

Time's a ticking: Time limitations on claims for loss under section 106(5) of the *Strata Schemes Management Act 2015* (NSW)

The Court of Appeal in the recent case of *The Owners - Strata Plan No. 74232 v Tezel* [2023] NSWCA 35 has determined that the two-year limitation period imposed by section 106(6) of the *Strata Schemes Management Act 2015* (NSW) begins from the time at which the owner was first aware of the type of loss that is the subject of the complaint.

Background

Ms Feride Tezel is the owner of a lot in Strata Plan 74232, a strata scheme located at Bondi. On multiple occasions in 2013, Ms Tezel noticed water leaks into her lot and shortly thereafter ceased living in the lot. In 2016, Ms Tezel attempted to rent out the lot to a tenant but was unable to do so.

On 6 November 2020, Ms Tezel commenced proceedings against the Owners Corporation under section 106 of the *Strata Schemes Management Act 2015* (NSW) ("SSMA"). As part of her application, Ms Tezel sought to recover loss of rent from the period of 6 November 2018, being the period two years prior to the commencement of the proceedings. The Tribunal dismissed this part of the application, concluding that the two-year time limitation imposed by section 106(6) of the SSMA had passed as Ms Tezel first became aware of the rental loss in 2016.

Ms Tezel appealed this decision and the appeal was upheld by the Tribunal. The Owners Corporation then appealed this decision in the Court of Appeal and, on 6 March 2023, the Court granted leave for this appeal.

Section 106 of the SSMA

Section 106(1) of the SSMA requires an owners corporation to properly keep and maintain the common property of a strata scheme. An owner of a lot in a strata scheme may recover, as damages, any reasonably foreseeable loss suffered as a result of a breach of this section pursuant to section 106(5); however, section 106(6) provides that an owner may not bring an action for a breach of the statutory duty imposed on an owners corporation by section 106(1) of the SSMA more than two years after the owner first became aware of the loss.

Final decision in *Tezel*

The Court of Appeal in *The Owners - Strata Plan No. 74232 v Tezel* [2023] NSWCA 35 ("*Tezel*") held that the phrase "first becomes aware of the loss" in section 106(6) of the SSMA means the time at which the lot owner was first aware of the kind or type of loss that they are entitled to recover under section 106(5).

In the case of *Tezel*, Ms Tezel was claiming loss of rent. The Owners Corporation submitted that the limitation period of two years, imposed by section 106(6) of the SSMA, did not relate to the time at which the breach occurred - the cause of action - but rather the date the loss was suffered. Unlike a breach of section 106(1), which could recur on a rolling basis until remedied (*The Owners - Strata Plan No. 80412 v Vickery* [2021] NSWCATAP 98 at [63]), the first awareness of the loss could only occur once and, from that point, the time limitation would start running.

Ms Tezel became aware of the loss of rent in 2016 when she attempted to rent out the lot and was unsuccessful. On this basis, the Court of Appeal determined that the limitation period ran from that point and, thus, Ms Tezel was out of time to seek damages for loss of rent under section 106(5) of the SSMA.

The Court of Appeal dismissed the cross-appeals raised by Ms Tezel. Interestingly, one of the grounds on which Ms Tezel sought to cross-appeal, although only phrased as such on the day of the hearing, was whether the Tribunal could award damages for future loss under section 106(5) of the SSMA. The Court did not consider this cross-appeal, having already determined that the application for damages was out of time. At this stage, there are no precedent decisions as to whether section 106(5) provides for an award of damages for future loss.

What does the *Tezel* decision mean for lot owners?

If you are a lot owner and you become aware of failing common property in your strata scheme, it is important that you notify the Owners Corporation to conduct the necessary repairs. In the event the failing common property, such as a water leak from a common property rooftop, causes damage to your lot, personal property or impacts on your ability to rent the lot, you should consider taking steps to commence an application in the NSW Civil & Administrative Tribunal seeking orders for the repair of the common property *and* damages for the losses suffered as a result.

Lot owners should be aware that such action should be taken well before the expiry of the two-year period from when the loss is first realised to ensure that the Tribunal has the power to determine your claim for damages.

Our strata team at Speirs Ryan have been involved in many disputes relating to failing common property and claims for losses suffered by lot owners under section 106 of the SSMA and would be happy to answer any queries or concerns you may have about this of the SSMA and the impacts of the *Tezel* case.

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Disclaimer: This article is a general summary with focus on issues of interest to the authors. It is not intended to be used as legal advice.