Claims by Owners for Damages caused by Water Ingress under s 106(5)

As a result of recent heavy rainfall, many lot owners have suffered significant water ingress/penetration issues and consequential water damage within their lots. These include, but are not limited to:

- damage to plasterboard in the form of blistering/bubbling paint
- water penetration through entry doors causing damage to floorboards
- additional deficiencies found/evident with waterproofing
- damaged drywalls
- resultant damage to carpet (such as mould and mushroom growth)
- need for mould treatment

These can be a result of a building defect, or poorly maintained common property.

As a result of the above, lot owners have suffered financially including loss of rent, or the cost of renting when the unit becomes uninhabitable, notwithstanding the cost to replace fixtures and fittings including furniture, cabinets, curtains and carpets (in the absence of the owners corporation effecting the repair and maintenance).

In addition to the adverse impact of the amenity of the building and the subsequent decrease of market and rental values of lots, if an owners corporation has failed to repair and maintain common property, the consequences can be serious in Court and/or Tribunal proceedings.

The recent storms have opened an array of insight for an individual owner to consider the next cause of action.

Recovery of damages

In accordance with Section 106 of the Strata Schemes Management Act 2015 *(NSW)* ("**SSMA**"), the owners corporation has a strict duty to repair and maintain the common property of a strata scheme. However, if the owners corporation fails to fulfil its strict duty of repair and maintenance, the lot owner is entitled to recover reasonably foreseeable loss as a result of the owners corporation breaching its statutory duty pursuant to Section 106(5) of the SSMA.

Circumstances that may give rise to a lot owner claiming damages (compensation) include:

- An owners corporation's failure to rectify water penetration issues originating from the common property that consequently damage the lot property which then renders the lot uninhabitable.

- An owners corporation's failure to rectify essential fire safety equipment which consequently leads to the issuance of a fire safety order that may potentially restrict the occupation of the building.

- An owners corporation's failure to repair and maintain defective balustrades on a lot's balcony which consequently leads to the lot's balcony to be unsafe and unusable.

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Following the decision handed down by the NSW Court of Appeal in *Vickery v The Owners – Strata Plan No 80412 [2020] NSWCA 284*, the Court determined that the Tribunal can award a lot owner for significant damages as a result of the owners corporation's failure to repair and maintain common property under section 106(5) of the SSMA.

Currently, there is no jurisdictional limitation on the amount that can be awarded by the Tribunal for the damages resulting from an owners corporation contravening its statutory duty under subsection 106(1) of the SSMA.

This means lot owners will now get a greater chance at having their disputes determined by the Tribunal for significant damages in a less formal and cost effective jurisdiction.

Some successful cases include:

Name of Case	**Quantum of Damages (in approximate amounts)**	**Basis of Damages**
Vickery v The Owners – Strata Plan No 80412 [2020] NSWCA 284 & The Owners – Strata Plan No 74835 v Pullicin; The Owners – Strata Plan No 80412 v Vickery [2020] NSWCATAP 5	$97,000.00	○ Loss of rent
Smith v The Owners – Strata Plan 3004	$6,400.00	○ Loss of rent.
Rosenthal v The Owners - SP 20211 [2017] NSWCATCD 80	$8,800.00	○ Cost of the rectification of the damage.
The Owners Strata Plan No 30621 v Shum [2018] NSWCATAP 15	$28,000.00	○ Loss of rent; ○ Outgoings; and ○ Interest.
Shih & ors v The Owners - Strata Plan No 87879 [2018] NSWCATCD 74	$540.00	○ Loss of rent.
Carli v The Owners - Strata Plan No 56120 [2018] NSWCATCD 55	$51,000.00	○ Cost of alternative accommodation.
Huang & Giang The Owners Strata Plan No.65865 [2021] NSWCATCD 15	$7,730.00	○ Loss of rent.
Zanetti v The Owners – Strata Plan No 43300 [2018] NSWCAT	$70,598.09	○ Loss of rent; ○ Cost of property manager in defending claim by tenant in NCAT; and ○ Cost of expert evidence.

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Liberant v The Owners – Strata Plan No 62713 [2019] NSWCATCD	$55,510.12	○ Loss of rent; and ○ Interest.
The Owners – Strata Plan No 62713 v Liberant [2022] NSWCATAP 80 (appeal of above matter of *Liberant v The Owners – Strata Plan No 62713* [2019] NSWCATCD)	As above	○ Loss of rent; ○ Interest; and ○ Costs of the first instance proceedings and the appeal (as agreed or assessed).
Tezel v The Owners - Strata Plan No 74232 [2022] NSWCATAP 149	$447,200	○ Loss of rent; and ○ Costs of proceedings
Bonanno v The Owners – Strata Plan No. 44034 [2022] NSWCATCD	$4,731.00	○ Increased cost of repairs to lot property floors due to the inability to install new floors until water ingress was rectified.

If you have suffered or believe that you may have suffered losses (financial or otherwise) as a result of an owners corporation's failure to repair and maintain the common property, please contact our experts at Bannermans Lawyers at enquiries@bannermans.com.au or call us on 02 9929 0226.

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Key takeaways

- Lot owners can claim damages if the owners corporation fails to maintain common property, leading to water ingress.
- The Tribunal can award significant damages for breaches of statutory duties under the SSMA.
- Recent court decisions have expanded the potential for lot owners to recover losses due to water damage.
- Circumstances for claims include unaddressed water penetration and safety equipment failures.
- There is no jurisdictional limit on the damages that can be awarded by the Tribunal.

****The information contained in this article is general information only and not legal advice. The currency, accuracy and completeness of this article (and its contents) should be checked by obtaining independent legal advice before you take any action or otherwise rely upon its contents in any way.*

Updated by Bannermans Lawyers

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