



Civil and Administrative Tribunal  
New South Wales

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Case Name: Mullen v Owners Corporation SP 15342

Medium Neutral Citation: [2017] NSWCATCD 97

Hearing Date(s): 10 August 2017

Date of Orders: 16 October 2017

Decision Date: 16 October 2017

Jurisdiction: Consumer and Commercial Division

Before: A Bell SC, Senior Member

Decision: 1. Application dismissed.

Catchwords: Breach of statutory duty to maintain and repair common property, causation, jurisdiction of Tribunal to award damages.

Legislation Cited: Strata Schemes Management Act 2015  
Strata Schemes Management Act 1996

Cases Cited: Rosenthal v The Owners – SP 20211 [2017] NSWCATCD 80  
Shum v Owners Corporation SP30621 [2017] NSWCA TCD 68.

Category: Principal judgment

Parties: Applicant: Annette Frances Mullen  
Respondent: Owners Corporation SP 15342

Representation: Applicant: G. McGlashan ( Solicitor)  
Respondent: T. Bacon (Solicitor)

File Number(s): SC 17/16775

Publication Restriction: Unrestricted

## REASONS FOR DECISION

### Introduction

- 1 The applicant, Ms Annette Mullen, is the owner of Lot 14 in Strata Plan 15342 (Unit 14), which is a strata scheme consisting of 14 townhouses located in [redacted] (Strata Scheme). The respondent is the Owners Corporation of the Strata Scheme ( Owners Corporation).
- 2 Ms Mullen purchased Unit 14 in September 2014. It is common ground that in May 2015 termite damage to Unit 14 was identified throughout the ground level of the townhouse, including below the stairs and throughout the staircase leading to the upper level.
- 3 Ms Mullen says that the Owners Corporation should have carried out annual termite inspections of the common property and that by failing to do so it failed to properly maintain the common property of the Strata Scheme and keep it in a state of good and serviceable repair. Ms Mullen says that the Owners Corporation thereby breached a statutory duty owed to her under section 106(1) of the Strata Schemes Management Act 2015 (NSW) (the Act). Ms Mullen claims damages of \$48,342.04 under section 106(5) of the Act.
- 4 The Owners Corporation denies that it has breached its statutory duty. It says that the termite damage was not caused by any failure to maintain the common property or keep it in good and serviceable repair. The Owners Corporation says in the alternative that Ms Mullen contributed to her own loss and damage by failing to carry out a pest inspection before she purchased Lot 14. The Owners Corporation disputes the amount of damages claimed. The Owners Corporation also says that the Tribunal has no jurisdiction to award damages under s 106(5) of the Act.
- 5 Ms Mullen gave sworn evidence and was cross-examined. Ms Mullen also relied on an expert report prepared by Mr John Maglis, a consulting engineer, dated 30 June 2017. Mr Maglis gave sworn evidence and was cross – examined.
- 6 The respondent relied on three affidavits. The first affidavit was sworn by Mr Robert Muir on 27 July 2017. Mr Muir has been the owner of Unit 13 in the Strata Scheme since 1999. The second affidavit was sworn by Mr Rein Simmul

on 28 July 2017. Mr Simmel and his wife were the owners of Unit 14 from 2000 until 2007. The third affidavit was sworn by Ms Glenda Hewitt on 31 July 2017. Ms Hewitt purchased Unit 4 in 2004 and has lived there since that time. Ms Hewitt has been a member of the Executive Committee of the Strata Scheme (Committee) since 2004. None of the deponents of these affidavits was required for cross-examination.

### **The Facts**

- 7 The floor structure of the Strata Scheme is suspended concrete and concrete slabs on ground. The walls are built of cavity brick and the roofing is tiles on a timber frame.
- 8 Strata Partners Pty Limited has been engaged by the Owners Corporation as the managing agent and Mr Toby Noad is the assigned manager.
- 9 In 2002, Mr Simmul, who at that time was one of the owners of Unit 14, whilst cleaning and tidying the garage, noticed that a box of old books that he was storing on the floor of the garage had become infested with termites. He removed and disposed of the box of books. In June or July 2002, Mr Muir, the owner of the adjoining townhouse at Unit 13, informed Mr Simmul of damage to the timber stud wall that separated the garage of Unit 13 from the adjoining garage of Unit 14. Mr Simmul told Mr Muir about his recent discovery of termites in a box of books in his garage.
- 10 Mr Muir then engaged Pestrid Pest Control Pty Ltd (Pestrid), a pest control company, to treat and bait the affected area for termites. The cost for this service was approximately \$700 which was shared by Mr Muir and Mr Simmul. Pestrid informed Mr Muir that the problem with the termites was fully resolved. In 2003 Mr Muir and Mr Simmul removed the adjoining stud wall between the garages and replaced it with a concrete brick wall at their own expense.
- 11 Although Mr Muir has been a member of the Committee from time to time, neither Mr Muir nor Mr Simmul informed other members of the Committee or the Owners Corporation of the termite damage which they had experienced. This was because they both believed that the problem was relevant to their units only and was not a common property issue.

- 12 I find that the termite damage to the timber stud wall between Units 13 and 14 in 2002 was due to termites introduced by a box of books brought into Unit 14 by the then owner of Unit 14, that the termite problem at that time did not extend to the common property of the Strata Scheme and that the problem was eradicated by no later than 2003.
- 13 There has been no further termite damage to any of the townhouses in the Strata Scheme until the termite damage which was identified to Unit 14 in May 2015.
- 14 In 2009 and 2010 the Owners Corporation organised for pest control inspections in relation to cockroaches, vermin and termites for the common property areas of the Strata Scheme. Both times the inspections concluded that there was no reported termite activity in the common area.
- 15 When Ms Mullen purchased Unit 14 in September 2014, she rented the townhouse to her son, Mr Zac Kennett. She did not become a member of the Committee. Before purchasing the townhouse Ms Mullen obtained a report on the inspection of the records for the Strata Scheme from Trachtenberg Strata Reporting Services dated 6 August 2014. This report disclosed the pest inspection including for termites which was carried out in the 2010 financial year and that \$2,442 was spent on pest control. The report did not disclose any subsequent pest inspections, although \$250 had been budgeted for pest control in the 2014 financial year.
- 16 Prior to purchasing the townhouse, Ms Mullen did not obtain a pest inspection for Lot 14 because she did not think it was necessary. She did ask a friend, who was a builder, to informally look at the property and he told Ms Mullen that he saw no problems.
- 17 Ms Mullen agreed in cross-examination that shortly after she purchased Lot 14 she arranged for some improvements and rectification work to the outside courtyard area of the townhouse. This work included the installation of new timber decking to go over existing paving as well as creating new garden beds. Ms Mullen was not able to be precise about when this work was carried out although she said that the work was done in stages. Ms Mullen did agree that the new timber decking was installed early in 2015.

- 18 The evidence included an email from Mr Kennett to Strata Partners dated 20 November 2014 attaching plans of the work proposed to the outside courtyard area of Lot 14. The email stated that “the first stage will be completing the back deck and this will require the most work and cause the most noise as such will be the highest priority and be completed as quickly as possible to limit disturbance to the other residents. Initial indications from the carpenter are that it will take one week to complete and at this stage is scheduled to go ahead in the early part of January”. There is also an email dated 11 January 2015 from the Committee to Strata Partners stating that it had no objection to the garden work proposed by the new owners of Lot 14.
- 19 Based on this evidence, I find that the new timber decking in the courtyard area of Unit 14 was installed and that at least some of the garden beds had been established in or shortly after January 2015 and prior to May 2015.
- 20 In May 2015, Mr Muir and Ms Hewitt, the owner of Unit 4, were asked by Mr Kennett to inspect damage to the timber floor coverings on the stairs of unit 14. During this inspection Mr Muir noticed that there were wooden floors and a wooden staircase which had been installed over the existing concrete floor and concrete stairs. He observed marks and damage in the timber frames and suggested that the damage may be due to termites. He mentioned that he and the former owner of Unit 14 had termite problems in the past which had been fully resolved.
- 21 Pestrid was requested to inspect and report on the damage. Pestrid found live termites throughout the ground level of the townhouse including below the stairs and throughout the staircase. A termite nest that might be responsible for the infestation was not located. Pestrid recommended that the property be inspected at intervals not exceeding 12 months for evidence of termites and conditions conducive to termite attack.
- 22 In June 2015 the Owners Corporation engaged Pestrid to install an exterior baiting system around the property at a cost of \$7,920.
- 23 I find on the evidence that Ms Mullen paid \$38,068.04 in 2016 and 2017 to remove and replace floorboards and skirting which had been damaged by the termites. Ms Mullen had other work done to the kitchen and doors but she has

not claimed for this work. Ms Mullen paid a further \$5,500.00 for painting and decorating and \$4,774.00 to install glass balustrades and stainless handrails to the stairwell. The Owners Corporation submitted that there was no evidence, for example from a quantity surveyor, to show that the new balustrades, handrails and the painting and decorating were necessary. However Ms Mullen gave evidence which I accept that the expenditure of these amounts was necessarily incurred to repair the termite damage.

- 24 Ms Mullen relied on an expert report prepared by Mr John Maglis of Tyrrell's Property Inspections Pty Ltd dated 30 June 2017. Mr Maglis is not an expert on termites, but has 29 years' experience in building construction, engineering and building consultancy.
- 25 During his site inspection on 5 June 2017, Mr Maglis determined that the entry point of the termites into Unit 14 appeared to have been at gaps in the interface between the ground floor concrete slab and the soffit of the internal concrete staircase. Mr Maglis found remnant termite mudding present at the soffit of the internal concrete staircase within unit 14. Mr Maglis found no evidence of any other termite entry points into the subject property and said in oral evidence that he did not see any evidence of mudding elsewhere. I find on the basis of this evidence that the termite damage to Unit 14 in May 2015 was due to the entry of termites at gaps in the interface between the ground floor concrete slab and the soffit of the internal concrete staircase. I am satisfied on the basis of this evidence that the termite entry point was part of the structure of the building and part of the common property of the Strata Scheme.
- 26 Mr Maglis agreed in cross-examination and I find that the gaps in the concrete through which the termites entered Unit 14 were not a defect in the building and were quite normal sized gaps in a building of this nature.
- 27 Mr Maglis noted that Pestrid had identified the active termites as *Coptotermes* Sp. He described this species as being the most destructive termite species of service timbers within buildings and said that the source of these termites would be from a nest most likely within 100 m of the subject property. In his oral evidence Mr Maglis said, and I find, that *Coptotermes* Sp. is a very aggressive species of termites which could travel through brickwork or plaster

to reach timber and could do significant damage in two months, depending upon the numbers of termites and the proximity of the nest.

- 28 In his report, Mr Maglis assumed at paragraph 8.1.2.1 that the Owners Corporation and the strata manager had engaged a licensed pest control company to manage the termite infestation which occurred in 2002 and that a written report was provided to the Owners Corporation and strata manager by the pest control company at that time. Mr Maglis' assumption was incorrect as I have indicated. In fact, the termite infestation in 2002 did not extend to the common property of the strata scheme and was not brought to the attention of the Owners Corporation. Although Mr Muir was a member of the Committee from time to time it does not seem to me to be apt to attribute his knowledge to the Owners Corporation.
- 29 At paragraph 8.1.3 of his report, Mr Maglis said that if his assumption at paragraph 8.1.2.1 was incorrect and the Owners Corporation did not engage a licensed pest control company at that time to undertake periodic inspections then it was his view that the common areas had not been maintained in a reasonable manner. However in reaching this view Mr Maglis was continuing to assume that the termite infestation in 2002 had been brought to the attention of the Owners Corporation, which is not in fact the case. Mr Maglis was also not aware that the Owners Corporation had in fact conducted pest inspections in 2009 and 2010 which did not identify any termite activity.
- 30 At paragraph 8.1.4 of his report Mr Maglis said that if he made no assumptions as to the history of termite infestation within the property, in his experience it was common for Owners Corporations to not adequately maintain their properties with regard to termite infestation and to misunderstand the risk which destructive termite species posed to buildings. He referred to the guidelines outlined in AS 3660.2 – 2000 dealing with termite management, which included measures such as annual visual inspections, baiting systems and chemical and physical barriers. Mr Maglis agreed in cross-examination that these were general comments and that it was fair to say that a lay person was only likely to appreciate the risk of termite damage if he or she had previously experienced termite problems.

31 Section 3 of Appendix D to AS 3660.2-2000 states that regular pest inspections will not prevent termite attack, but may help in the detection of termite activity and thereby minimise damage. Based on the evidence and facts which I have set out I am not satisfied that more regular inspections of the common property of the Strata Scheme by the Owners Corporation would have prevented the termite damage to Unit 14 which was identified in May 2015, or that the failure to carry out more regular inspections caused the termite damage which occurred. Indeed, whilst the evidence does not in my opinion permit an affirmative finding about this matter, it seems to me to be a real possibility that the termite damage to Unit 14 which was identified in May 2015 was caused by an aggressive species of termites introduced during the improvements and rectification work carried out by Ms Mullen in 2015 and which then acted in a period of months to cause the damage suffered.

## **Analysis**

### *The contentions of the parties*

32 Ms Mullen says that section 106(1) of the Act imposed a strict duty on the Owners Corporation to properly maintain the common property and keep it in a state of good and serviceable repair. Ms Mullen says that the Owners Corporation breached that duty by failing to carry out annual termite inspections of the common property. Ms Mullen says that she is thereby entitled to damages. Ms Mullen says that the Pestrid report in 2015 and Mr Maglis' evidence established a causal connection between the alleged breach of duty and the damage claimed. Alternatively, as I understood it, Ms Mullen says that because the statutory duty to repair and maintain common property is a strict duty, it was not necessary for the Tribunal to be satisfied that the breach of statutory duty caused the damage claimed.

33 Ms Mullen says that the Tribunal has jurisdiction to award damages under section 106(5) of the Act by virtue of the power conferred on the Tribunal by section 232(1)(e) of the Act to make an order to settle a complaint or dispute about an exercise of, or failure to exercise, a function conferred or imposed by or under the Act. Ms Mullen says that the power to make an order to settle a complaint or dispute is a broad power and includes the power to award damages.



- 34 As I understood it, the Owners Corporation did not dispute that the authorities establish that the statutory duty under section 106(1) of the Act to repair and maintain common property was strict and that when common property has been found to be in disrepair, an Owners Corporation is in breach of that duty. The Owners Corporation denied that the common property was in disrepair and denied that it breached its statutory duty by failing to carry out annual termite inspections. The Owners Corporation also denied that its failure to carry out annual pest inspections caused the damage suffered by Ms Mullen. Alternatively, the Owners Corporation said that Ms Mullen contributed to the loss and damage which she suffered by failing to take steps to protect her lot and her internal furnishings. The Owners Corporation also disputed the damages claimed by Ms Mullen.
- 35 The Owners Corporation says that the Tribunal has no jurisdiction to award damages under section 106(5) of the Act. The Owners Corporation says that if Parliament had intended the Tribunal to have a broad and unfettered power to award damages for breach of statutory duty, clear and unambiguous language would have been used. The Owners Corporation also points to the absence of a monetary limit to the damages which can be awarded as indicating that there was not a legislative intention to confer jurisdiction on the Tribunal. The Owners Corporation says that there is no positive indication in the Act that the Tribunal has jurisdiction to award damages under section 106 (5), but that there is a positive indication that Parliament did not intend to confer jurisdiction on the Tribunal. The Owners Corporation referred to the Introductory Note and accompanying table to Part 12 of the Act headed “Disputes and Tribunal Powers”, which identifies the orders which may be made by the Tribunal under the Act. The table describes the types of orders which can be made by the Tribunal, identifies who may apply for those orders and states the sections of the Act which enable those orders to be made. The Owners Corporation pointed out that there is no reference in the table to section 106 or to the Tribunal having power to make an award of damages under section 106(5).

#### *Jurisdiction*

- 36 Section 106(5) is a new provision in the Act which did not exist in any of the previous NSW statutes relating to strata management. There is no express

indication in the Act that the Tribunal has jurisdiction to award damages under section 106(5). The Explanatory Note relating to the Strata Schemes Management Bill 2015 does not provide any guidance in relation to this issue. Nor does the Second Reading Speech relating to the Bill made on 14 October 2015 by the then Minister for Innovation and Better Regulation.

- 37 It has been brought to my attention that since the hearing of this matter there have been two decisions by the Tribunal which have held that the Tribunal does have jurisdiction to award damages under section 106(5) of the Act: *Rosenthal v The Owners – SP 20211* [2017] NSWCATCD 80 and *Shum v Owners Corporation SP30621* [2017] NSWCA TCD 68. In each of those cases it was held that the Tribunal’s jurisdiction to award damages under section 106(5) derived from section 232 (1) (e) of the Act, as contended by Ms Mullen in this case.
- 38 I have doubts about whether the Tribunal does have jurisdiction to award damages for breach of statutory duty under section 106(5). In my view it is not significant that there is no monetary limit on the amount of damages which can be awarded under section 106(5). The Tribunal clearly has jurisdiction, for example, to make an order under section 132(1)(b) of the Act that an owner or occupier pay to the Owners Corporation or the owner of a lot a specified amount for the cost of repairs and any associated costs for damage caused to common property or another lot, despite there being no monetary limit on the amount which may be ordered. However it seems to me that there is force in the other points raised by the Owners Corporation on the question of jurisdiction. The fact that the Tribunal is expressly identified in section 132 as having jurisdiction to make an order for a monetary payment is to be contrasted with the lack of any similar identification in section 106. The Tribunal’s jurisdiction to make a monetary order under section 132 is also expressly identified in the table accompanying the Introductory Note to Part 12 of the Act.
- 39 It is also arguable that when section 232(1)(e) of the Act is read with section 232(2), the intention of the legislature in relation to the failure of an Owners Corporation to exercise a function imposed by the Act was to confer jurisdiction

on the Tribunal limited to determining disputes about whether the Owners Corporation should exercise the function prospectively.

- 40 However, it is not necessary for me to make a final determination of whether the Tribunal has jurisdiction to award damages under section 106(5) of the Act, because for reasons which I will now explain I have decided that Ms Mullen's application should nevertheless be dismissed.

*Breach of statutory duty*

- 41 Both parties relied upon a number of cases decided in the Supreme Court of New South Wales under the relevantly equivalent provisions of section 62(1) of the Strata Schemes Management Act 1996 (NSW) on the question of whether the Owners Corporation breached a statutory duty under section 106 (1) of the Act: *Ridis v Strata Plan 10308* [2005] NSWCA 246;(2005) 63 NSWLR 449;*Seiwa Pty Ltd v Owners Stata Plan 35042* [2006] NSWSC 157; and *Riley v The Owners-Strata Plan 73817* [2012] NSWCA 410.

- 42 It was not in issue, as I understood it, that these cases establish that the obligation under section 106 (1) of the Act is a strict or absolute obligation rather than an obligation to use reasonable care or best endeavours: *Seiwa* at [3]; *Riley* at [75].

- 43 These cases also establish that:

- (1) The obligations of maintenance and repair in section 106(1) of the Act are directed to keeping the common property operational, and to restoring something which is defective: *Ridis* at [158];
- (2) The duty to maintain the common property under section 106 (1) involves an obligation to keep the common property in proper order by acts of maintenance before it falls out of condition. There is thus a duty not only to attend to cases where there is a malfunction, but also to take preventative measures to ensure that there will not be a malfunction :*Seiwa* at [4];
- (3) As soon as something in the common property is no longer operating effectively or at all, or has fallen into disrepair, there has been a breach of the section 106 duty: *Seiwa* at [5]; *Riley* at [76];
- (4) Section 106 does not oblige an Owners Corporation to conduct or procure the conduct of an expert assessment of every possible source of danger in the common property: *Ridis* at [177] ( although it is relevant to bear in mind that in *Ridis* the issue was whether the statutory

obligation under section 106 informed a common law duty of care: *Seiwa* at [5]; *Riley* at [75]);

- (5) As the duty of an Owners Corporation under section 106(1) is strict it is irrelevant to consider whether the Owners Corporation took all reasonable steps to comply with its duty. It also means that contributory negligence is no defence to an action for breach of statutory duty under section 106(1): *Seiwa* at [21];
- (6) In the final analysis the question of whether the duty under section 106 has been breached will depend upon the circumstances of each case. It will be relevant to identify whether the Owners Corporation was aware of any particular danger with regard to any aspect of the common property, whether there had been any earlier problems and whether there was any factor which should have led the Owners Corporation to carry out an inspection regularly or at all: *Ridis* at [187]-[188].

44 Having regard to these authorities, in my opinion the Owners Corporation was not in breach of its statutory duty under section 106 (1) of the Act in failing to conduct an annual termite inspection of the common property, or, if it be relevant, in failing to take any other preventative measures. I accept that there may hypothetically be circumstances where previous incidents of termite damage to common property, or other features of particular vulnerability, may necessitate regular termite inspections or other preventative measures in relation to termites by an Owners Corporation in order for the corporation to comply with its statutory duty under section 106(1). However in this case the Owners Corporation had not been made aware of any previous termite damage extending to the common property. Indeed, the termite inspections conducted in 2009 and 2010 failed to identify any termite activity in the common property. There was no defect in, or feature of the common property which made it particularly vulnerable to termite attack. The gaps in the concrete through which the termites entered Unit 14 were normal and were not a defect in the building.

#### *Causation*

45 If I am wrong in this view, then I am nevertheless of the view that Ms Mullen's application should be dismissed because the failure of the Owners Corporation to conduct annual termite inspections did not cause the damage suffered by Ms Mullen.

- 46 I have indicated that I am not satisfied on the evidence that the termite damage suffered by Ms Mullen in 2015 was caused by any failure by the Owners Corporation to carry out annual termite inspections.
- 47 I do not accept Ms Mullen’s alternative submission that because the duty under section 106(1) of the Act is strict, it was not necessary for her to establish that the failure by the Owners Corporation to conduct annual termite inspections caused the damage which she suffered. First, section 106(5) expressly provides that the damages which an owner may recover from an Owners Corporation under that sub-section must be losses suffered “as a result of a contravention of this section by the Owners Corporation”. This plainly imports a causal connection between the contravention and the losses suffered. Secondly, the fact that a liability is strict or absolute means that liability arises if a defect is present irrespective of whether reasonable care was taken to prevent it. It does not mean that it is unnecessary for an applicant to establish a causal connection between the defect and the loss claimed. This is emphasised by the language used by the Court of Appeal in Riley at [77], which referred to the liability of an Owners Corporation for “any damage occasioned by the failure to comply with its statutory duty”.
- 48 The fact that statutory liability is strict also means that no question of contributory negligence can arise, as the authorities demonstrate.

### **Conclusion**

- 49 For these reasons in my opinion Ms Mullen’s application should be dismissed.

**A Bell SC**

**Senior Member**

**Civil and Administrative Tribunal of NSW**

**16 October 2017**

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I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.  
Registrar

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