for an order to require an owner or occupier to repair damage to the common property caused by them. It appears that if the owners corporation takes legal action against an owner or occupier in NCAT to obtain that order, that allows the owners corporation to put on hold its duty to repair the damage.

Anything Else?

The duty to repair the common property also requires the owners corporation to carry out repairs which are not for the benefit of the majority of owners. Indeed, the owners corporation is obliged to carry out repairs to the common property that only benefit a single owner. This means that an owners corporation cannot refuse to repair a leaking window on common property on the basis that the leak only affects one lot.

Is there an Escape Route?

There are generally two ways for an owners corporation to relieve itself from its duty to repair common property (apart from the ways we have discussed above).

First, an owners corporation can pass a special resolution at a general meeting to determine that it is inappropriate to repair a particular item of common property. This can be done under section 106(3) of the Act but only if the decision will not affect the safety of the building or detract from the building's appearance.

Second, an owners corporation can make a common property rights by-law that transfers its responsibility for the repair of a particular item of common property to one or more owners. The by-law needs to be approved by a special resolution at a general meeting. However, the by-law also needs to be approved by the owners who will be responsible for repairing the item of common property under the by-law. Often it proves difficult to obtain the consent of those owners.

What about Compensation?

The recent inclement weather has led to a substantial increase in claims for compensation being made by owners against owners corporations who have failed to repair defects that have allowed water to leak into and cause damage to lot property. Typically, those claims are made by investor owners for rental loss when the damage to their lots become so severe that the lots are uninhabitable. But compensation claims can also cover alternate accommodation expenses if an owner occupier is forced to move out of a lot due to damage caused by water ingress, the costs an owner incurs cleaning and repairing lot property (e.g. replacing saturated carpet), experts' fees and legal costs. The liability of an owners corporation to pay compensation to an owner is a strict one.

This can make it difficult for owners corporations to defend compensation claims that are made by owners as a result of common property defects that allow water to leak into and damage lot property. Indeed, one Court has remarked that this puts an owners corporation into the position of an insurer.

Conclusion

Even though the recent inclement weather has made it difficult to find contractors who are able to repair common property defects, that does not provide an owners corporation with a lawful excuse for delaying essential repairs and maintenance. The duty to repair is a strict one and there are limited exceptions to that rule. This emphasizes the importance of proactive and ongoing building maintenance to help avoid the problems that many owners corporations are now encountering.

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About JS Mueller & Co Lawyers

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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