Failure to repair - some guidance on strata committee and strata managing agent liability

A recent decision of the Appeal Panel of the NSW Civil and Administrative Tribunal ("NCAT") provides some guidance relating to liability for damage to lot owner property arising from failure to maintain common property. *The Owners - Strata Plan No 55468 v Silberstein [2025] NSWCATAP 102.* Appeal Panel on 8 May 2025.

The case involved water ingress damage to a lot in a Sydney scheme, with some unusual features:

- The unit was a luxury penthouse apartment, so amounts involved were considerable.
- The damage was considerable, rendering the apartment uninhabitable and necessitating the owner residing in alternate accommodation for an extended period, ultimately for more than two years.
- The owners corporation and strata committee opposed the owner's claim, including on the following bases:
    - Claiming that substantial renovations were underway at the time of the loss, such that the owner could not lawfully occupy the apartment.
    - Claiming that a property occupied by the owner during the "alternate accommodation" phase was purchased by a trust associated with the owner during her occupation of that property, negating entitlement to include rental for that property in damages awarded to the owner.
- Numerous interesting claims by the owner, including:
    - Claims for damages, including temporary accommodation costs and loss of amenity, based on breach of the statutory duty to maintain and repair common property under Section 106 of the Strata Schemes Management Act 2015 against the owners corporation.
    - Claims for damages, based on Section 106 and negligence against four strata committee members, the strata managing agent and the building manager.
    - Claims for aggravated damages against all defendants.
    - Claims for orders removing committee members and restraining them from acting as committee members, based on bad faith conduct.

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The decision suggests a number of important propositions:

- The Tribunal can award damages in relation to loss caused by failure by an owners corporation to comply with its statutory duty to maintain and repair common property under Section 106(5) of the Strata Schemes Management Act 2015 ("Act") and this can extend to temporary accommodation costs and loss of amenity.

- Current renovations of the lot may not negate liability in relation to temporary accommodation costs, if it is lawful for the owner to occupy the parts of the lot not undergoing renovation.

- Purchase of a property being occupied by the owner as temporary accommodation by an entity associated with the owner may not negate inclusion of rental for that property in damages awarded to the owner, if the owner does not receive the benefit of the rent.

- The Tribunal does not have power to award aggravated damages.

- The Tribunal has jurisdiction to make an award of damages based on a cause of action in negligence against committee members, strata managing agents and building managers based on Section 232(1)(a) of the Act, but:

    - As to strata committee members:

        - The Tribunal will not do so where the Section 260 good faith protections apply, as to which:

            - the owner asserting committee member personal liability had an onus and burden of proof in establishing that the relevant thing was not done in good faith.

            - acting in good faith requires a strata committee member to exercise the caution and diligence to be expected of an honest person of ordinary prudence or to act with reasonable caution and diligence.

            - might be established by closing one's eyes to there being any possible substance to the owners claim, rather than analysing it, e.g. because of its expense and to avoid setting a precedent for the future.

            - might not be established on the sole basis of agreement with fellow committee members, if independent judgement was retained, even if there was failure to appreciate some information provided.

        - The Tribunal will likely not do so, irrespective of application of the Section 260 good faith protections, where the owner does not seek damages against committee members different in nature to those sought against

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the owners corporation, as the liability would in any event attach to the owners corporation under Section 260(2).

- As to strata managing agents, the Tribunal will likely find that even if relevant functions have been delegated to the strata managing agent, the strata managing agent does not owe the owner a duty of care at general law to carry out its functions, including those delegated to it, with due and proper care, skill and diligence, as this is incongruous with the agent's contractual obligations to the owners corporation and as there is no reason to superimpose tortious duties in addition to the pre-existing contractual relationship.

- As to building managers:

  - The Tribunal likely find that the building manager does not owe a duty of care to the owner, based on similar reasoning as was applied in relation to the strata managing agent.

  - The Tribunal will likely find no delegation had been made to the building manager, which in addition to negating a claim in negligence, may also be fatal to a claim against the building manager under Section 106(5), as such liability attached to the owners corporation and delegates, not those assisting it to carry out and fulfil those duties.

- The Tribunal has power to remove a committee member for not acting in good faith, as a finding that the committee member did not act in good faith was sufficient to establish that the member had not carried out functions with due care and diligence in breach of Section 37 and in turn Section 238(2).

- The Tribunal does not have power to restrain former committee members and officers from acting in those capacities in the future.

If you are having problems with these or other issues in your strata scheme or community association, please contact us at enquiries@bannermans.com.au or on 02 9929 0226.

****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.*

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Key takeaways

- The Tribunal can award damages for failure to maintain common property, including temporary accommodation costs.
- Current renovations may not negate liability for damages if lawful occupation of the property is possible.
- The Tribunal has jurisdiction to award damages based on negligence against strata committee members and managing agents.
- Good faith protections apply to committee members, requiring proof that actions were not taken in good faith.
- Aggravated damages cannot be awarded by the Tribunal.

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