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# SUPREME COURT REJECTS OWNER'S CLAIMS FOR DAMAGES

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## SUPREME COURT REJECTS OWNER'S CLAIMS FOR DAMAGES

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### **Introduction**

The recent heavy rainfall in Sydney has led to an increase in compensation claims by lot owners against owners corporations due to water leakage and consequential damage. Often, those claims are for loss of rent. Typically, these types of claims are difficult for an owners corporation to defend because it has a strict duty to properly maintain and keep in good repair the common property. But a recent case, in which the Supreme Court rejected a compensation claim by an owner for loss of rent, provides a glimmer of hope for owners corporations.

### **Background**

Mr & Mrs Smith own an investment unit in Mona Vale, Sydney which they purchased in 2003. They leased the unit until August 2017 when it became vacant. Before re-letting the unit, the Smiths decided to replace the carpet. Mr Smith pulled up the carpet in the living room and noticed damage to the magnesite flooring near a sliding balcony door. That damage was caused by a defect in the common property underneath the sliding door. Mr Smith removed a significant part of the magnesite in the living area without the consent of the owners corporation. Since then, the Smith's unit remained vacant because they did not think it was safe to live in.

### **The Case**

The Smiths sued the owners corporation for loss of rent covering a period of about 3 ½ years after Mr Smith removed the carpet in the unit. They claimed that the owners corporation had breached its duty to properly maintain and keep in good repair the common property which caused water to leak into the unit and damage the magnesite in the living room and the concrete floor slab which made the unit unsafe. The owners corporation defended the claim and asserted that any loss of rent was caused by the Smiths unauthorised decision to remove the magnesite. The owners corporation also argued that the Smiths failed to mitigate their loss because they did not notify the owners corporation of the defective magnesite until about April 2018, they failed to reinstate the carpet and take steps to rent the unit whilst the owners corporation organised for the defects to be repaired and, by their unilateral actions in removing the magnesite, caused their unit to be uninhabitable.

### **Local Court Decision**

The Smith's claim was heard in the Local Court. The claim was only partially successful. The Smiths were awarded 3 months' loss of rent in the sum of \$6,377.40. The Local Court concluded that the damage to the magnesite and the concrete slab beneath it resulted from the owners corporation's



failure to maintain the common property. However, the Court held that there was insufficient evidence to demonstrate that the unit was unsafe. The Court found that the unit was uninhabitable but that was due to a combination of factors primarily Mr Smith's unilateral decision to remove the magnesite from the living area floor. Ultimately, the Court concluded that it was not reasonably foreseeable that the unit would remain vacant for over 3 ½ years. The Court held that it was only reasonably foreseeable that the unit would be vacant for a short time whilst the owners corporation carried out the necessary remedial work to fix the defects in the common property that had allowed water to leak into the unit and to repair the damage to the concrete slab in the living area and replace the magnesite with a new floor topping. Ultimately, the Court held that the Smiths made a commercial decision not to put a tenant in their unit and that there was nothing stopping them re-letting the unit over the relevant period. The Court considered that the Smith's conduct in removing the magnesite themselves and then doing nothing to make it good to allow the unit to be rented out was unreasonable.

### **Supreme Court**

The Smiths appealed to the Supreme Court against the Local Court's decision. In their appeal, the Smiths argued that the Local Court made an error in concluding that it was not reasonably foreseeable that the unit would be vacant for so long and that they would suffer rental loss for that period. Their appeal was unsuccessful. The Supreme Court held that a lot owner is entitled to be awarded compensation for loss that is "reasonable foreseeable" and "suffered by the owner as a result of a contravention of" the owners corporation's duty to properly maintain and keep in good repair the common property. The Supreme Court concluded that the Local Court did consider that loss of rent was a type of damage that was reasonably foreseeable but that the reason the Smiths were not awarded the full amount of rental loss they claimed was because they did not mitigate their loss as it was not reasonable for them to make a commercial choice not to put tenants in their unit until the floor was repaired, when the unit was safe to be rented. The Smiths argued that because the duty of the owners corporation to repair common property is strict, there was no room for the principle of mitigation to operate in the case. The Supreme Court disagreed. The Court concluded that the Local Court did not make an error in reducing the amount of damages that were awarded to the Smiths for loss of rent.

### **Conclusion**

The *Smith* case demonstrates that there will be occasions when an owners corporation does have a good defence to a claim by a lot owner for compensation arising from damage caused by water ingress due to a failure to repair common property defects. The case is a timely reminder that owners must act reasonably and mitigate their loss which means that if it is possible for a unit to be tenanted (even for a lower rent) that is what should occur. An owner who chooses to leave his or her unit vacant when it could be tenanted is not entitled to recover all of the rental loss they suffer.



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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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