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A GLIMMER OF HOPE – OWNER’S LOSS OF RENT CLAIM TIME BARRED

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The rainfall New South Wales has experienced over the last 18 months has led to an increase in the number of claims made by owners against owners corporations for compensation arising from water ingress affecting apartments. These claims can be difficult for an owners corporation to defend. But a recent decision of the NSW Court of Appeal provides a glimmer of hope for owners corporations and demonstrates that compensation claims that are made by owners need to be brought promptly otherwise they will be out of time.

Background

An owners corporation has a duty to maintain and repair the common property in its building. This duty arises under section 106(1) of the *Strata Schemes Management Act 2015 (Act)*. If an owners corporation breaches that duty, for example, by failing to repair defects in the common property that allow water to leak into a lot, an owner is entitled to sue the owners corporation to recover any reasonably foreseeable loss he or she suffers because of that breach. There have been many cases in which owners have successfully claimed compensation from owners corporations in those circumstances including compensation for loss of rent. However, section 106(6) of the Act says that an owner cannot bring a claim for compensation against an owners corporation more than 2 years after the owner first becomes aware of his or her loss. Where water leaks into a lot over many years and an owner suffers loss of rent for more than 2 years, can the owner bring a compensation claim against an owners corporation to recover that loss of rent more than 2 years after the owner first becomes aware of that loss? A recent decision of the NSW Court of Appeal answers that question.

The Case

Mrs Tezel owns a unit in a strata building in Bondi Beach. In 2013, she first noticed water leaking into her unit following periods of heavy rain. In 2013, Mrs Tezel removed the carpet from her unit and stopped living in the unit because of the water ingress. In 2016, Mrs Tezel decided to rent the unit but she could not find a tenant due to the condition of the unit due to the water ingress. The unit has remained unoccupied since 2016.

In November 2020, Mrs Tezel sued her owners corporation in NCAT for remediation of the defects in the common property that were allowing water to leak into her unit and for compensation for loss of rent. Mrs Tezel’s compensation claim was rejected because NCAT concluded that the claim was brought out of time by reason of section 106(6) of the Act because Mrs Tezel first became aware of her rental loss in 2016 which was more than 2 years before she started the case in NCAT. Mrs Tezel successfully appealed against NCAT’s decision not to award her compensation for loss of rent to the

Appeal Panel of NCAT. The owners corporation then appealed against the decision of the Appeal Panel to the NSW Court of Appeal.

Court of Appeal's Decision

On 6 March 2023, the Court of Appeal upheld the owners corporation's appeal and determined that Mrs Tezel was not entitled to be awarded compensation for her loss of rent.

The Court of Appeal concluded that section 106(6) of the Act meant that Mrs Tezel needed to sue the owners corporation within 2 years after she first became aware of her loss of rent, that she first became aware of her rental loss in 2016 and that she did not sue the owners corporation until 2020.

For those reasons, the Court of Appeal concluded that Mrs Tezel's compensation claim for loss of rent was brought of time and that NCAT was correct to reject the claim.

The Court of Appeal did not accept Mrs Tezel's argument that section 106(6) of the Act just meant that she had to limit her claim against the owners corporation to one for no more than 2 years' loss of rent or that because her loss of rent was ongoing the 2 year limitation period for her to bring a claim continued to reset.

The Court concluded that the 2 year limitation period in section 106(6) was intended to ensure that an owner could not delay suing an owners corporation for compensation where the people having to pay that compensation are also lot owners and the passing of time may affect their ability, through the owners corporation, to recover that compensation from other persons.

Conclusion

The decision in the *Tezel* case provides a glimmer of hope for owners corporations. It means that there is a strict, 2 year time period for an owner to start legal action against an owners corporation to recover compensation for a loss the owner suffers because of the owners corporation's failure to repair common property. The decision means that if an owner waits more than 2 years to start that legal action, his or her compensation claim will be time barred and able to be defeated.

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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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