

Who Pays? NCAT Takes it to the Next Level!

Who Pays the Compensation?

When an owners corporation is ordered to compensate an owner, who pays that compensation? The owners corporation, right? A recent decision by NCAT's Appeal Panel produced a surprising answer to that question.

Introduction

An owners corporation has a statutory duty to properly maintain and keep in good repair the common property. This duty arises under section 106 of the *Strata Schemes Management Act 2015*. If an owners corporation does not repair defects in the common property, it will breach that duty. Where that occurs, a lot owner who suffers monetary loss arising from that breach is able to sue the owners corporation to recover that loss.

Previous Cases

There have been a number of cases where both NCAT and the Supreme Court have ordered owners corporations to pay compensation to owners to cover their losses arising from failures to repair defects in common property that typically allow water to leak into and cause damage to lots. In those cases, owners have been awarded compensation for rental loss, alternate accommodation expenses, cleaning costs, repair costs, experts' fees and legal costs. But when an owners corporation is ordered to compensate an owner for those losses, who ends up paying that compensation? The answer to that question should be straightforward, right? Not so.

NCAT Case

On 30 November 2021, NCAT's Appeal Panel handed down its decision in *SP 74698 v Jacinta Investments Pty Ltd* [2021] NSWCATAP 387. In that case, an owner had sued an owners corporation for (among other things) compensation to cover the owner's losses that arose from an owners corporation's breach of its duty to repair common property. The owner was successful and was awarded over \$250,000.00 in compensation. NCAT also ordered that the compensation be paid through a contribution that was levied on all owners except the successful owner who won the case. The owners corporation appealed against that aspect of NCAT's decision (and others). NCAT's Appeal Panel upheld the decision. The Appeal Panel concluded that it would be unjust for the successful owner to have to contribute towards the payment of the compensation the owners corporation had been ordered to pay the owner. This meant that the owners corporation was required to levy a contribution on all owners (apart from the successful owner) to raise the funds needed to pay the compensation it was ordered to pay. The owners corporation was also ordered to pay the owner's costs of the case and those costs were determined to be payable through a contribution to be levied on all of the other owners.

The Wash Up

The *Jacinta Investments* case provides an example of one of the rare circumstances in which an owners corporation is able impose a differential levy on some but not all owners. The case also highlights that individual owners can be made liable to pay compensation that an owners corporation is ordered to pay to another owner to cover any damage or loss the owner suffers where the owners corporation does not fulfill its responsibility to repair common property.

The Future

The *Jacinta Investments* case has broader implications. It opens the door for owners to argue in legal proceedings in NCAT that they should not be required to contribute to the payment of costs an owners corporation will incur repairing common property or consequential damage to lot property. So, for example, where an owner sues an owners corporation in NCAT for an order to force the owners corporation to repair common property defects and water damage to the owner's lot caused by those defects, the owner may now be able to obtain an order from NCAT excusing the owner from having to contribute to a levy that is raised to pay for those repairs. Stay tuned because there is likely to be another chapter to this story.

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