



District Court  
New South Wales

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Case Name: Pursell v Eversham Close Pty Ltd

Medium Neutral Citation: [2020] NSWDC 372

Hearing Date(s): 9, 10, 11 October 2019  
Plaintiff's Supplementary Submissions – 15 October 2019  
Defendant's response to Supplementary Submissions – 21 October 2019

Date of Orders: 13 February 2020

Decision Date: 13 February 2020

Jurisdiction: Civil

Before: Hatzistergos DCJ

Decision: Verdict for the Plaintiff (see [224])

Catchwords: LEASES AND TENANCIES — Strata title — Leasehold strata scheme — Common property — Maintenance and repair of common property — Obligations of owner and occupiers — Continual water damage — Renewal of lease despite water damage

RESIDENTIAL AGREEMENT — Purported breach of lease — Failure to fix damaged property — Whether defendants failed to act reasonably in the circumstances — Whether making an application under s 140 of the SSMA Act 1996 would have been a reasonable step in fixing property

Legislation Cited: Residential Tenancies Act 2010 (NSW), ss 3, 13, 43(2), 63(2), 65  
Residential Tenancies Regulation 2010 (NSW)  
Strata Schemes Management Act 1996 (NSW), ss 62, 138, 140, 150

Cases Cited: Craig Kentell v Oliver Steele; Oliver Steele v Craig Kentell [2014] NSWCATCD 102  
Edex International Holdings Pty Ltd v Marmalade Films Pty Ltd [2003] NSWCA 8; (2003) 56 NSWLR 63  
Italia Ceramics International Super Ltd and Anor v CM Corporation Pty Ltd [2019] SASCFC54  
Lee v Fuzessery [2010] NSWCTTT 205  
Matthew Hanney and Belinda Smiley v Lachlan McCabe and Amanda Toshack [2014] NSWCATCD 239  
Northern Sandblasting Pty Ltd v Harris (1997) 188 CLR 313; (1997) 146 ALR 572  
Reiss v Helson [2001] NSWSC 486  
Timms and Simpson v Adams [2012] NSWCTT 53  
Wang v Abdel-Messih [2017] NSWCATCD 11

Texts Cited: Anforth, Allan, Peter Christensen, Christopher Adkins, Residential Tenancies Law and Practice New South Wales (Federation Press, 7th ed, 2017)

Category: Principal judgment

Parties: Bruce Alan Pursell (Plaintiff)  
Eversham Close Pty Ltd (Defendant)

Representation: Counsel:  
Mr S.J. McMahon (Plaintiff)  
Mr J McKenzie (Defendant)

Solicitors:  
Laycock Burke Castaldi Lawyers (Plaintiff)  
Priest Legal (Defendant)

File Number(s): 17/375351

Publication Restriction: N/A

## JUDGMENT

1 The Plaintiff was the tenant of property owned by the Defendant located at 401/22 Mort Street Port Macquarie in a building known as the Icon between February 2013 and December 2016 (**the property**). By all accounts it was a beautifully positioned apartment which had some appeal to the Plaintiff and his

wife, who resided in another unit in the building prior to 2013.<sup>1</sup> Notwithstanding this their occupancy was, from time to time, disturbed principally by water ingress. Following the tenancy coming to an end and having paid all rent otherwise due, the Plaintiff brings these proceedings claiming damages.

- 2 The Plaintiff in his case gave evidence himself and also called his wife, Ms Lydia Pursell, who resided with him at the premises.
- 3 The Defendant was the Landlord of the property. In its case it called Mr John Constant, a director of the Defendant,<sup>2</sup> as well as his wife Ms Margerite Constant who was a co-director and secretary. Ms Constant's evidence was that the Defendant engaged managing property agents, Ray White Port Macquarie (**the Agents**) as the property managers for the premises. She stated that all dealings were left to them, and they liaised with the tenant, the Strata,<sup>3</sup> and others on the Defendant's behalf and sought instructions as required.<sup>4</sup>
- 4 The Defendant also called Ms Lisa Lewis, the property manager of the Agent. Ms Lewis affirmed an affidavit,<sup>5</sup> in respect of which the Plaintiff did not seek to cross examine. The Defendant also tendered an affidavit affirmed by its solicitor Mr Jeremy William Bridgen dated 18 February 2019. This annexes records produced by the Strata Professionals Port Macquarie (**the Strata Professionals**) in response to a subpoena.<sup>6</sup> Those records inter alia reveal that Strata Professionals were the Strata Managers of the Strata from at least 24 May 2013.

## **Plaintiff's Case**

### *Inspection*

- 5 Prior to entering into the lease the Plaintiff gave evidence that he inspected the property. In his affidavit, he stated that generally in his role as a property manager he was critical of the state of rental properties. However, apart from the property being dirty and infested with cockroaches, he did not see any

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<sup>1</sup> Exhibit A, Affidavit of Bruce Pursell at [10] and [52].

<sup>2</sup> T 78.35-.39.

<sup>3</sup> Owners Corporation of Strata Plan 83383.

<sup>4</sup> Exhibit 1 Affidavit of Bruce Pursell at [3]-[4].

<sup>5</sup> Exhibit 3, Affidavit of Lisa Lewis.

<sup>6</sup> Exhibit 4, Affidavit of Jeremy William Bridgen.

damage or areas of concern on the inspection.<sup>7</sup> In oral evidence he qualified this, stating that it was that it was a cursory look, and he did not look for anything.<sup>8</sup> It was not in issue that he was familiar with the building in which the unit was located, having previously leased another unit in the block.

6 Ms Pursell also gave evidence on this point. She stated that she went around to inspect the property, and there was no indication that there was anything wrong. She stated that both the Plaintiff and herself wanted to stay in the Icon, as they enjoyed living in it and it was easy for the Plaintiff to be able to move around.<sup>9</sup>

7 In cross-examination, Ms Pursell stated that at the point that she inspected the property she did not know that there were any problems with it,<sup>10</sup> nor did the Plaintiff notice any problems.<sup>11</sup>

8 The Plaintiff stated that on or about 4 February 2013, he sent an email to the Agent seeking to make some modification in light of the fact that he required easier access as he had impaired mobility.<sup>12</sup>

#### *First Tenancy Agreement*

9 On 13 February 2013, the Plaintiff entered into a tenancy agreement with the Defendant pursuant to which the Plaintiff agreed to tenant the property for a period of 104 weeks at a weekly rent of \$650.00. This document, described in evidence as the 'First Lease',<sup>13</sup> was in the format of the Real Estate Institute of NSW Residential Tenancy Agreement.<sup>14</sup>

10 Ultimately, the Plaintiff and his wife took possession of the property on 18 February 2013 and were provided with a condition report to complete.<sup>15</sup>

11 Thereafter, the Plaintiff said he noticed a number of problems. He stated that he sprayed cockroaches, fixed broken lights, and cleaned windows which had

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<sup>7</sup> Exhibit A, Affidavit of Bruce Pursell at [9].

<sup>8</sup> T 15.24-.32.

<sup>9</sup> Exhibit B at [5]-[6].

<sup>10</sup> T 61.29-.32.

<sup>11</sup> T 61.37-.39.

<sup>12</sup> Exhibit A, Affidavit of Bruce Pursell at [10]; Exhibit BP-1 at page 1.

<sup>13</sup> The term lease was used during the hearing as synonymous with a residential tenancy agreement.

<sup>14</sup> Exhibit A, Affidavit of Bruce Pursell at [11]; Exhibit BP-1 at page 3.

<sup>15</sup> Exhibit A, Affidavit of Bruce Pursell at [13].

building material on them.<sup>16</sup> He stated that he did these tasks himself, because that was the state that the property was presented to him.<sup>17</sup>

12 On 23 February 2013, the Plaintiff stated that there was some water ingress in the lounge room and the two guest bedrooms. The water ingress required a bucket to be placed underneath the air conditioner duct in the hallway and to soak the carpet in certain rooms.<sup>18</sup>

13 On the same day the Plaintiff said that he contacted the Agent to advise of the water ingress in two bedrooms on the southern side of the property, as well as other issues that had been identified.<sup>19</sup> The Plaintiff stated that he thereafter recorded in the condition report many of the issues with the property, none of which had been noted by the Agent in the comments section of the initial report. These included:

- (a) Some water damage on the walls of the main bedroom;
- (b) Some water ingress in the second bedroom;
- (c) Some water damage in the hallway;
- (d) Mould on the balcony and external walls;
- (e) Stains and marks on the carpet in the lounge room and hallway; and
- (f) Marks on the ceiling and stains on the doors throughout the property.<sup>20</sup>

14 On 25 February 2013, the Agent's property manager, Ms Vanessa Alderton, emailed the Plaintiff and advised that she had emailed the Strata earlier that morning and hoped to have a reply soon so that she could update the Plaintiff. She also asked the Plaintiff if the carpet required extraction of water and cleaning, as she would arrange this as soon as possible.<sup>21</sup>

15 The Plaintiff responded thereafter stating that he would not take up the suggestion until the water ingress had been fixed and the rain had abated. He stated that his own work team was flat out with renovations; otherwise he could

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<sup>16</sup> T 15.39-.45.

<sup>17</sup> T 15.39-.45.

<sup>18</sup> Exhibit A, Affidavit of Bruce Pursell at [14].

<sup>19</sup> Exhibit A, Affidavit of Bruce Pursell at [15]; Exhibit BP-1 at pages 15-16.

<sup>20</sup> Exhibit A, Affidavit of Bruce Pursell, at [16]; Exhibit BP-1 at pages 17-22.

<sup>21</sup> Exhibit A, Affidavit of Bruce Pursell; Exhibit BP-1 at page 15.

have offered to fix the problem.<sup>22</sup> In evidence, the Plaintiff accepted that he declined the opportunity to have the water removed.<sup>23</sup>

- 16 For her part, Ms Pursell stated that it was only after mid-February 2013 when she and the Plaintiff moved into the property that it became apparent several things that were not noticed upon inspection, such as the cleanliness of the premises and a broken sky light. There was also mould on the windows in the two bedrooms, and along the small window in the kitchen, with water dribbling down the cupboards from the sky light.<sup>24</sup> Ms Pursell stated that she had not noticed any of these problems on her earlier inspections, as she had just had a brief look and concentrated mostly on the toilet and the bathroom.<sup>25</sup> She stated that she didn't notice the smell.<sup>26</sup>
- 17 Ms Pursell stated that after living in the property for 5 days it rained, and it was apparent that water was leaking into the property. Water came in from the front side of the apartment through the doors and windows, which faced onto the large balcony. Water also came through the two bedrooms and the living room.<sup>27</sup>
- 18 Between occupation and early May, the Plaintiff stated that additional issues became apparent in the property, including:
- (a) Drummy and loose tiles;
  - (b) Insufficient fall on the terrace towards the drainage, causing pooling of water;
  - (c) A damaged shade sail was unusable; and
  - (d) Cascading rain down the stairs, possibly causing some of the water ingress into the lounge room.<sup>28</sup>

### *May 2013*

- 19 The Plaintiff stated that on or about 6 May 2013, it rained again and the leaks reoccurred. Consequently, there was damage to the carpet in the lounge room and the bedrooms. The Plaintiff thereafter sent an email to the Agent updating

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<sup>22</sup> Exhibit A, Affidavit of Bruce Pursell; Exhibit BP-1 at page 15.

<sup>23</sup> T 17.34-.42.

<sup>24</sup> Exhibit C, Affidavit of Lydia Pursell at [8].

<sup>25</sup> T 61.45-.49.

<sup>26</sup> T 62.05-.10.

<sup>27</sup> Exhibit C, Affidavit of Lydia Pursell at [9].

<sup>28</sup> Exhibit A, Affidavit of Bruce Pursell at [17].

them on the issues that he had raised on 23 February 2013, as well as the more recent issues on the roof terrace. He added "All of this not urgent but carpet wet where mentioned."<sup>29</sup>

20 The Plaintiff conceded by reference to an email forwarded to the Agent dated 8 May 2013 that a plasterer came to fix the damaged areas.<sup>30</sup> He said that he thought it was the actual builder who sent the plasterer, rather than the body corporate.<sup>31</sup> He also stated that he knew that the Agent had contacted the Strata.<sup>32</sup>

21 On 8 May 2013 the Agent asked the Plaintiff for further details as to what had been attended to and what had not. The Plaintiff acknowledged, to this extent, the Agent had been proactive.<sup>33</sup> In response, the Plaintiff forwarded an email updating on the state of repairs.<sup>34</sup> It referred to the plasterer having plastered the damaged areas adding that, "The unit is generally fine even though it is sounding like a novel and fixing is becoming negligent." Referring to outstanding issues it stated:-

Water Dropping from a/c vent in corridor entry (bucket under) ONLY WHEN RAIN FROM SOUTH"

Southern b/r where sliding door opens and eastern window STILL THE SAME

Other southern b/r water trickling down from window STILL THE SAME

All of this not urgent but carpet wet where mentioned BECOMING MORE DAMAGED

...

Water still entering the unit

Plasterer (Mat) doing repair work today without the problem being fixed

2 Next rain water will come in and ruin the work being done now

3 No attempt has been made to fix the water entry point for many years

4 I am not sure the entry points can be pinpointed and fixed

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<sup>29</sup> Exhibit A, Affidavit of Bruce Pursell at [18]; Exhibit BP-1 at page 23.

<sup>30</sup> T 19.19-.36.

<sup>31</sup> T 20.21-.25.

<sup>32</sup> T 20.35-.39.

<sup>33</sup> T 21.17-.19.

<sup>34</sup> Exhibit A, Affidavit of Bruce Pursell at [18].

5 We have spoken to Ian who is aware of the problems but with the plastering being done prior to the water entry points

6 Nothing done in the upstairs area but again Ian is aware of the problems being

a Tiles not laid correctly with many drummy and some loose

b North western drain blocked and built at a height that the drain is ineffective to drain the roof area

c Shade damaged

d Rain cascades down stair area which may be a partial cause to the water entering the lounge area.<sup>35</sup>

22 The Plaintiff acknowledged an email sent by the Agent on 24 May 2013 requesting a date for inspection involving various parties.<sup>36</sup> He said that the inspection that was suggested for 29 May 2013 at 3:30pm,<sup>37</sup> did in fact take place as far as he knew.<sup>38</sup>

23 Also on 24 May 2013, the Agent sent an email to Mr Glen Duggan from Strata Professionals, and also to a person described as the “odd job man”, known as Ian.<sup>39</sup> The email sought advice as to when the water leaks would be fixed. The Plaintiff acknowledged that the Agent and the Plaintiff were taking active steps to try and have the leaks fixed.<sup>40</sup>

24 The Plaintiff stated that the water ingress was coming around the frames of the doors and the windows which had been incorrectly installed and also through the roof.<sup>41</sup> The Plaintiff said that in early June, the windows were sealed and repainted but no substantive repairs were undertaken.<sup>42</sup> Notwithstanding this, the Plaintiff’s evidence was that the property continued to leak during rain events throughout 2013, and most notably in late June, early July and mid-November.<sup>43</sup>

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<sup>35</sup> Exhibit A, Affidavit of Bruce Pursell; Exhibit BP-1 at page 25.

<sup>36</sup> Exhibit A, Affidavit of Bruce Pursell; Exhibit BP-1 at page 27.

<sup>37</sup> Exhibit A, Affidavit of Bruce Pursell at [20]; Exhibit BP-1 at page 27.

<sup>38</sup> T 21.43-.48.

<sup>39</sup> Exhibit A, Affidavit of Bruce Pursell at [20]; Exhibit BP-1 at page 28.

<sup>40</sup> T 22.23-.25.

<sup>41</sup> T 23.17-.46.

<sup>42</sup> Exhibit A, Affidavit of Bruce Pursell at [21].

<sup>43</sup> Exhibit A, Affidavit of Bruce Pursell at [22].



- 25 On 27 June 2013 and 11 June 2013, the Plaintiff stated that he notified the Agent of the continuing leak problems.<sup>44</sup> The Plaintiff stated that 2013 was a fairly dry year,<sup>45</sup> with some heavy periods of rain in June and November, which was when the most significant leaks occurred. However, when there was only light rain, water was said to have still come into the property that caused wet carpet, a terrible smell and bubbles in some of the paint work.<sup>46</sup> He stated that there were numerous visits from handymen in late 2013 and early 2014, who tried numerous times to stop the water ingress; however, none of these fixed the problem and the leaks continued each time after it rained.<sup>47</sup>
- 26 On 25 July 2013, the Plaintiff emailed the Agent stating that “Ian is struggling to complete jobs” and that the problem with the sail post “clunking” was “NOW FIXED.”<sup>48</sup>
- 27 On 11 November 2013, the Plaintiff sent another email to the Agent stating that:-
- Water again entered the unit  
In the main b/r water running under paint as witnessed by you some time ago  
I have marked with SAME OR FIXED  
Ian has attempted to repair some problems to no avail  
Let’s know if we can help any way but I feel the problems will persist without expert guidance.<sup>49</sup>
- 28 The same day the Agent advised that they were not happy that the Strata had not fixed the problems and were following it up.<sup>50</sup>
- 29 For her part Ms Pursell stated that over the months that followed their tenancy, each time it rained it got worse. Ms Pursell stated that the area affected depended upon the direction of the rain. She stated that mould started to spread across the window sill in Bedroom 3 and water clearly leaked down

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<sup>44</sup> Exhibit A, Affidavit of Bruce Pursell at [22]; Exhibit BP-1 at page 29.

<sup>45</sup> Exhibit A, Affidavit of Bruce Pursell at [23]; Exhibit BP-1 at page 30.

<sup>46</sup> Exhibit A, Affidavit of Bruce Pursell at [23].

<sup>47</sup> Exhibit A, Affidavit of Bruce Pursell at [24].

<sup>48</sup> Exhibit A, Affidavit of Bruce Pursell; Exhibit BP-1 at page 29.

<sup>49</sup> Exhibit A, Affidavit of Bruce Pursell; Exhibit BP-1 at page 29.

<sup>50</sup> Exhibit A, Affidavit of Bruce Pursell; Exhibit BP-1 at page 29.

behind the paint and started to bubble.<sup>51</sup> Ms Pursell stated that by mid-2013 the damp smell became almost unbearable. The rain was heavier, and the water down the stairs became almost like a waterfall.<sup>52</sup>

- 30 Notwithstanding this, Ms Pursell's evidence was that they did not consider leaving because the property suited them both. She described this as referable to the fact that the Plaintiff is paraplegic, and the bathroom was big enough for him to get into the toilet and go into the shower.<sup>53</sup> She stated that she used air freshener plug-ins to try and lessen the smell.<sup>54</sup>

#### *February 2014*

- 31 The Plaintiff stated that by February 2014, the water ingress was so severe that he and his wife were unable to utilise the second and third bedrooms because either the carpet was wet from where the water would come in, or the dank and mouldy smell permeated the rooms beyond use. He stated that they could not close the door in these rooms, nor could they use them for anything. They used their own driers to try and dry the carpet; however, if they attempted to shut the property, the smell would become unbearable. They therefore had to leave doors and windows open to air it out.<sup>55</sup>
- 32 Ms Pursell added that in February 2014, the water ingress was so bad that she found mushrooms growing in the carpet. The strip of timber holding the carpet down to the floor started to rot, and came away from the wall, such that as soon as she opened the front door she could smell dampness.<sup>56</sup> In cross-examination, Ms Pursell nonetheless conceded that from February 2014 (when she noticed the mushrooms growing), there were people coming to look and trying to fix the things, albeit not succeeding.<sup>57</sup>
- 33 Thereafter on 24 February 2014, the Plaintiff wrote an email to the Agent informing her that following the talks with the neighbouring occupier, they were

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<sup>51</sup> Exhibit C, Affidavit of Lydia Pursell at [10].

<sup>52</sup> Exhibit C, Affidavit of Lydia Pursell at [11].

<sup>53</sup> T 63.18-.23.

<sup>54</sup> T 62.46-63.06.

<sup>55</sup> Exhibit A, Affidavit of Bruce Pursell at [25].

<sup>56</sup> Exhibit C, Affidavit of Lydia Pursell at [12].

<sup>57</sup> T 65.04-.13.

successfully getting their problems fixed, while Ian was a “dead horse”.<sup>58</sup> The Plaintiff reiterated that he had been disadvantaged by the water, in that they were unable to have guests use the southern rooms due to the dank smell. He explained that they had to dry the wet areas continually and they had to curtail the cleaning of the top deck, as the tiles had not been waterproofed and consequently water would come into the property.<sup>59</sup>

34 This correspondence was forthwith forwarded to the Strata manager.

*March 2014*

35 The Plaintiff stated that there was a significant amount of rain on 1 and 2 March 2014. The leaks at that stage were severe, and there were additional problems starting to show, including a fairly major leak in the main bedroom that caused bubbling in the roof paint in the bedroom. While the Plaintiff was away at the time of that rain (as he was on holiday in Queensland) the Agent attended for inspection, and telephoned to advise that there was a new leak.<sup>60</sup>

36 The Plaintiff and his wife immediately returned from Queensland, and stated that the result smell was horrid and there was a lot of water inside and a pooling on the carpet. The furniture then had to be moved to avoid the wet carpet.<sup>61</sup>

37 Ms Pursell stated that in March 2014, she received a call from the Agent advising that there had been a lot of rain and following a check on the property and she found huge bubbles of water trapped behind the bed head in the wall of the master bedroom.<sup>62</sup> Upon returning to the property, Ms Pursell stated that she noticed that there was not only bubbling paint, but also water trickling through the light above the bed.

38 Consequently, the Plaintiff sent an email to the Agent on 3 March 2014.<sup>63</sup> According to the Plaintiff, the Agent regularly advised that the Strata had been contacted and asked to fix the problem. However, after each rain event, he

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<sup>58</sup> Exhibit A, Affidavit of Bruce Pursell; Exhibit BP-1 at page 31.

<sup>59</sup> Exhibit A, Affidavit of Bruce Pursell; Exhibit BP-1 at page 31.

<sup>60</sup> Exhibit A, Affidavit of Bruce Pursell at [27].

<sup>61</sup> Exhibit A, Affidavit of Bruce Pursell at [27].

<sup>62</sup> Exhibit C, Affidavit of Lydia Pursell at [13].

<sup>63</sup> Exhibit A, Affidavit of Bruce Pursell; Exhibit BP-1 at page 32.

complained to the Agent, and someone invariably came to the property for a day or so to try and fix the leak, but nothing worked. He stated that it was only when he complained about water going into the lights that someone was sent around to fix the leaks that had occurred on 1 and 2 March 2014.<sup>64</sup> Ms Pursell also stated that only when the water came through the light switch did the Agent take action.<sup>65</sup>

39 The Plaintiff's email to the Agent of 3 March 2014 stated:-

We have heard nothing from you and as you can imagine much rain came in on the weekend including the bubble viewed by you which had come down to the light switch

All our team are busy doing renovations at present o the builder

The problem is much greater that first imagined as the water is coming through the top deck which may necessitate taking up the tiles

All the issues still exist

Brian who heads the body corporate has said "we have a submission to go the tribunal which I am impressed with"

David and Jackie in 403 have somebody trying to fix the leaks on behalf of the builder

If a repair dollar can be established the cheapest method may be to put a roof over the top deck

Your landlord should be informed as there may be structural faults that to rectify will cost many dollars.<sup>66</sup>

40 The Agent, through Ms Alderton, responded that she was under the impression that the Strata/builder was attending to the water leaks in the complex but was trying to ascertain why they had not been attended to like the others.

41 The Plaintiff's further email of 3 March 2014 stated:-

We do have a water expert in our team

We have found you have to remove all surface material and apply the water seals and then reapply the surface material

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All of the leaks are repairable but expensive and given a free reign we are able to help with this but feel the Landlord has to in consultation with

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<sup>64</sup> Exhibit A, Affidavit of Bruce Pursell at [28].

<sup>65</sup> Exhibit C, Affidavit of Lydia Pursell at [14].

<sup>66</sup> Exhibit A, Affidavit of Bruce Pursell; Exhibit BP-1 at page 32.

us know which track we recommend and they have to make the decision as to our direction

This would be taken by us gaining a report as to what has to be done which then would be presented to the landlord for his approval

This report would be presented to the builder but would have the life (sic) in consultation with the body corporate as to what course should be taken

1 Builder undertakes to fix things within a time frame

2 Tribunal by the body corporate to make the builder or insurance fix the problems

3 Body corporate undertakes to fix problems

A year has passed with us as the tenant greatly inconvenienced

Who is to recompense for that.<sup>67</sup>

- 42 Ultimately, a builder described as Mr Doug Merrick, came after the rain in March to fix the leak in the main bedroom on the instruction of the Strata.<sup>68</sup> The Plaintiff stated that there was no substantive work done on the major leaks in the other bedrooms, in the living room, or in respect of the issues of water streaming down the stairs from the roof terrace into the living area.<sup>69</sup>
- 43 Ms Pursell stated that following the March 2014 leaks, there was an attempt made to fix the leaks, particularly around the light fitting and the bedroom, and some minor works were done with the door and windows being resealed. She observed that this did not make much of a difference, and possibly led to leaks that arose in other parts of the property. Water also started to leak through the light fitting in the wardrobe and through the front door. This led to her having to use buckets to catch water, but the resulting smell from the numerous leaks was horrendous.<sup>70</sup>
- 44 Ms Pursell gave evidence that in May 2014, Mr and Ms Constant, together with the Agent, came around to inspect the property. Ms Pursell stated that during one of the conversations, Ms Constant indicated that they put a row of tiles down in front of the window which would save some of the carpet being

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<sup>67</sup> Exhibit A, Affidavit of Bruce Pursell; Exhibit BP-1 at page 32.

<sup>68</sup> Exhibit A, Affidavit of Bruce Pursell at [30].

<sup>69</sup> Exhibit A, Affidavit of Bruce Pursell at [31].

<sup>70</sup> Exhibit C, Affidavit of Lydia Pursell at [15].

damaged.<sup>71</sup> She stated that her response was that it would be terrific, and Ms Constant agreed that she would go back and choose some colours to match the carpet.<sup>72</sup> However, she subsequently stated that she did not recall whether the Plaintiff told them that he did not want to do that.<sup>73</sup>

- 45 The evidence of the Plaintiff was that between April and August 2014, there wasn't much rain and the water ingress was not as bad. However, the property remained affected as a consequence of the water damage, such as the smell and the mouldy carpet. He stated that the two spare bedrooms were unusable and the living room carpet was significantly damaged, such that guests could not be accommodated.<sup>74</sup>

#### *October 2014*

- 46 On 13 October 2014 Ms Jenny McEwan, property manager of the Agent, emailed the Plaintiff stating that she was having a meeting with someone from the Strata and requested the Plaintiff to compile a list of all the water leaks and the issues.<sup>75</sup> The Plaintiff acknowledged in evidence that the email of 13 October 2014 from Ms McEwan referred to a meeting between one of the Defendant's directors, described as "Margerite", and "Kaitlyn" from Strata Professionals on Thursday.<sup>76</sup> The Plaintiff stated that he responded on the same day, referring also to the fact that the only leak that had been effectively fixed in the 20 months of occupation was that by Mr Merrick in March 2014.<sup>77</sup> This appears to be the main bedroom.
- 47 In an email dated 16 October 2014, the Plaintiff provided the details of the issues in respect of the unit. The email included that there were leaks as follows:-

Kitchen  
Eastern small widow  
Lounge room

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<sup>71</sup> Exhibit C, Affidavit of Lydia Pursell at [16] and T 65.15-.42.

<sup>72</sup> T 65.36-.38.

<sup>73</sup> T 65.40-.42.

<sup>74</sup> Exhibit A, Affidavit of Bruce Pursell at [32].

<sup>75</sup> T 26.36-.48.

<sup>76</sup> T 26.30-.38.

<sup>77</sup> Exhibit A, Affidavit of Bruce Pursell at [33]; Exhibit BP-1 at page 34-37.

leaks from the northern sliding door eastern single door ceiling centre

Bedroom 1

Leaks fixed by Dough (sic)

Hallway

Air conditioner vent leaks

Bedrooms 2 and 3

Leaks form southern side and eastern window

Entry foyer

Southern side of elevator

Top Deck

North western side and North east side water does not flow out the exit pipes

Water flows overside on eastern side

Tiles drummy and no waterproofing underneath<sup>78</sup>

48 The Plaintiff described that the work done by “Ian” consisted of him painting over the windows, but not fixing the ingress of water.<sup>79</sup> It was put to the Plaintiff that the owners (the landlord) had been acting on the complaints that he had made, and the Plaintiff’s response was “It doesn’t matter. They didn’t fix it.”<sup>80</sup> The Plaintiff accepted that the Defendant referred the complaints to the Strata on a number of occasions.<sup>81</sup>

49 The Plaintiff described the dilemma as follows:

WITNESS: Your Honour, the water's coming in. We're inconvenienced. They only looked at it once, they weren't worried about us, nor was the agent. And here we were in water the whole time with a smelly carpet and all the rest of it, and they wouldn't fix it. I offered to fix it for them and they didn't – that didn't even go to the landlord, I don't think. And that's where I became disillusioned with the agent.<sup>82</sup>

50 The term of the first tenancy agreement ended in February of 2015. The Plaintiff stated that there were serious water ingress problems, but the thought of having to find a suitable place to move to again after living in the building for 6 years was unappealing due to his specific needs with access. He stated that

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<sup>78</sup> Exhibit A, Affidavit of Bruce Pursell; Exhibit BP-1 at page 35.

<sup>79</sup> T 27.45-.50.

<sup>80</sup> T 28.03-.08.

<sup>81</sup> T 28.14-.16.

<sup>82</sup> T 28.47-29.02.

there were no other apartments available in the building at the time, and he hoped that once the leaks were fixed, they could negotiate a longer lease to avoid moving again. Accordingly, he and his wife remained in occupation of the property and looked at ways to deal with the water ingress by trying to engage with the landlord and the Strata manager to get the leaks fixed.<sup>83</sup>

### *Second Tenancy Agreement*

- 51 On 17 February 2015, the Plaintiff signed a second tenancy agreement for a period of 6 months.<sup>84</sup> He stated that he only signed 'a short lease' with the intention that the Defendant might be inclined to fix the leaks. The rent during the second tenancy agreement remained the same.<sup>85</sup>
- 52 The Plaintiff stated that he knew at the time of entering into the second agreement that there were problems with the unit.<sup>86</sup> However, he did not accept the state of the property when he entered into that agreement.<sup>87</sup> He stated that he expected the landlord to fix the leaks. He stated that he did not ask for a further lease, but was told that the first agreement had expired and the landlord demanded that a new one be entered into. He admitted wanting a longer tenancy, but stated that he did not ask for the second agreement.<sup>88</sup>
- 53 He said that the landlord undertook the same conditions in the second agreement, as it did in the first.<sup>89</sup>
- 54 The Plaintiff acknowledged that the rent in the second agreement had not been increased, but stated that \$650 was high to begin with and he was happy with the rent because the premises were a penthouse.<sup>90</sup>
- 55 The Plaintiff's evidence was that the water ingress increased over time, and in addition to the leaks in the two spare bedrooms, there were leaks in the doors

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<sup>83</sup> Exhibit A, Affidavit of Bruce Pursell at [34].

<sup>84</sup> Exhibit A, Affidavit of Bruce Pursell; Exhibit BP-1 at pages 38-49.

<sup>85</sup> Exhibit A, Affidavit of Bruce Pursell at [35].

<sup>86</sup> T 30.07-.09.

<sup>87</sup> T 30.11-.12.

<sup>88</sup> T 29.40-.45.

<sup>89</sup> T 30.15-.19.

<sup>90</sup> T 31.30-.44.



in the living room, another leak in the main bedroom, and moisture started to form in the light fitting in the walk in wardrobe.<sup>91</sup>

- 56 On 3 June 2015, the Plaintiff wrote to the Agent in respect of what was described as “water leaks getting greater in number with a leak near the ensuite door of bedroom 1” and “the light in the closet appearing to be gaining moisture from somewhere being mould has appeared.” The email added “our absence in complaint has been knowledge of the body corporate’s actions and we have for a long time put up with all the leaks.”<sup>92</sup> The Agent passed this on to the Strata manager the same day.
- 57 There is evidence that the Strata arranged to have a builder Ian Little provide a report. That report dated 13 July 2015 noted a number of defects and recommended that the matter be referred to the builder of the apartment block.<sup>93</sup>
- 58 The Plaintiff acknowledged that his claim for abatement of 80% of the rent was on the basis that 80% of the property was unusable to him.<sup>94</sup> He conceded that this was the case when he entered the second agreement. He stated he made no earlier claim in abatement as the problem was ongoing and until the problem was fixed the claim had not crystallised.<sup>95</sup> He conceded that when he entered into the second agreement, he did not get an inspection certificate. He stated that he would only enter into a lease for 6 months as he thought the landlord would be sick of coming around every 6 months for the lease.<sup>96</sup>
- 59 When the term of the second agreement ended the Plaintiff wished to stay in the premises, and a third agreement was said to be required.<sup>97</sup> He stated that although the leaks were continuing and were affecting the day to day use of the property, there were numerous considerations against moving. He maintained that based on his experience of the property, all of the issues were fixable and he continued to report issues by complaining to the Agent in the hope that the

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<sup>91</sup> Exhibit A, Affidavit of Bruce Pursell at [36].

<sup>92</sup> Exhibit A, Affidavit of Bruce Pursell; Exhibit BP-1 at page 50.

<sup>93</sup> Exhibit 4 Affidavit Jeremy William Brigden; Exhibit JC-1 at page 309.

<sup>94</sup> T 42.04-.12.

<sup>95</sup> T 42.29-.44.

<sup>96</sup> T 45.47- 46.04.

<sup>97</sup> T 46.17-.31.

landlord would attend to leaks so that they could enjoy the use of the property.<sup>98</sup>

### *Third Tenancy Agreement*

60 The Plaintiff acknowledged that on 7 August 2015, he executed a third tenancy agreement for a fixed term of 12 months at the same rent of \$650 per week.<sup>99</sup> In evidence, he had no idea as to why he did not enter an agreement for another 6 months.<sup>100</sup> He added that he thought the landlord had demanded a yearly lease, but he can't say that for sure.<sup>101</sup> He conceded that at the time he entered into the third tenancy agreement, he was still aware of the problems that he saw with the top deck.<sup>102</sup>

61 On 18 June 2015 the Agent carried out a routine inspection of the property. On 17 December 2015 the Agent's property manager Ms Lisa Blanch reported to the Defendant that the property appeared to be well maintained throughout and the tenant seemed quite happy in the property.<sup>103</sup>

62 In terms of the Plaintiff's contention that 80% of the property was unusable, he acknowledged that the terrace area was part of that.<sup>104</sup> He stated however, that the spa was usable, the outdoor kitchen was usable, and that he had furniture on the terrace.<sup>105</sup> He added that there was a sail over the area which had leaned, and had on some occasions blown off and blown away,<sup>106</sup> although he acknowledged that the post had been repaired several times.<sup>107</sup> Furthermore, when there was rain a pool ponded, as the outlet was too high. There were also stairs going down to the bottom section that carried rain water down.<sup>108</sup> When it was put to the Plaintiff that he was exaggerating the extent of the problems, he rejected this.<sup>109</sup>

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<sup>98</sup> Exhibit A, Affidavit of Bruce Pursell at [37].

<sup>99</sup> Exhibit A, Affidavit of Bruce Pursell at [38]; Exhibit BP-1 at page 63.

<sup>100</sup> T 46.36-.37.

<sup>101</sup> T 46.39-.40.

<sup>102</sup> T 46.42-.44.

<sup>103</sup> Exhibit 3, Affidavit of Lisa Lewis; Exhibit LL-1 at page 6.

<sup>104</sup> T 43.21-.23.

<sup>105</sup> T 43.31-.41.

<sup>106</sup> T 43.43-.50.

<sup>107</sup> T 44.31-.32.

<sup>108</sup> T 43.48-.50.

<sup>109</sup> T 44.45-45.13.

- 63 The Plaintiff stated that in early February 2016 during another rain event, the light in the walk-in wardrobe began to leak. He subsequently sent an email to the Agent on 5 February 2016, stating that he had been most patient with the lack of performance.<sup>110</sup>
- 64 On 5 February 2016 the Agent sent a repair job order.<sup>111</sup>
- 65 When he did not receive a reply, the Plaintiff sent a further email on 9 February 2016, stating:-

IT HAS BEEN 4 DAYS SINCE I GAVE YOU NOTICE OF AN URGENT PROBLEM OF WATER COMING THROUGH THE LIGHT

THIS IS NOW UNACCEPTABLE AND RECEIVE THIS AS A NOTICE OF NEGLIGENCE INCLUDING MY OTHER COMPLAINTS WHICH HAD NOT BEEN ACTED UPON

WE SERVE YOU WITH THIS NOTICE AND WILL CLAIM COMPENSATION FOR THE PERIOD WE HAVE OCCUPIED THE UNIT

WITHOUT THE NEW WATER LEAK BEING FIXED IMMEDIATELY WE WILL VACATE THE UNIT AND CLAIM COMPENSATION.<sup>112</sup>

- 66 Ms McEwan responded shortly after this email, stating:-

Hi Bruce

Just to let you know that I contacted Strata by phone when the leak in the wardrobe was reported to our office. Unfortunately when I sent the work order I have accidentally left out that the water was coming through a downlight. I have rung Strata upon receipt of your email today & advised that this is urgent and resent the email to both Julie & Kathryn at Strata for urgent attention.<sup>113</sup>

- 67 The Agents records show that a further work order was sent out on 9 February 2016. Thereafter an electrician from Brighter Davis Electrical was engaged to fix a flickering bathroom light, and buzzing switch and Doug Merrick by the Strata had been engaged to source and repair the leak in the wardrobe. The records show that these matters were attended to on 1 March 2016.<sup>114</sup>

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<sup>110</sup> Exhibit A, Affidavit of Bruce Pursell; Exhibit BP-1 at page 64.

<sup>111</sup> Exhibit 3, Affidavit of Lisa Lewis; Exhibit LL-1 at page 64.

<sup>112</sup> Exhibit A, Affidavit of Bruce Pursell; Exhibit BP-1 at page 64.

<sup>113</sup> Exhibit A, Affidavit of Bruce Pursell; Exhibit BP-1 at page 64.

<sup>114</sup> Exhibit 3, Affidavit of Lisa Lewis; Exhibit LL-1 at page 63.

68 A report was prepared by the tenants on 19 May 2016 in advance of a routine inspection on 8 June 2016.<sup>115</sup> The report contained references to the leaks to the property, including “the water”, the fact it was “continually wet at entrance to the main ensuite” and the “many water leaks”. Also mentioned was that the sail was bending. The report added:-

”WE HAVE OCCUPIED THIS UNIT FOR MANY YEARS DURING WHICH TIME YOUR AGENCY OR THE LANDLORD HAS FAILED TO ACT

ONLY WHEN THREATENED HAVE TWO LEAKS BEEN FIXED.

WE HAD TO CLEAN THE UNIT AND GET RID OF A COCKROACH INFESTATION WHEN WE STARTED OUR LEASES.

THROUGH YOUR AGENCY NEGLIGENCE WE HAD TO SPEND \$90 CLEANING AND COST OF ELECTRICAL.<sup>116</sup>

69 Over the weekend of 4 and 5 June 2016, the Plaintiff stated that it rained in Port Macquarie. The rain was extreme and the leaks to the property were the worst it had ever been. The water pooled severely on the carpet in the lounge room and bedrooms, and would splash to walk in. The Plaintiff stated that he and his wife could not move the furniture anywhere because the two guest bedrooms and the living room area were underwater. Photographs were taken showing the extent of the water affecting the use of the property.<sup>117</sup>

70 On 6 June 2016, the Plaintiff sent an email to the Agent regarding the severity of the water leaks. The email read as follows:-

...

THE WHOLE OF THE NORTHERN END IS FLOODED UP TO 3M IN LENGTH AND SPLASHY TO WALK IN

FURNITURE IS SITING IN WATER AND MAY BE INCURRING DAMAGE

THIS IS NOT STORM AND TEMPEST BUT AN ONGOING PROBLEM THAT YOUR FIRM HAS BEEN NEGLIGENT IN NOT BEING ABLE TO FIX

THIS UNIT HAD THE DEFECTS PRIOR TO US RENTING OF WHICH WE WERE NOT MADE AWARE

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<sup>115</sup> Exhibit 3, Affidavit of Lisa Lewis; Exhibit LL-1 at page 37.

<sup>116</sup> Exhibit 3, Affidavit of Lisa Lewis; Exhibit LL-1 at page 37.

<sup>117</sup> Exhibit A, Affidavit of Bruce Pursell at [40]; Exhibit BP-1 at pages 69-127.

WE HAVE NOTIFIED YOUR FIRM THE WHOLE PERIOD WITH  
EMAILS AS WATER COMES IN EVERY TIME IT RAINS

WE WISH THAT THE WATER BE SUCKED OUT AND THE CARPET  
DRIED NO LATER THAN TODAY

FURNITURE WILL HAVE TO BE MOVED AND DAMAGE EVALUATED

WHEN THE PROBLEM IS FIXED AND NO MORE WATER IS  
EXPECTED WE WILL DISCUSS OUR LEASE WITH YOU AS TO THE  
VIOLATIONS THAT HAVE OCCURRED DURING OUR WHOLE  
PERIOD OF OCCUPANCY<sup>118</sup>

71 To this email, Ms Blanch of the Agent, responded on 6 June 2016 stating:-

Thank you for letting me know.

As mentioned previously this is a Strata responsibility and we have sent  
this through to them every time.

It is not correct saying that we are negligent. We have done our best to  
get this rectified. It is strata that are to arrange the repairs and  
tradesmen

In regards to your furniture getting wet etc. – do you have contents  
insurance? This may need to be claimed on your insurance.

I will send this to Strata now and call them to ensure they have received  
this. I will let them know about Stanley Steamer being able to do this  
today.<sup>119</sup>

72 In response to that email, the Plaintiff sent the following email:-

We do not have a contract with the landlord only you

We are not beholden to the body corporate

We are proceeding with the repair with Stanley as authorised by Jenny

We stress that without substantial work the unit will be flooded next time  
it rains

We are holding you responsible for our furniture and further  
inconveniences we will incur in the repair.<sup>120</sup>

73 Ms Blanch then attended the property to inspect the damage and to take  
photos.<sup>121</sup> On 8 June 2016, the Agent advised the Plaintiff of the arrangements  
that were being made to repair the property and stated that the landlord would  
negotiate a rent reduction after the work was complete.<sup>122</sup>

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<sup>118</sup> Exhibit A, Affidavit of Bruce Pursell; Exhibit BP-1, page 131.

<sup>119</sup> Exhibit A, Affidavit of Bruce Pursell; Exhibit BP-1 at page 130.

<sup>120</sup> Exhibit A, Affidavit of Bruce Pursell; Exhibit BP-1 at page 130.

<sup>121</sup> Exhibit A, Affidavit of Bruce Pursell at [42]-[43].

<sup>122</sup> Exhibit A, Affidavit of Bruce Pursell at [44]; Exhibit BP-1 at page 132.

- 74 Around this time, Mr Merrick was instructed to complete rectification work, which was carried out while the Plaintiff and his wife continued to live in the property. The Plaintiff indicated that there was some disruption to his lifestyle while these repairs were being undertaken.<sup>123</sup> He stated that he observed Mr Merrick do various jobs, including replacing windows and doors, which took about 10 weeks.<sup>124</sup> A shade sail on the roof was removed in August 2016, leaving the furniture exposed.<sup>125</sup>
- 75 Ms Pursell's account was that in June 2016, there was a major rain event in Port Macquarie which resulted in the property being flooded. All furniture had been moved into the middle of the room, and the bed had been moved out of the master bedroom and put right next to the kitchen bench. The Plaintiff and her slept there for several days because the bedroom was flooded. She stated that the bedrooms were back to being unusable, with soggy carpet and mould around the windows.<sup>126</sup>
- 76 Ms Pursell stated that the Agent arranged for repairs to be done, and the carpet was lifted and commercial dryers used to dry out the remaining areas. Use of the property was restricted to the kitchen and a small area in the dining room.<sup>127</sup> All up, the rectification works took around 4 months to finish, and during this time she stated that the Plaintiff and her moved around the house to suit the builders.<sup>128</sup>
- 77 So far as the roof terrace was concerned, Ms Pursell stated that although this was considered to be an asset to the property, it was virtually unusable during the period that they lived there, as water pooled around the terrace to the extent that it would splash when stepped in. The shade sail also flapped dangerously at just the slightest breeze. Ms Pursell stated that it was impossible to clean the terrace because water ran down the stairs and leaked in the living room. She stated that the whole terrace area seemed to be a

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<sup>123</sup> Exhibit A, Affidavit of Bruce Pursell at [45].

<sup>124</sup> Exhibit A, Affidavit of Bruce Pursell at [46].

<sup>125</sup> Exhibit A, Affidavit of Bruce Pursell at [47].

<sup>126</sup> Exhibit C, Affidavit of Lydia Pursell at [17].

<sup>127</sup> Exhibit C, Affidavit of Lydia Pursell at [18].

<sup>128</sup> Exhibit C, Affidavit of Lydia Pursell at [19].

series of hazards and they felt unable to use that space safely, particularly with the Plaintiff being in a wheel chair.<sup>129</sup>

78 In cross-examination, Ms Pursell accepted that on days when there was strong winds, the terrace area was able to be used now or then, other than when there was water ponding. She accepted that water ponding occurred only after rain events, and she would normally sweep it down the drain to move it.<sup>130</sup>

79 Ms Pursell stated that although use of the property was constantly affected by leaks and the smell, and inability to use the roof terrace, both her and the Plaintiff remained in the property as they were hopeful that the landlord would rectify the problems so that they could settle there long term. She acknowledged that efforts were taken during the time that they were there, and that it was difficult to find a place that suited all their specific needs. She stated that the relevant unit was perfect for both of them to use, and that there were not many apartments in Port Macquarie that could cater for the Plaintiff's disability.<sup>131</sup>

#### *Plaintiff's Claim*

80 The Plaintiff admitted that he had informed the Agent of the claim that he was making for \$17,443.00.<sup>132</sup> This had been communicated to the Agent according to their file notes, on 31 August 2016.<sup>133</sup>

81 The Plaintiff stated that in October 2016, the carpets were replaced and at that stage it was noticed that the floor was extremely mouldy and had rotted.<sup>134</sup> Repairs were finalised on 28 October 2016.<sup>135</sup>

82 By that time, the term of the Plaintiff's tenancy agreement had expired and he and his wife continued to reside at the premises on a month to month basis.<sup>136</sup>

83 The Plaintiff acknowledged that he attended a meeting with Mr Constant on 26 October 2016, but stated that he did not ask the Agent to attend because he

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<sup>129</sup> Exhibit C, Affidavit of Lydia Pursell at [21]-[22].

<sup>130</sup> T 64.09-.32.

<sup>131</sup> T 67.18-.24.

<sup>132</sup> T 55.01-.35.

<sup>133</sup> Exhibit 3, Affidavit of Lisa Lewis; Exhibit LL-1 at page 53.

<sup>134</sup> Exhibit A, Affidavit of Bruce Pursell at [49].

<sup>135</sup> Exhibit A, Affidavit of Bruce Pursell at [50].

<sup>136</sup> T 53.04-.05.

was concerned that the problems that had arisen were at least in part due to the Agent's responsibility. He rejected the version of events that Mr Constant reported and stated that the conversation was amicable, and he indicated to Mr Constant that he wanted to claim compensation for the time that he was living in the premises. He rejected the suggestion that Mr Constant had told him that he did not think that he had a claim. He stated that he did invite him to make an offer, which he did to no avail.<sup>137</sup>

84 In cross-examination, the Plaintiff agreed that at that meeting he indicated that he would be making a claim, and the reason the meeting was held was to try and get a settlement.<sup>138</sup> He stated that he did not think the Agent was doing his job and he thought that if he spoke to the landlord that they could get somewhere.<sup>139</sup>

85 The Plaintiff conceded that he is now making a claim for \$107,000, stating that he had done a lot of research since the initial offer.<sup>140</sup>

#### *Notice to Vacate*

86 On 7 November 2016, the Plaintiff received a notice to vacate the premises by 7 February 2017.<sup>141</sup> The Plaintiff subsequently decided to move to another unit and on 1 December 2016 emailed a notice of termination effective on 19 January 2017.<sup>142</sup>

87 The Plaintiff stated that he was not able to make a claim for compensation or abatement until the rectification works had been completed, as that was the only time when the extent of the loss was crystallised.<sup>143</sup>

88 The Plaintiff denied that he had waited until that time to make a claim because he wanted it to be bigger.<sup>144</sup> He further conceded that he made an initial claim to NCAT, however the person hearing the matter stated that he could only

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<sup>137</sup> Exhibit B, Affidavit of Bruce Pursell at [7]-[8].

<sup>138</sup> T 53.28-.41.

<sup>139</sup> T 54.16-.21.

<sup>140</sup> T 55.37-56.04.

<sup>141</sup> Exhibit A, Affidavit of Bruce Pursell at [51]; Exhibit BP-1 at page 133.

<sup>142</sup> Exhibit A, Affidavit of Bruce Pursell at [52]; Exhibit BP-1 at page 134.

<sup>143</sup> Exhibit B, Affidavit of Bruce Pursell at [5].

<sup>144</sup> T 56.06-.09.



award up to \$15,000.<sup>145</sup> He denied that he withdrew his claim because he was restricted by the *Residential Tenancies Act 2010* (NSW) (**the 2010 Act**), which limits claims to those made within 90 days of the breach.<sup>146</sup>

- 89 In an email recorded by the Agent, the Plaintiff is stated to have claimed on 31 August 2016:-

Under a tribunal hearing we would ask for a refund of 50% of the rent paid commencing on the 18/2/13 and 100% after 4/6/16 By way of compromise we ask for a refund of \$50 per week commencing 18/2/13 to 4/6/16 and \$600 per week there after till the work is complete Again by way of compromise we will take the refund over a period of a further year of occupying the unit at \$650 per week Summarising 18/2/13 to 2/6/16 171 weeks x \$50 = \$8550 3/6/16 1 day 7 4/6/16 to 3/9/16 13 weeks x \$ 600=\$7800 Total \$16357 Further year being 52 weeks @ \$650 = \$33800 Less refund \$16357 balance to pay \$17443. We see this as a breach of contract that you have enacted with us and feel we are being more that fair in our assessment<sup>147</sup>

- 90 The Plaintiff stated this was based on the fact that he had resided at the subject premises for 207 weeks at a weekly rent of \$650.00 for the whole period. He stated that throughout the tenancy, other than for the first few days, there were multiple leaks which inhibited his use and enjoyment of the property. Repeated requests were made to rectify the leaks, but nothing substantive or effective was done until June 2016. On the Plaintiff's calculation, 80% of the use of the property was lost as a result of the leaks, including the roof terrace which was unusable, three bedrooms, most of the living areas, and enjoyment of the property generally due to the permeating smell.<sup>148</sup>
- 91 In an affidavit sworn on 13 March 2019, the Plaintiff stated that despite the fact there were numerous issues with water ingress and ongoing maintenance problems, he was keen to negotiate a long term lease so that he didn't have to move and make necessary adaptations to another property in light of his disability. He was constantly expecting the landlord to rectify the problems whenever he reported them, but this did not occur until he had been in occupation for 3 years.<sup>149</sup>

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<sup>145</sup> T 56.27-.31.

<sup>146</sup> T 56.33-.46.

<sup>147</sup> Exhibit 3, Affidavit of Lisa Lewis; Exhibit LL-1 at page 53.

<sup>148</sup> Exhibit A, Affidavit of Bruce Pursell at [53]-[58].

<sup>149</sup> Exhibit B, Affidavit of Bruce Pursell at [4].

92 The Plaintiff maintained that he did not believe that the landlord could have justifiably increased the rent above what he was paying, particularly when the property was suffering from extreme problems.<sup>150</sup>

### **Defendant's Case**

#### *Water Penetration Noticed by the Defendant*

93 Ms Constant indicated that when the Defendant purchased the unit, it had already been tenanted. She indicated that she did not know how long the previous tenant had been in the premises before the Plaintiff,<sup>151</sup> but did state that the previous tenants had been retrenched. After they moved out she noticed some water around the window, and she arranged a meeting with the Strata manager, herself, John Constant and the Agent.<sup>152</sup> Ms Constant stated that there were a number of managers over the period since the beginning of the occupancy of the building, and there were problems in having them attend to various works from the start.<sup>153</sup> She stated that they were not attending to making sure the Owners Corporation undertook the works required to rectify the common property.<sup>154</sup>

94 Mr Constant also acknowledged that the unit at 401 had water penetration issues.<sup>155</sup> He stated that the builder was bankrupt, and the Owners Corporation pursued the builder in an action for damages, but he was not aware of any damages being recovered at any time.<sup>156</sup> Mr Constant stated that he did not know whether any rectification works had been done by the builder.<sup>157</sup>

#### *Interaction with Strata*

95 Ms Constant stated that she was the one who predominately instructed the Agent when instructions were sought to proceed with repair works if they required approval for expenditure to engage tradesmen. She indicated some (if not the majority) of the issues were issues that were not able to be fixed by the Defendant because they related to Strata or common property. These were

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<sup>150</sup> Exhibit B, Affidavit of Bruce Pursell at [13].

<sup>151</sup> T 111.15-.27.

<sup>152</sup> T 101.29-.37.

<sup>153</sup> T 105.39-.46.

<sup>154</sup> T 106.01-.03.

<sup>155</sup> T 79.35-.36.

<sup>156</sup> T 80.19-.37.

<sup>157</sup> T 80.39-.40.

notified by the Agent to the Strata, and she also sought to apply pressure to the Strata to fix the issues with the common property.<sup>158</sup>

- 96 Mr Constant agreed that most of the liaising was done with his wife Margerite, who dealt with the Agent and the Owners Corporation.<sup>159</sup> He said that he relied on the Agent to organise the various repairs.<sup>160</sup> Although he was not clear on the dates, Mr Constant was aware that rectification works were undertaken on a regular basis to try and alleviate the problems at the unit.<sup>161</sup>
- 97 Ms Constant stated that the primary common property issue was the lack of adequate drainage of water, which resulted in water ingress to the unit during major rain events.<sup>162</sup>
- 98 In cross-examination, Ms Constant indicated that she was the one who was primarily involved in liaising in respect of the unit.<sup>163</sup> She noted that although she was not a member of the Strata Executive, she would attend meetings and would become involved in the discussion.<sup>164</sup> She indicated that Strata managers were slow in dealing with issues of water proofing. This was because the Strata Executive did not want to spend too much money. She stated that the Strata had attempted to pursue the builder of the apartments, but with no avail.<sup>165</sup>
- 99 Mr Constant stated that he remembered that in November 2013 there was a motion tabled and a general meeting at the Owners Corporation regarding building defects, and there was a work order issued to test the water entering the garage of the unit.<sup>166</sup> He also recalled a discussion with Fair Trading to look at outstanding defects on the property.<sup>167</sup>
- 100 Mr Constant stated that during the time the complaints were being made, he contacted the Agent to endeavour to get the Strata to fix the problems, but not

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<sup>158</sup> Exhibit 1, Affidavit of Marguerite Constant at [7].

<sup>159</sup> T 80.47-81.05.

<sup>160</sup> T 82.21-.23.

<sup>161</sup> T 80.42-.46.

<sup>162</sup> T 104.37-.40.

<sup>163</sup> T 98.40-.45; T 99.06-.26.

<sup>164</sup> T 99.33-.36.

<sup>165</sup> T 100.15-.17.

<sup>166</sup> T 82.39-.43.

<sup>167</sup> T 82.45-.47.

for the Agent to do this.<sup>168</sup> He stated that he contacted the Owners Corporation on numerous occasions seeking that they attend the water penetration issues, but he couldn't provide an exact figure.<sup>169</sup> He stated the complaints were raised at executive meetings, including in relation to unit 401. He stated that it was raised at every meeting that he attended.<sup>170</sup>

- 101 Mr Constant acknowledged the frustration with the Owners Corporation as growing from at least late 2013,<sup>171</sup> and that the water penetration was a significant issue that the Owners Corporation had not attended to when they were obliged to. He stated that the Owners Corporation were endeavouring to do it, but were trying to chase down the "owner".<sup>172</sup> According to Mr Constant, the Owners Corporation wouldn't accept the fact that it had to do the repairs and there was no use chasing the builder.<sup>173</sup> He stated that the circumstances were such that a special levy needed to be raised.<sup>174</sup> He rejected the suggestion that he did not want a special levy raised.<sup>175</sup>
- 102 Mr Constant acknowledged that every year the Defendant had raised the issue of water penetration in unit 401 at the annual meeting.<sup>176</sup> He acknowledged that a letter was written on 26 June 2015 but couldn't say whether further correspondence was sent at another time.<sup>177</sup> Mr Constant rejected the suggestion that he did not badger and harass the Owners Corporation.<sup>178</sup>
- 103 Ms Constant conceded that sometime in October 2014 she had a meeting with "Kaitlyn" from Strata management, and asked her to ask the tenant to compile a list of all the water leaks and problems with the property.<sup>179</sup>
- 104 Ms Constant conceded that there were complaints about works being undertaken on the common property by the Owners Corporation.<sup>180</sup> She did not

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<sup>168</sup> T 83.35-.39.

<sup>169</sup> T 83.41-.44.

<sup>170</sup> T 83.46-.84.10.

<sup>171</sup> T 84.12-.20.

<sup>172</sup> T 86.07-.09.

<sup>173</sup> T 86.29-.32.

<sup>174</sup> T 86.34-.37.

<sup>175</sup> T 86.48-87.04.

<sup>176</sup> T 87.20-.24.

<sup>177</sup> T 87.10-.27.

<sup>178</sup> T 88.17-.21.

<sup>179</sup> T 111.01-111.05.

recall whether or not there was a motion tabled by her or on her behalf, for rectification works.<sup>181</sup> She stated that she did write a letter to the body corporate about the water ingress problems in June 2015; although she indicated that she did not have a copy of that letter due to a crash with her personal computer.<sup>182</sup> She stated that she did not understand what it meant by putting a special resolution forward.<sup>183</sup>

105 Ms Constant's frustration with the Strata manager was evident in an email she sent to Ms Blanch dated 25 February 2016,<sup>184</sup> and another email dated 28 April 2016,<sup>185</sup> complaining as to a lack of action on the part of the Executive Committee.

106 She stated that she observed flooding to the property on 7 June 2016, and received all instruction reports from the Agent. This, to her knowledge, was the only significant issue with the property throughout the entire duration of the tenancy.<sup>186</sup>

107 Mr Constant accepted that the rectification work was not successfully carried out until after the storm events of June 2016.<sup>187</sup> He stated that the money eventually came forward through the raising of a special levy.<sup>188</sup> In evidence, Ms Constant indicated that the body corporate did try and send in people to do small jobs, and in relation to the water penetration issue, they brought someone in to do a full inspection who wrote a report.<sup>189</sup>

108 Ms Constant stated that she was paying the Strata manager, and that she was paying the property manager, and she didn't believe that it was her role to interfere with the Strata.<sup>190</sup> She acknowledged that she did not instruct the Strata manager to bring an application to the Consumer Trading and Tenancy

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<sup>180</sup> T 107.36-.38.

<sup>181</sup> T 107.44-.108.04.

<sup>182</sup> T 98.30-.38.

<sup>183</sup> T 109.11-109.15.

<sup>184</sup> Exhibit 3, Affidavit of Lisa Lewis; Exhibit LL-1 at page 83.

<sup>185</sup> Exhibit 3, Affidavit of Lisa Lewis; Exhibit LL-1 at page 97.

<sup>186</sup> Exhibit 1, Affidavit of Marguerite Constant at [7]-[9].

<sup>187</sup> T 88.23-.24.

<sup>188</sup> T 88.30-.34.

<sup>189</sup> T 107.27-.34.

<sup>190</sup> T 109.30-.34.

Tribunal (**CTTT**), or the New South Wales Civil and Administrative Tribunal (**NCAT**), nor did she instruct the property manager to do this.<sup>191</sup>

109 Mr Constant gave evidence that back in 2013, the rent of \$650.00 per week was high, but not the highest in the building.<sup>192</sup> For her part Ms Constant stated that the amount of rent paid was average, and she acknowledged that she did not increase it over the tenancy.<sup>193</sup> She accepted that she saw condition reports over the period of the Plaintiff's occupation, and instructed the Agent to attend to what needed doing, but was advised that the tenants did not want anything done because no carpets needed to be replaced.<sup>194</sup>

### *Claim*

110 Mr Constant admitted that at the time, he was prepared to offset a rent reduction considered reasonable. He stated he didn't know when this was.<sup>195</sup> For her part Ms Constant indicated that she informed Ms Pursell that the owner would be happy to negotiate rent reduction during the period of the rectification work.<sup>196</sup>

111 Mr Constant stated that there was one occasion when he spoke directly to tenant in relation to the tenancy. This was in late 2016, when the tenant was claiming compensation on the basis that the property was unusable. Mr Constant stated that he felt this was surprising given that two new leases had been signed.<sup>197</sup> He stated that he was aware that the tenants wanted to make a claim for abatement of rent, but he was not aware until October 2016 that the Plaintiff was claiming for most of the rent that had been paid over the past 4 years.<sup>198</sup>

112 Mr Constant agreed that he attended a meeting at the Plaintiff's hotel, known as the El Paso. He stated the Plaintiff did not give any figures, and he believed

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<sup>191</sup> T 109.21-.46.

<sup>192</sup> T 79.26-.28.

<sup>193</sup> T 110.17-.32.

<sup>194</sup> T 110.45-.50.

<sup>195</sup> T 92.45-.93.03.

<sup>196</sup> T 112.07-.10.

<sup>197</sup> Exhibit 2, Affidavit of John Desmond Constant at [5].

<sup>198</sup> Exhibit 2, Affidavit of John Desmond Constant at [6].

that the strata body was more at fault, but the Defendant was prepared to discuss it if the Plaintiff gave a figure.<sup>199</sup>

113 In his affidavit, Mr Constant stated that he told the Plaintiff that he didn't have a claim, but to save court costs, if he came back with a sensible offer then he would endeavour in conjunction with the strata body to resolve the issues.<sup>200</sup> In cross-examination, Mr Constant conceded that this was recorded.<sup>201</sup>

114 Ms Constant stated that she was aware that Mr Pursell was agitating a claim.<sup>202</sup> She acknowledged that following a meeting between Mr Constant and the Plaintiff on 31 October 2016, she was aware that the Plaintiff was agitating a claim and they were trying to resolve it.<sup>203</sup>

115 Ms Constant stated that the notice of termination was forwarded to the tenants on 7 November 2016, as they needed to get it vacated in order for the works to be carried out by way of repair.<sup>204</sup>

#### *Lisa Lewis*

116 Ms Lewis indicated that conversations and written communications were recorded between the tenant and the Agent by way of a software system.<sup>205</sup> The contents of the Agents recorded communications have been earlier referred to.

117 During the majority of the tenancy, there were frequent issues raised by the Plaintiff, as detailed in the records. Work orders and actions were undertaken by the Agent in response to those issues, and all issues were dealt with by Ray White or were referred to the Strata if they were common property issues.<sup>206</sup>

118 One of the major issues was the flooding in June of 2016, when there was a major storm in Port Macquarie. Ms Lewis indicated that a number of the managed units suffered flooding, and the property in this instance was badly

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<sup>199</sup> T 93.41-.49.

<sup>200</sup> Exhibit 2, Affidavit of John Desmond Constant at [9].

<sup>201</sup> T 94.33-.39.

<sup>202</sup> T 112.20-.27.

<sup>203</sup> T 112.46-.47.

<sup>204</sup> T 113.16-.24.

<sup>205</sup> Exhibit 3, Affidavit of Lisa Lewis at [6].

<sup>206</sup> Exhibit 3, Affidavit of Lisa Lewis at [9].

flooded. Ms Lewis indicated that she attended the property on 7 June 2016 and took photos, which were annexed to her affidavit.<sup>207</sup>

119 She indicated that the Plaintiff had already arranged to remove the carpet and the underlay, and that it was placed on the balcony to dry. She attended the premises on other occasions, and provided the tenant with a questionnaire which would enable him to identify the issues.<sup>208</sup>

120 The routine inspection took place on 8 June 2016, being the day after she attended the unit in respect of the flood incident. Ms Lewis indicated that she spoke to Ms Pursell and while she reported some repair issues, she stated that “we are not being inconvenienced” and “we are happy with the property.”<sup>209</sup> Certainly, the Agent’s notes record that on 9 June 2016 Ms Blanch met with Mr and Ms Constant and reported that:-

The tenant is still happy in the property and has suggested we don’t replace the carpet until they move out and leave the mildew for now however marguerite wasn’t this removed as it is a health hazard. The owner is more than happy to reduce the rent or give them one month’s free rent or let them move out if they want to.<sup>210</sup>

121 An unsigned agent’s condition in respect of 8 June 2016 completed by Nicole Williams, inter alia, noted as follows:- <sup>211</sup>

LOUNGE	appears very well maintained however carpets were wet and pulled up at this inspection, underlay was also removed.
KITCHEN	clean and tidy. The garbage bin (slider) is broken
BEDROOM1	very well maintained, appears clean and tidy however the carpets were lifted to dry
BEDROOM2	very well maintained appears clean and tidy, carpet was also wet here, water damage done to

<sup>207</sup> Exhibit 3, Affidavit of Lisa Lewis at [11]; Exhibit LL-1 at pages 148-177.

<sup>208</sup> Exhibit 3, Affidavit of Lisa Lewis at [12].

<sup>209</sup> Exhibit 3, Affidavit of Lisa Lewis at [13].

<sup>210</sup> Exhibit 3, Affidavit of Lisa Lewis; Exhibit LL-1 at page 64.

<sup>211</sup> Exhibit 3, Affidavit of Lisa Lewis; Exhibit LL-1 at page 38.



	wall/window sill
BEDROOM3	very well maintained, appears clean and tidy. This is the room that the tenants are sleeping in due to the water leak
...	
GENERAL/SAFETY	The water leak should be getting repaired by strata very soon. The tenants are happy in the property and maintain the property well.

122 Following the flooding, Ms Lewis stated that the Owners Corporation undertook the repairs and maintenance of the building, and the tenants offered to continue to reside in the unit while the works were being considered.<sup>212</sup> Ms Lewis indicated that although the Defendant had offered to replace the carpets following the storm, the tenants had declined.<sup>213</sup>

123 Ms Lewis stated that the issue of rent refunds was first raised by the Plaintiff on 31 September 2016, and was followed by a meeting with the Plaintiff, his wife and Mr Constant on 26 October 2016. In respect of that meeting, Mr Constant provided Ray White with a file note of that discussion.<sup>214</sup>

124 Ms Lewis did not agree with the Plaintiff that any part of the property was uninhabitable during the tenancy, with the exception of the lounge and the master bedroom that it would have been uninhabitable for a short period in June 2016. She stated that she attended the property on multiple occasions, and that it was always in good condition and she never witnessed anything that would suggest it to be uninhabitable, bar the June 2016 incident. On that occasion, she stated that the rain was so heavy that the balcony doors and windows couldn't deal with the amount of deluge.<sup>215</sup>

<sup>212</sup> Exhibit 3, Affidavit of Lisa Lewis at [14].

<sup>213</sup> Exhibit 3, Affidavit of Lisa Lewis at [15].

<sup>214</sup> Exhibit 3, Affidavit of Lisa Lewis; Exhibit LL-1 at page 197.

<sup>215</sup> Exhibit 3, Affidavit of Lisa Lewis at [19].

*Strata Professionals Port Macquarie*

125 The evidence produced by the Strata Professionals revealed that on 11 June 2013, at the Annual General Meeting of the Strata Plan, the question of building defects was discussed. The minutes record:-

The Strata Manager informed the meeting that Dale Carr & Associates, the original engineer overseeing the building project, had advised that it is their belief that the Owners Corporation may not be successful in pursuing the builder for faulty waterproofing or tiling, however, if it can be shown that the concrete structure, i.e. transfer slab, is showing dilapidation from constant water ingress then the claim is more likely to be successful. Dale Carr & Associates have advised that they can assist in further investigation, however this will require physical techniques such as coring and observing locations to assess the condition of the topping slab reinforcement and testing of water constituency. This will provide a clear indication of the impact of the observed water ingress on the building. Dale Carr & Associates provided an estimate of \$1,500-\$2000 to carry out this investigative work. The meeting agreed that the Executive Committee is authorised to spend up to \$3000.00 on an engineer and upon receipt of the report it is to be referred to the Executive Committee.

Furthermore each owner is requested to provide the Strata Manager with written notification, by no later than 20 July 2013, of any defects within their respective lot. On receipt of the defects, the Strata Manager is to compile a register and forward a copy to the builder for review and rectification action, If no satisfactory responses is received from the builder, the matter is to be referred to the Office of Fair Trading and further if deemed necessary.<sup>216</sup>

126 At the executive meeting of 5 July 2013 the minutes record:-

Water Penetration to Garage Areas: Concerns were raised that water penetration continues to affect the interior of some garages and the common areas within the basement garage. It is noted that, due to the corrosive nature of the water, it has begun to etch into the paint and windscreen of some owner's motor vehicles. The Strata Manager requested that all owners provide written notification by 20 July 2013 of any water penetration issues within their garages or areas leading to same, which will be included on the defects register for action by the builder.

Following the aforementioned discussion, Joe O'Bree informed the meeting that his attempt to liaise with Craig Edwards, the original waterproofing contractor, in respect to the faulty water proofing membranes installed to the terraces, roof top and the planter boxes had been unsuccessful. After discussion, the Executive Committee agreed that the Owners Corporation is to pursue Craig Edwards for the faulty

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<sup>216</sup> Exhibit 4, Affidavit of Jeremy William Bridgen; Exhibit JB-1 at pages 73-4.

waterproofing and, in accordance with the instruction received during the Annual General Meeting held on 11 June 2013, Dale Carr & Associates( Engineer) is to carry out further investigations which will include intrusive inspection, such as core drilling and observing various locations to assess the condition of the topping slab reinforcement and testing of water constituency.<sup>217</sup>

- 127 At an Extraordinary General Meeting held on 15 November 2013 the minutes record the following discussion in relation to a motion to review the status of building defects:-

Building Defects: The Strata Managing Agent advised the meeting that Dale C Carr & Associates has been issued with a work order to test the water entering the garage areas and will provide a detailed report of the findings. Dale Carr has suggested that the core drilling that he originally proposed will cause future problems with water ingress and similar (if not the same ) results will be obtained from testing the water. The contractor is currently waiting on extended period of rain to allow accurate testing to be carried out. Therefore, as the report from Dale C Carr & Associates will form the basis of the Owners Corporation's application to the CTTT, the application is yet to be lodged.

However, the Strata Managing Agent advised the meeting that Fair Trading have agreed to again review the outstanding defects evident at the property, i.e. common property and individual units. Therefore, a detailed application is currently being compiled and will be lodged with Fair Trading in the near future. The Strata Managing Agent had requested statements from relative contractors regarding some common property defects, in particular, the delaminating spa surface and gas metering system. These statements will be included in the Fair Trading application as evidence.<sup>218</sup>

- 128 At the Executive Committee Meeting held on 26 March 2014 with John Constant in attendance, the minutes record:-

The Strata Managing Agent addressed the meeting to advise that Geocal Construction (builder) has engaged the services of a local contractor to attend to some defects, in particular water ingress to the interior of some units. It was further noted that the application has been lodged with NSW Fair Trading regarding the remaining building defects. NSW Fair Trading provided the builder with one (1) month to respond to the application, however this time has lapsed and the application has been moved onto the inspection stage. Therefore, the Strata Managing Agent is awaiting advice of a date and time for the inspection of the property to take place. Once a proposed date is received, the Executive

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<sup>217</sup> Exhibit 4, Affidavit of Jeremy William Bridgen; Exhibit JB-1 at page 78.

<sup>218</sup> Exhibit 4, Affidavit of Jeremy William Bridgen; Exhibit JB-1 at page 83.

Committee will be advised and representative/s nominated to attend the inspection.<sup>219</sup>

129 At the Annual General Meeting held on 20 June 2014 (with Marguerite Constant in attendance) the minutes record as follows:-

**BUILDING DEFECTS:** The Owners Corporation:

(i) Reviewed the status of the building defects and noted that Geocal Constructions Pty Ltd had attended to a number of building defects, however, there is still a large number of building defects outstanding.

(ii) Considered the quotation submitted by Paul Mapsoine & Associates Building Consultants in the sum of \$18,750.00 excl GST and agreed that further quotations are to be sought from alternate building consultants. On receipt of the quotations, further instructions are to be sought during a future Executive Committee Meeting.

(iii) Agreed that further discussions are to take place during the aforementioned Executive Committee Meeting in respect of engaging the services of a building consultant to assist the Owners Corporation in any action lodged against Geocal Constructions with NSW Civil & Administrative Tribunal.

(iv) Agreed that prior to the aforementioned Executive Committee Meeting, the Strata Managing Agent is to obtain approximate costing from appropriate legal representatives to provide advice in respect to the outstanding building defects and to represent the Owners Corporation during any proceedings with the NSW Civil & Administrative Tribunal.<sup>220</sup>

130 The minutes of the Executive Committee meeting of 17 September 2014 record as follows:-

The Executive Committee discussed the building defects at great length and subsequently agreed:

(i) In principle, to engage the services of an independent building consultant to document the outstanding building defects. Prior to the Executive Committee approving RHM Consultants or Paul Mapstine & Associates, the Strata Managing Agent is to liaise with the contractors to establish the reason for the significant difference in the quoted price, i.e. does one of the quotation include more than the other, and on receipt of the information further instructions are to be sought from the Executive Committee, and

(ii) To engage the services of the approved building consultant to assist the Owners Corporation with any action lodged with Geocal Construction and the NSW Civil & Administrative Tribunal, and

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<sup>219</sup> Exhibit 4, Affidavit of Jeremy William Bridgen; Exhibit JB-1 at page 87.

<sup>220</sup> Exhibit 4, Affidavit of Jeremy William Bridgen; Exhibit JB-1 at page 93.

(iii) To engage the services of Byrnes Lawyers to obtain advice regarding pursuing Geocal Constructions for the outstanding building defects and represent the Owners Corporation during any proceedings with the NSW Civil & Administrative Tribunal.<sup>221</sup>

131 The minutes of the Executive Committee meeting of 3 December 2014 record that the report of RHM consultants was envisaged to be completed by mid-December 2014. Following receipt it was envisaged that it would be reviewed by the Executive Committee and then referred to the Owners Corporation and to legal representatives for preparing and deciding on an application to the NSW Civil and Administrative Tribunal.<sup>222</sup>

132 Specifically in relation to the subject property the Strata manager obtained a report from Ian Little, licensed builder, dated 13 July 2015. This followed an inspection on 3 July 2015. It identified the following:-

That on the window sill there were holes drilled down through the window sill to allow all water to enter the sub sill. The purpose of the sub sill is to catch any over flowing water to enter the sub sill. The purpose of the sub sill is to catch any over flowing water from the sill or any possible leaks through the window frame, not to be flooded with 100% drainage. This was consistent with every window in the Unit.

All windows and sliding doors in the Unit have sustained damage to the interior linings or skirting and paintwork from water penetration.

Leaks have occurred in numerous locations on the ceiling and around the air conditioning vents. One air conditioning vent in the main bedroom a was falling of the wall and held on by blue tack.

There is a major calcium build up at the base of the roof deck stairs which means water is pooling under the tiles

There is a bad water leak stain on the carpet in the front of the ensuite door which implies that there is a bathroom water proofing breakdown,

There is also bad water damage in the fir stairwell at the lift well and ceiling level.<sup>223</sup>

133 Mr Little added that as this building was less than seven years old the repairs should be referred to the original builder.<sup>224</sup>

134 At the Annual General Meeting held on 26 June 2015 (with the Defendant represented) the minutes of the Owners Corporation record the following:-

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<sup>221</sup> Exhibit 4, Affidavit of Jeremy William Bridgen; Exhibit JB-1 at pages 98-99.

<sup>222</sup> Exhibit 4, Affidavit of Jeremy William Bridgen; Exhibit JB-1 at pages 102-3.

<sup>223</sup> Exhibit 4, Affidavit of Jeremy William Bridgen; Exhibit JB-1 at page 309.

<sup>224</sup> Exhibit 4, Affidavit of Jeremy William Bridgen; Exhibit JB-1 at page 309.

The Strata Manager tabled correspondence (*see attached*) from John and Marguerite Constant, owners of units 105 and 401 , in relation to moving forward with priority defect rectification works noting windows and roof as most urgent.

Following lengthy discussion the Owners Corporation **RESOLVED** to enter into a Costs and Disclosure Agreement with Walters Solicitors Pty Ltd to represent and provide advice to the Owners Corporation in respect to the building defects claim. Specifically, that Walters Solicitors forward formal correspondence to Geocal Constructions Pty Ltd including a copy of the building defects report dated 17 December, 2014, prepared by RHM consultants, seeking a response. And, that Walters Solicitors lodge an application to NCAT (NSW Civil and Administrative Tribunal) if required and on advice to commence proceedings necessary in order to protect the rights of the Owners Corporation under the *Home Building Act 1989* (NSW). Any advice, information, correspondence or other received in the matter will be forwarded to the Executive Committee.

In conjunction with the aforementioned, the Owners Corporation **RESOLVED** to obtain a prioritised defects rectification costs estimate schedule from RHM consultants which, once to hand, is to be referred to the Executive Committee for review and as a guide in the possible event the Owners Corporation undertakes, at its cost, common property defects remedial works.<sup>225</sup>

- 135 At the Executive Committee meeting of 25 September 2015, the minutes recorded that emailed advices and correspondence provided by Walters Solicitors had been noted. It recorded that the factual matrix was complex. It further noted that a verbal building defects repair estimate from RHM consultant was in the vicinity of \$500,000 to \$1,000,000 and based on that estimate the matter was out of NCAT's jurisdiction and a Court matter. It recorded that the legal process was likely lengthy, costly and futile and therefore not viable. It recorded:-

Although noting the detailed defects report, the meeting agreed to Minute for the attention of all Lot owners that any significant building defects issues relating to and affecting their Lot be listed and forwarded in writing to the Strata Manager. These items are to be then referred to the Executive Committee with appropriate contractor/s to inspect and advise accordingly.

Finally, the meeting agreed to note that Lot owners should be aware that additional levies are likely required in the future in relation to carrying out building defects repairs.<sup>226</sup>

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<sup>225</sup> Exhibit 4, Affidavit of Jeremy William Bridgen; Exhibit JB-1 at page 114.

<sup>226</sup> Exhibit 4, Affidavit of Jeremy William Bridgen; Exhibit JB-1 at page 118.

A notation was subsequently added reading as follows:-

Since the meeting, further information and questions were raised by Brian Hughes and Michael McInerney. A teleconference was held with Michael McCall Barrister, Brian Hughes, Michael McInerney and the Strata Manager, where it was strongly advised that considering the significant defect repairs estimate and time limitations i.e. February 2016 it was appropriate and cost effective to lodge an application with NCAT against Geocal Constructions Pty Ltd to produce a copy of the Building contract to enable Walters Solicitors to properly inform the owners corporation in order for the Owners Corporation to finally determine the matter. Based on this information, Walters Solicitors was instructed by the Strata Manager to lodge this application. As soon as the advice is received, the matter will firstly be referred to the Executive Committee and thereafter determined by the Owners Corporation.<sup>227</sup>

136 On 1 December 2015 the Executive Committee minutes noted:-

The meeting noted that a Home Building Application and Affidavit had been prepared by Walters Solicitors and forwarded to NCAT (NSW Civil and Administrative Tribunal) with the anticipation that a Notice of directions Hearing will be advised shortly. At this hearing, a Summons for production will be sought of the builder Geocal Constructions Pty Ltd to provide a copy of the building contract which thus far has been refused to be provided. It has noted that considering the RHU consultant's verbal repair estimate, review and advice concerning the contractual documentation is critical to enable the Owners Corporation to decide whether or not to continue legal proceedings or alternatively undertake building defect repairs at its cost.

The meeting noted that based on the NCAT outcome and legal advice thereafter, that an Extraordinary General Meeting will be convened in early 2016 for the Owner's Corporation to ultimately decide the matter

In the meantime, the Strata Manager is to arrange<sup>3</sup> various contractors, namely a tiler and builder to inspect, in conjunction with Executive Committee member Brian Hughes, David Ledgerwood, Michael McInerney and Jan McKibbin, the planter boxes located over the basement car park, any tiles on the balconies and patios causing leaks and any leaking windows with a view to offer appropriate rectification advice, solutions and estimates as to repair.<sup>228</sup>

137 On 19 February 2016 the Executive Committee minutes reveal that the Executive Committee resolved to discontinue legal action as this would be

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<sup>227</sup> Exhibit 4, Affidavit of Jeremy William Bridgen; Exhibit JB-1 at page 118.

<sup>228</sup> Exhibit 4, Affidavit of Jeremy William Bridgen; Exhibit JB-1 at pages 120-121.

unlikely to be successful and action against the developer would be costly and risky. The minutes further record in relation to the subject property:-

Unit 401 Leak in Walk-in Robe The Strata Manager tabled a quotation from Doug Merrick in relation to water ingress via a walk in robe light fitting in unit 401, as most recently reported by the leasing agent. The Executive Committee approved the quotation to test and locate the source of the leak (suspected water or gas penetration in roof slab), carry out pressure sealing and repairs of resultant damage to ceiling and waste lining in robe. The meeting noted that the cost of the work may be claimable on insurance due to the rain event dated 5 February 2016.<sup>229</sup>

138 The Executive Committee's decision was endorsed by the Extraordinary General Meeting on 1 April 2016 carrying a motion as follows:-

The meeting discussed the priority of rectification work required to each lot and common property and RESOLVED to commence rectification work, the means of how this work is to be funded will be a matter for the next Annual General Meeting. In the meantime, the Executive Committee is to formulate a number of draft proposals of funding methods which will be in the Agenda for the Annual General Meeting and which will form the basis for motions at this meeting. Also the rectification work is subject to the finalisation of the list of priorities through the Executive Committee and the cost of work being ascertained.

Therefore, following the finalisation of the list of priorities, the Strata Manager is to obtain quotations for the priorities, the Strata Manager is to obtain quotations for the 'Priority1' works, with the view of same being available for the Annual General Meeting.

Furthermore, the meeting noted that some owners have already carried out rectification work to some of the defects within their own lots and /or common property. The Strata Manager has requested that all owners advise in writing what work have been carried out to their lots so that the information is held on record for future reference , If any rectification work is planned in the future, the Strata Manager is to be informed in writing prior to work commencing and the Executive Committee will be notified accordingly.

### **Plaintiff's Submissions**

139 It was not in issue between the parties that the Plaintiff had entered into the three tenancy agreements with the Defendant.

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<sup>229</sup> Exhibit 4, Affidavit of Jeremy William Bridgen; Exhibit JB-1 at pages 124-125.



140 Relevantly the Defendant's obligation in respect of the condition of the premises clause in each of the three leases read as follows:-

18. The landlord agrees:

...

18.3 To keep the residential premises in reasonable state of repair, considering the age of, the rent paid for, and the prospective life of the premises, and

...<sup>230</sup>

141 The Plaintiff argued that the Defendant was in breach of this clause because it failed to cause a rectification of the various water penetration issues and the problems on the terrace; that is, the pole leaning and being dangerous and the sail.<sup>231</sup>

142 The Plaintiff conceded that there were also internal parts of the unit that needed repairs; however, it was not reasonable for the Defendant to effect those repairs prior to resolution of the source of water ingress.<sup>232</sup>

143 In essence, the Plaintiff argued pursuant to clause 18.3, it was necessary for the Defendant to get the body corporate to effect the repairs that they say were necessary.<sup>233</sup>

144 The Plaintiff argued that the definition of residential premises in s 3 of the *2010 Act* was not qualified and did not require exclusive use. It observed that the definition of residential tenancy agreement in s 13 of the *2010 Act* did not require the agreement to "grant a right of exclusive occupation" and therefore there is no reason to find that the land occupied with the premises must be for the exclusive use of the tenant of the premises.

145 The Plaintiff further argued that the definition is broad and includes any part of premises including any land occupied with the premises. The Plaintiff submitted that the same clearly extends to common property (including windows and doors), noting that the landlord alone is part owner of common property through the Owners Corporation and had the ability to take steps to

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<sup>230</sup> Exhibit A; Affidavit of Bruce Pursell; Exhibit BP-1 at pages 6, 42, 55.

<sup>231</sup> T 123.13-.20.

<sup>232</sup> T 124.44-125.14.

<sup>233</sup> T 124.19-.26.

force or coerce the Owners Corporation to attend to rectification of defects in common property which might affect the Plaintiff's use of the premises. It noted that complaints in relation to the water penetration issues continued for at least 4 years and little was done by the landlord to attend to rectification of the water penetration issues in a meaningful way.

146 The Plaintiff asserted that bearing in mind its preferred meaning of "residential premises", the Defendant's assertion that it "badgered and harassed" and "put pressure" on the Owners Corporation to attend to the rectification of the defects could not be maintained. This is so in light of what it described as a lack of evidence concerning the same (aside from correspondence referred to in the annual general meeting minutes of 26 June 2015).

147 In particular, the Plaintiff drew attention to the fact that:-

The Defendant did not request a general meeting seeking that the specific repairs be undertaken properly. No motion was tabled that the Owners Corporation attend to rectification of the defects at the Premises. No special resolution was sought that the Owners Corporation attend to rectification of the defects at the Premises. The Defendant did not make an application to the relevant tribunal (either the CTTT or the NCAT) pursuant to s 140 of the *Strata Schemes Management Act 1996* (NSW) ("*SSMA 1996*") under s 62 of the *SSMA 1996* to seek orders that the Owners Corporation be forced to attend to the rectification of the water penetration issues.<sup>234</sup>

148 The Plaintiff argued that pursuant to section 138 of the *Strata Schemes Management Act 1996* (NSW) (**the 1996 Act**), an occupier of a property was an interested person who could apply to the Tribunal to resolve a dispute about an exercise of, or failure to exercise, a function conferred by or under the Act or by the by-laws, or about the operation, administration or management of a strata scheme.

149 Accordingly, this would have entitled the Plaintiff to apply to the Tribunal for the relief of a settlement of a dispute about whether the Owners Corporation had exercised or failed to exercise, a function. This is as opposed to actually obtaining an order that anything be done. It argued that only an owner, such as the Defendant, could seek orders or force consent to alter or repair the common property pursuant to section 150 of the *1996 Act*.

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<sup>234</sup> Plaintiff's Outline of Submissions at [49].

150 The Plaintiff further argued that:-

53. There was (and remains in the 2015 Act) a provision for an owner to add to or alter the common property to improve or enhance it, provided a special resolution had been passed authorising that action (see s 65A of the SSMA 1996).

54. There was also, under s 140(2), a right given to an owner to make alterations or repairs to common property that directly affected the owner's lot if the tribunal considered that the corporation refused consent to those repairs. This would have given the Defendant an avenue to seek the consent to repair work and, if refused, to undertake it and ask the Tribunal for forgiveness latterly.<sup>235</sup>

151 Whilst the Plaintiff conceded that the Plaintiff notified the Agent who notified the Defendant and the Strata manager, the consequence was that some works were undertaken at various times with little effect. It contended that the Defendant failed to act with reasonable diligence to cause the defects to be rectified, notwithstanding the fact that the Plaintiff had complained on at least ten occasions prior to the works being undertaken.

152 The Plaintiff further contended that the Defendant's argument may have some weight if there was evidence that supported the proposition that the Defendant "badgered and harassed" the Strata Manager or the Owners Corporation, although such evidence is not available.<sup>236</sup>

153 The Plaintiff argued that the Defendant waited until the Owners Corporation raised a special levy in 2016 to undertake the rectification works at the premises, and that the Defendant sought solace behind the fact that an action was being pursued against the builder, and likely sought to avoid any contribution to a special levy to finance the works to the common property defects.<sup>237</sup>

154 In short, the Plaintiff argued that the Defendant had available to it a number of simple steps which could have forced the cooperation of the Owners Corporation to undertake remedial work by way of:

- (a) Requesting a general meeting seeking that the specific repairs be undertaken properly;

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<sup>235</sup> Plaintiff's Outline of Submissions at [53]-[54].

<sup>236</sup> Plaintiff's Outline of Submissions at [60].

<sup>237</sup> Plaintiff's Outline of Submissions at [62].

- (b) Tabling (or causing to be tabled) a motion that the Owners Corporation attend to rectification of the defects at the premises;
- (c) Seeking a special resolution that the Owners Corporation attend to rectification of the defects at the premises;
- (d) Making an application to the relevant Tribunal pursuant to ss 62 and 140 of the *1996 Act* to seek orders that the Owners Corporation be forced to attend to the rectification of the water penetration issues.

155 The Plaintiff contended that none of these steps were undertaken by the Defendant at any time between February 2013 and October 2016.

156 The Plaintiff further drew attention to the provision of s 140(2) which enabled an owner to make alterations or repairs to common property that directly affected the owner's lot if the Tribunal considered that the Owners Corporation refused consent to those repairs. This, it was said, would give the Defendant an avenue to seek consent to repair work and if refused, to undertake it and ask the Tribunal for forgiveness latterly.

157 The Plaintiff sought to rely the decision of Harrison M in *Reiss v Helson*.<sup>238</sup>

158 That was said to have been followed by the Tribunal in *Wang v Abdel-Messih*,<sup>239</sup> where it was held:-

88 In circumstances where the issue relates to common property of the strata scheme, the landlord has a duty to use such rights as the landlord holds to compel the owners corporation to take action to remedy defects in the landlord's tenanted premises, including taking action against the owners corporation under the Strata Schemes Management Act 1996 (*Lee v Fuzessery* (201)CTTT)). This is the consistent approach taken by the Tribunal in circumstances where the owners corporation refuse to carry out repairs that impact on the tenancy agreement that the landlord has with the tenants. This position is supported by Master Harrison in *Reiss v Helson* [2001] NSWSC 486 where he upheld a decision of the Tribunal to the effect that inaction by the owners corporation is no defence to a claim against a landlord for failure to repair.

159 The cited authority of *Lee v Fuzessery*,<sup>240</sup> provided no authority or analysis as to the basis for the orders made in that case.

160 The Plaintiff's claim was for a partial abatement of rent.<sup>241</sup> On Day 2 of the hearing I raised with the Plaintiff the power of the Court to grant such relief.<sup>242</sup> I

<sup>238</sup> [2001] NSWSC 486 at [25]-[27] and [33].

<sup>239</sup> [2017] NSWCATCD 11.

<sup>240</sup> [2010] NSWCTTT 205.

was informed that the power existed at common law.<sup>243</sup> On Day 3 the Plaintiff conceded that abatement of rent was not available at common law.<sup>244</sup> Nevertheless, it argued that the Defendant had breached clause 18.3 of the lease, entitling the Plaintiff to damages by which an abatement of rent can be used as a method of quantification.<sup>245</sup> The Plaintiff conceded that there was no authority to this effect.<sup>246</sup>

### **Defendant's Submissions**

- 161 The Defendant contended that the proper interpretation of clause 18.3 of the lease related to repairs that the landlord itself was able to effect. This was argued to have flowed from s 65 of the *2010 Act* which details the things that the landlord has to do, and furthermore by the provisions of s 65(3)(b), which refers to the Tribunal not determining that a landlord has breached the obligation unless it is satisfied that the landlord has failed to act with reasonable diligence to have the repair carried out.
- 162 The Defendant argued that there was no basis for the suggestion that 'reasonable diligence' incorporated some inchoate obligation to commence an action either in the CTTT or NCAT. It further contended that 'residential premises' did not include common property. It submitted that there was no evidence or reason to believe that had the Defendant taken action in either Tribunal, things would have occurred any quicker or that any such action would have been successful. It observed that there were a number of actions being taken by Mr Constant to try and get the Strata to take action, and that the Court would be satisfied that there was reasonable diligence in this case. It argued that the decision of *Reiss v Helson* was distinguishable on this basis.
- 163 The Defendant observed that the Plaintiff's proposition was not that action was not taken, but that, that action did not succeed in remedying the leaks.<sup>247</sup> It drew attention to the fact that there was not a single identified instance where

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<sup>241</sup> Amended Statement of Claim at [10]; Plaintiff's Statement of Issues (MFI 2) at [3].

<sup>242</sup> T 91.13-.18.

<sup>243</sup> T 91.20

<sup>244</sup> T 115.30-.41.

<sup>245</sup> T 116.27-.39; T 118.05-.09.

<sup>246</sup> T 118.11-.13.

<sup>247</sup> T 141.08-.20.

the Agents either refused or failed to pass on a complaint, and the Court would be satisfied that there was no breach of contract.<sup>248</sup>

- 164 So far as the action of abatement was concerned, reliance was based on the decision in *Edex International Holdings Pty Ltd v Marmalade Films Pty Ltd*,<sup>249</sup> where Hodgson JA stated at [25]:-

Dealing first with the case of rent that has already been paid in full, in discharge of a liability for rent that has actually arisen, it would in my opinion be a most unreasonable result if the tenant could claim a refund of that rent or part of it, at least unless the tenant had made a claim for abatement of the rent and had paid the rent under protest or otherwise provisionally pending resolution of that claim. Otherwise, a landlord having no reason to suppose that anything was wrong would be deprived of the option of repairing the damage or terminating the lease under cl.8.2.4, and may be liable to make very substantial refunds of rent. I think it most unlikely that that result could have been intended.

- 165 In supplementary submissions, the Defendant argued that accepting the Plaintiff's characterisation of the Defendant's breach – being the failure to coerce the Strata Corporation to take action more quickly – it could not be said that the Defendant was in breach at the time the tenancy started and there must be some definable time when the alleged breach occurred. The Defendant submitted that the assertion that the Defendant had some undefined obligation to commence legal action against the Strata at some undefined point in time in the hope that this would accelerate<sup>250</sup> the repair process is unfounded in law and the facts of the case.

## Consideration

- 166 There was no issue in the case that the premises were subject of water ingress from time to time until after the rectification work undertaken after June 2016. The Plaintiff's complaints in relation to the sail area and the ponding of water on the roof terrace were also not in issue. There was challenge to the extent that it constituted a loss of use.
- 167 During submissions, I explored with the Plaintiff whether clause 18.3 included common property as part of the residential premises. The Plaintiff argued that it did. The Plaintiff conceded that the obligation to keep the residential premises

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<sup>248</sup> T 141.22-.38.

<sup>249</sup> [2003] NSWCA 8; (2003) 56 NSWLR 63.

<sup>250</sup> Defendant's Supplementary Written Submissions at [4].

in a state of repair was a personal one, but argued that in relation to common property, the Defendant can cause the repairs to be carried out.<sup>251</sup>

168 There is no definition of “residential premises” in the first lease signed on 13 February 2013 although “premises” is described as:

...the premises at 401/22 MORT STREET, PORT MACQUARIE and the following parking station and storeroom...: DOUBLE UNDERCOVER PARKING.<sup>252</sup>

169 Nevertheless, the agreement acknowledges that the *2010 Act* and the *Residential Tenancies Regulation 2010* (NSW) apply to the agreement and both the landlord and the tenant must comply with these laws.<sup>253</sup>

170 Section 3 of the *2010 Act* provides:-

Residential premises means any premises or part of premises (including any land occupied with the premises) used or intended to be used as a place of residence.

171 This definition is the same as that contained in notes to the second and third tenancy agreements dated respectively 17 February and 7 August 2015.<sup>254</sup>

172 Those agreements also refer to the premises as “401-22/22 Mort Street, Port Macquarie, NSW 2444” with inclusions being “double undercover parking”. The evidence in relation to the pole was that it was a matter that the Plaintiff had reported to the Defendant’s agent by reference to “shade damage”.<sup>255</sup> There is also evidence that the Agent wrote to the body corporate on 3 October 2013 stating:-

We wish to report an issue with the sail to the above unit, the corner post creates a loud banging noise when windy.

...

Hoping could get someone to attend to this urgently.<sup>256</sup>

173 The Defendant argued that that entry indicates that it was the Strata’s responsibility to fix the problem.

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<sup>251</sup> T 125.39-126.07.

<sup>252</sup> Exhibit A, Affidavit of Bruce Pursell; Exhibit BP-1 at page 3.

<sup>253</sup> Exhibit A, Affidavit of Bruce Pursell; Exhibit BP-1 at page 4 (See also s 6 of the 2010 Act).

<sup>254</sup> Exhibit A; Affidavit of Bruce Pursell; Exhibit BP-1 at pages 47 and 60.

<sup>255</sup> Exhibit A, Affidavit of Bruce Pursell at [15]; Exhibit BP-1 at page 61.

<sup>256</sup> Exhibit 3, Affidavit of Lisa Lewis; Exhibit LL-1 at page 42.

174 Accepting this to be the position, and accepting the Plaintiff's contention that it was reasonable for the landlord not to effect internal repairs until such time as the external matters were attended to by the Strata, the Plaintiff's contention requires the terms of clause 18.3 to be construed so as to give the words 'residential premises' an interpretation that extends to the state of repair of the common property, albeit recognising that it was not a matter which the Defendant itself could attend to except by pressuring or coercing the body corporate.

175 Section 62 of the *1996 Act* provided:-

**62 WHAT ARE THE DUTIES OF AN OWNERS CORPORATION TO MAINTAIN AND REPAIR PROPERTY?**

(1) An Owners Corporation must properly maintain and keep in a state of good and serviceable repair the common property and any personal property vested in the Owners Corporation.

(2) An Owners Corporation must renew or replace any fixtures or fittings comprised in the common property and any personal property vested in the Owners Corporation.

(3) This clause does not apply to a particular item of property if the Owners Corporation determines by special resolution that:

(a) it is inappropriate to maintain, renew, replace or repair the property, and

(b) its decision will not affect the safety of any building, structure or common property in the strata scheme or detract from the appearance of any property in the strata scheme.

176 Section 138 of the *1996 Act* provided:-

**138 GENERAL POWER OF ADJUDICATOR TO MAKE ORDERS TO SETTLE DISPUTES OR RECTIFY COMPLAINTS**

(1) An Adjudicator may make an order to settle a dispute or complaint about:

(a) an exercise of, or a failure to exercise, a function conferred or imposed by or under this Act or the by-laws in relation to a strata scheme, or

(b) the operation, administration or management of a strata scheme under this Act.

(2) For the purposes of subsection (1), an Owners Corporation or building management committee is taken to have failed to exercise a function if:



(a) it decides not to exercise the function, or

(b) application is made to it to exercise the function and it fails for 2 months after the making of the application to exercise the function in accordance with the application or to inform the applicant that it has decided not to exercise the function in accordance with the application.

(3) An Adjudicator may not make an order under subsection (1) for the settlement of a dispute or complaint:

(a) dealt with in another section of this Chapter, or

(b) referred to the Tribunal or only within the jurisdiction of the Tribunal, or

(c) relating to the exercise, or the failure to exercise, a function conferred on an Owners Corporation by this Act or the by-laws if that function may be exercised only in accordance with a unanimous resolution or a special resolution (other than a special resolution under section 62 (3), 65A or 65B), or

(d) that includes the payment by a person to another person of damages.

(4) If a dispute or complaint arises from or relates to the operation or application of a provision of a lease of a lot, or of the common property, in a leasehold strata scheme, the lessor of the strata scheme must not:

(a) commence other proceedings in connection with the settlement of the dispute or complaint after having made an application under this section for the settlement of the dispute or complaint, or

(b) make an application under this section for the settlement of the dispute or complaint after having commenced other proceedings in connection with the settlement of the dispute or complaint.

(5) An application for an order under this section may be made only by an interested person.

177 Interested person is defined in the dictionary as:-

"interested person", in relation to a strata scheme for a stratum parcel, **includes** the following:

(a) the Owners Corporation or a strata managing agent for, an owner of a lot in, a person having any other estate or an interest in a lot in, or an occupier of a lot in, any other strata scheme affecting the building,

(b) any other person for the time being bound by the strata management statement for the building.

178 Section 140 of the 1996 Act provided:-

## 140 ORDER RELATING TO ALTERATIONS AND REPAIRS TO COMMON PROPERTY AND OTHER PROPERTY

(1) An Adjudicator may order an Owners Corporation to consent to work proposed to be carried out by an owner if the Adjudicator considers that the Owners Corporation has unreasonably refused its consent and the work relates to any of the following:

- (a) alterations to common property directly affecting the owner's lot,
- (b) carrying out repairs to common property or any other property of the Owners Corporation directly affecting the owner's lot.

(2) An Adjudicator may make an order approving of alterations or repairs already made by an owner to common property or any other property of an Owners Corporation directly affecting the owner's lot if the Adjudicator considers that the Owners Corporation unreasonably refused its consent to the alteration or repairs.

(3) An order under subsection (2) is taken to be the consent of the Owners Corporation to the alterations or repairs concerned and may be expressed as having effect from a day specified in the order that occurred before the order was made.

(4) An Adjudicator may specify in an order under this section whether the Owners Corporation or the owner of the lot concerned has the ongoing responsibility for the repair and maintenance of any additional property arising out of an alteration or repair to common property approved under the order.

(5) If an order makes provision for the owner of a lot to have the ongoing responsibility for the repair and maintenance of any such additional property, the order also has effect in relation to any subsequent owner of the lot.

(6) In deciding whether to grant an order under subsection (2) or to provide for the order to have effect from a day that occurred before the date of the order, an Adjudicator may take into account the conduct of the parties in the proceedings, for example, if an owner did not first seek the consent of the Owners Corporation before carrying out the alterations or repairs.

(7) An application for an order under this section may be made only by a lessor of a leasehold strata scheme or an owner.

179 The question of whether clause 18.3 embraces a requirement for the landlord to seek orders under s140 of the *1996 Act* was said to be based on the approach taken in *Reiss v Helson*.<sup>257</sup> That case involved an appeal from a Tribunal decision ordering payment of compensation following a complaint about noise emanating from the floor boards of a unit above. The appeal

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<sup>257</sup> [2001] NSWSC 486.

included the question of the landlord's responsibility for the noise created by the floor boards and joists. The Tribunal had decided that there had been breaches of s 22 (tenant's right to quiet enjoyment) and s 25 (landlord's obligation for cleanliness and repair) of the *Residential Tenancies Act 1987* (NSW). Harrison M (as Her Honour then was) noted that the Tribunal had determined that there was a breach of s 22(1)(b) as this was not avoided by the Owners Corporation doing nothing. Her Honour agreed with that finding. On the question of whether s 25 was breached her Honour noted the divergence of opinion in the Tribunal stating:

**6) Finding the plaintiffs had breached s25(1)(b) of the Residential Tenancies Act**

[36] At para 10.29 the Tribunal made his decision in relation to s25. He stated that:

"Clearly, there is the factual link. It is common evidence that the floor joists are inadequate. It is common to the evidence that such vibrations and noise would be caused. The landlords knew about this in 1997 and wrote to the owners corporation. No further action was taken. It was clearly within the contemplation of the landlord that a tenant can experience noise and vibration from residing in that strata unit. The loss of enjoyment of that unit and the complaints made by the tenants flow from inadequate flooring. The casual connection is very clear. There is no question of remoteness of damage; the landlords knew about the problem. It is clearly within the contemplation that the person who suffers from the floor being inadequate will also suffer a reduced use of the premises. The tenants would not have suffered but for the flooring being inadequate. The landlords sought no orders against the owners corporation between 1997 and 2000 to get repair. The landlords, as such, failed to provide the premises in a reasonable state of repair contrary to s25(1)(b) of the Act."

[37] By finding that there was a factual link, the Tribunal member is saying that the noise suffered by the tenants was caused by the inadequate floor joists and inadequate flooring.

[38] The Tribunal member at para9.1 to para9.10 gave his reasons in relation to s25. He referred to *Day v Hartland & Wolff Ltd* (1953) 2 All ER 387 at 388 where Pearson LJ referred to the obligation of a landlord to carry out repair work in anticipation of likely defects rather than waiting for them to occur. No particular kind of repair is excluded - see *London Transport Executive v Betts* [1959] AC 213 at 232-233. The Tribunal member pointed out that the obligation to repair does not involve an obligation to renew or improve the premises although replacement of the structure from time to time may be necessary

depending on the facts of the case and it appears to be a question of degree whether the amount of work required can properly be described as repair - see *Graham v Market Hotel Ltd* (1936) 67 CLR 567 at 579. The Tribunal member adopted the reasoning in *Jewell* that the landlords are responsible for the maintenance and repair of defective common property if they fail to take reasonable steps to ensure the owners corporation rectify the problem.

[39] In view of the foregoing authorities, does carrying out work such as installing steel or timber beams into the floor structure at mid-span fall within the landlords duty to provide and maintain the premises in a reasonable state of repair? It appears that the Tribunal member did not make a finding in this regard. The Tribunal member held that the landlords had breached s 25(1)(b) of the Act as they had failed to maintain the premises in a reasonable state of repair. His reasons relied in part on the fact that the landlords sought no orders against the owners corporation between 1997 and 2000 to get repairs. The Tribunal member cited a passage from Gummow J (referred to earlier in this judgment) and held that the landlord failed to carry out the necessary works with reasonable expedition.

[40] However, as the landlords were in breach of s 22, it is unnecessary for me to finally determine whether the Tribunal member's decision the landlords were in breach of s 25 was correct. I have some doubts that the foreshadowed work falls within the definition of "maintaining the premises within a reasonable state of repair".

180 Although her Honour expressed some doubt as to whether s 25(1)(b) and clause 18.3 were breached this was on the basis of whether the foreshadowed repairs fell within the terms of "maintaining the premises within a reasonable state of repair." It is implicit that her Honour otherwise accepted that the terms of these provisions extended to oblige the landlord to be responsible for the maintenance and repair of defective common property

181 Whilst there may be room to doubt that common property is included in the obligation under clause 18.3, I am inclined to accept that it does, following the decision in *Reiss v Helson*.<sup>258</sup> To hold otherwise would provide a narrow interpretation of residential premises that would enable the landlord to hide behind the Strata in circumstances where the landlord has to ensure that the residential premises meet the requirements of clause 18.1.

182 Accepting the Plaintiff's construction as correct, the issue arises as to whether clause 18.3 was breached.

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<sup>258</sup> [2001] NSWSC 486.

- 183 The capacity to grant abatement is provided for pursuant to clause 7.1 and applies, inter alia, if the residential premises are destroyed or become wholly inhabitable, otherwise than as a result of a breach of the agreement. It is therefore not available consequent to a breach.<sup>259</sup>
- 184 *Edex International Holdings Pty Ltd v Marmalade Films Pty Ltd*<sup>260</sup> stands for the proposition that a tenant who pays rent under the tenancy agreement cannot thereafter seek an abatement of rent in respect of the entirety of the payments that it has already paid. However that does not mean that a payment made under protest may not be recoverable.<sup>261</sup> Such a case, however, was not advanced with the Plaintiff conceding that abatement as such was not available.
- 185 However s 187(1)(d) of the *2010 Act* may be available to award compensation in circumstances amounting to a breach of the agreement.
- 186 During submissions the asserted relief based on breach of clause 18.3 was expressed by the Plaintiff's Counsel as follows:-

MCMAHON: His enjoyment of the use of the premises of premium property for which he is paying \$650 a week for has been interrupted. He has had to sleep in the lounge room at certain times. He has had carpet rolled up, he has had water in, there are puddles on the ground. The terrace of the property has to have pools of water swept into drains, otherwise it is unusable.

HIS HONOUR: Is this some form of non-economic loss, is it?

MCMAHON: No. The issue is the only way we can really look at his loss is to say, "You were paying this much by way of rent per week. You were not getting what you were promised for that rent".

HIS HONOUR: That sounds to me like an abatement.

MCMAHON: Unfortunately it does, but, really, is there any other way to calculate the damages?<sup>262</sup>

- 187 In the context of this case the Plaintiff made clear that it was not seeking damages based on loss of enjoyment and no claim was brought asserting breach of any other part of the agreement such as the right to quiet

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<sup>259</sup> See also s 43(2) of the 2010 Act.

<sup>260</sup> [2003] NSWCA 8.

<sup>261</sup> *Italia Ceramics International Super Ltd and Anor v CM Corporation Pty Ltd* [2019] SASCFC 54.

<sup>262</sup> T 118.26-41.

enjoyment.<sup>263</sup> To the extent clause 18.3 was relied upon it is no answer that the tenant may have been on notice of the state of disrepair before entering into a tenancy agreement.<sup>264</sup>

188 Further in submissions the Plaintiff's Counsel added:-

MCMAHON: Yes, we are claiming breach of contract. The contract was unit 401 to be provided in a reasonable state of repair for \$650 a week over the period of the lease. That's the promise. Mr Pursell kept up his end of the bargain. He paid \$650 a week. The landlord did not keep up their end of the bargain. The premises weren't in a reasonable state of repair. Now, we have, then a loss. As your Honour knows, I have provided a general outline in my submissions, your Honour, looking at Amann and Fink and cases of that nature, and even Bellgrove v Eldridge. The Court is not prohibited from making an award of damages when entering into that exercise is difficult. It's often the case the Court is put in a position where it needs to look at difficult circumstances and attempt to put a successful plaintiff in a position by way of a monetary award that might put them in the position they would have been but for the loss.

Now, in this circumstance, your Honour, we can draw some analogies with an abatement of rent type argument, and we can look at and this is the first leg and the preferable way of looking at it, your Honour, from the plaintiff's perspective of how was the premises uninhabitable. Well, the plaintiff has given evidence and his wife has given evidence saying that about 80% of the

premises was uninhabitable. There were rooms which were uninhabitable. This is carpet rolled up. There is a smell. He was sleeping in the lounge room for a period. The terrace was unusable. The water which pooled on the terrace had to be swept to the drain, otherwise it would sit for a week. There was a pole on top of the terrace which was bent over and caused the plaintiff and his wife concern. They were worried about it, and the plaintiff's wife mentioned she was worried about having grandchildren near it.

So in those circumstances you can draw an analogy with the calculation of an abatement of rent, and you can say, well, the plaintiff had difficulties in using 80% of the premises over this period, consequently we can calculate damages at 80% of what he's paid. Your Honour, it's a relatively drawing an analogy in the calculation of compensation and then the damages, in the plaintiff's submission it's possibly the easiest way to deal with it. It's relatively simple and you look at well, was he provided with what he was meant to be provided with? No. What's the

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<sup>263</sup> See Amended Statement of Claim at [9]; T 135.1.28.

<sup>264</sup> S 63 (2) of the 2010 Act.

effect of that? Well, the plaintiff says 80% of the premises weren't usable.<sup>265</sup>

189 The Plaintiff's contention finds support in *Residential Tenancies Law and Practice New South Wales* (7th edition) where the authors state:-

Often the awards of compensation for various breaches are assessed by reference to the rent payable-for example the compensation for the loss of the facility is compensated by the amount of one weeks rent. There is nothing intrinsically wrong in such an approach as long as the quantum is truly proportional. Part of the logic is that the tenant should not normally be compensated for inconvenience in living in premises to a greater extent than the rent payable. This method of making a global assessment was recommended by the English Court of Appeal in *Wallace v Manchester* (1998) 30 HLR 1111 and also *English Churches Housing Group v Shine* [2004] EWCA 434.<sup>266</sup>

190 As the order of compensation is not referable to abatement it would not be precluded by the tenant's payment of the rent.<sup>267</sup>

191 The Defendant was on notice of the water ingress issues affecting various parts of the property. In particular, in submissions the Defendant did not dispute the credibility of Ms Pursell as to the extent of the ingress that she described. Efforts to address them consisted of referral of matters to Strata managers by the Agent and as indicated above the Strata itself.

192 In respect of the subject unit, it is apparent that in response to complaints made there were repairs carried out around May 2013 by a plasterer and in June 2014 the windows were resealed and painted. In March of 2014, the evidence was that there were additional problems that started to show, including a major leak in the main bedroom behind the bed head and also trickling through the light above the bed. Following that, it appears that repairs undertaken by Mr Doug Merrick addressed the concerns in the main bedroom along with resealing of the doors and windows. According to Ms Pursell, however, this possibly led to leaks that arose subsequently through the light fitting in the wardrobe and through the front door. On 3 June 2015, an email was sent complaining of the water leaks being greater in number with a leak

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<sup>265</sup> T 135.34-136.19.

<sup>266</sup> Allan Anforth, Peter Christensen, Christopher Adkins, *Residential Tenancies Law and Practice New South Wales* (Federation Press, 7th ed, 2017).

<sup>267</sup> *Matthew Hanney and Belinda Smiley v Lachlan McCabe and Amanda Toshack* [2014] NSWCATCD 239; *Craig Kentell v Oliver Steele*; *Oliver Steele v Craig Kentell* [2014] NSWCATCD 102; *Timms and Simpson v Adams* [2012] NSWCTT 53.

near the ensuite door of bedroom 1. Also noted was that the light in the closet appears to have moisture. No other complaint was recorded at that time. It is not clear what happened at that point. The Agent's records show that the builder, Ian Little, had been contacted to arrange an inspection and provide advice. That appeared to occur in 13 July 2015 in a report to the Strata. On 17 December 2015, the Agents' records disclose that following a routine inspection by the Agent, the tenant was noted to be quite happy in the property. Approval of the quotation by Doug Merrick to locate the source of the leak in the walk in wardrobe did not occur until 19 February 2016.

- 193 The evidence of Ms Blanch to the effect of what happened in June 2016 was that the balcony doors and windows could not cope with the amount of water leading to the penetration of the lounge and master bedroom. The overall impression I have is that the landlord did, through the Agent, follow up all requests for repairs with the Strata manager the repairs undertaken were ineffective and new complaints of water ingress arose. Problems that did arise were also not confined to the property in question.
- 194 Nevertheless, whilst I accept that parts of the property were from time to time unable to be used, particularly because of the water ingress and smell, I would not accept that this was consistently the case and of the same intensity throughout the period of the tenancy.
- 195 In respect of the drainage on the terrace area and the sail post, this matter whilst not particularised specifically as a breach of clause 18.3 of the lease,<sup>268</sup> it was as noted earlier mentioned in the Plaintiff's Reply.<sup>269</sup>
- 196 The problems with the terrace area were not mentioned in the condition report of 18 February 2013.<sup>270</sup> The Plaintiff's email response of 6 May 2013 did refer to "north western drain blocked and built at a height that the drain is ineffective to drain the roof area," "shade damaged" and "rain cascades down stair area which may be a partial cause to the water entering the lounge area."<sup>271</sup> That was reiterated in an email of 8 May 2013. As noted earlier, there was email

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<sup>268</sup> Statement of Claim at [5].

<sup>269</sup> Plaintiff's Amended Reply at [2].

<sup>270</sup> Exhibit 3, Affidavit of Lisa Lewis; Exhibit LL-1 at pages 22-27.

<sup>271</sup> Exhibit A, Affidavit of Bruce Pursell; Exhibit BP-1 at page 24.



correspondence to the Strata about the sail corner post “creating a loud banging noise when windy.” On 4 October 2013 there was an email to the Plaintiff from the Agent informing him of the report and advising “if you do not hear from anyone in the next couple of days Bruce please let us know so we can follow it up”.<sup>272</sup> There was no recorded tenant communication relating to the matter thereafter until 24 February 2014, where the Plaintiff is stated to have advised the Defendant’s Agent “we at all times have to curtail our cleaning of the top deck as the tiles have not been waterproofed and consequently water comes through.”<sup>273</sup>

197 The Strata minutes confirm that a quote to repair the damaged shade sail for Unit 404 (another unit) was approved on 20 June 2014 at a cost of \$2,200. The minutes record that the contractor was to be requested to use heavier gauge cable to reduce the possibility of further damage occurring in the future.<sup>274</sup> Also resolved was the provision of heightened anchor posts for the shade sails on level 4 in order to achieve greater tension.<sup>275</sup>

198 On 16 October 2014 the Plaintiff’s email stated “North western side and North east side water does not flow out the exit pipes” and “Water flows over side on eastern side.”<sup>276</sup> On 13 October 2014 the Plaintiff’s email reiterated, “We at all times have to curtail our cleaning of the top deck as the tiles have not been waterproofed and consequently water comes through.”<sup>277</sup> The routine inspection report of 1 December 2014 refers to the roof top terrace as well presented.<sup>278</sup> There was no mention of any issues in the report of 15 December 2015. On 3 November 2015 the tenant report refers to there being no “obstructions to the property which could be dangerous.”<sup>279</sup> The tenant report of 19 May 2016 refers to the “pole holding the sail bending.”<sup>280</sup>

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<sup>272</sup> Exhibit 3, Affidavit of Lisa Lewis; Exhibit LL-1 at page 43.

<sup>273</sup> Exhibit 3, Affidavit of Lisa Lewis; Exhibit LL-1 at page 44.

<sup>274</sup> Exhibit 4, Affidavit of Jeremy William Bridgen; Exhibit JB-1 at page 93.

<sup>275</sup> Exhibit 4, Affidavit of Jeremy William Bridgen; Exhibit JB-1 at page 94.

<sup>276</sup> Exhibit A, Affidavit of Bruce Pursell; Exhibit BP-1 at page 35.

<sup>277</sup> Exhibit A, Affidavit of Bruce Pursell; Exhibit BP-1 at page 36.

<sup>278</sup> Exhibit 3, Affidavit of Lisa Lewis; Exhibit LL-1 at page 30.

<sup>279</sup> Exhibit 3, Affidavit of Lisa Lewis; Exhibit LL-1 at page 33.

<sup>280</sup> Exhibit 3, Affidavit of Lisa Lewis; Exhibit LL-1 at page 37.

- 199 On 26 October 2016 there is evidence that Port Plumbing was commissioned to clean out the roof top deck drains including on unit 401. The relevant invoice noted that they were not able to widen all drain openings due to the offset of the outlet and the level of the water proofing.<sup>281</sup> To the extent that these matters needed attention, it can be accepted that this would be in conjunction with the other matters that needed attention by the Strata.
- 200 Both the Plaintiff and Ms Pursell gave evidence as to the lack of useability of the terrace area; however the Plaintiff admitted that the spa was usable, the outdoor kitchen was usable, and he had furniture on the terrace. The Plaintiff also acknowledged that the post had been repaired several times and the shade sail was eventually removed in August 2016.<sup>282</sup> It was put to the Plaintiff that he was exaggerating the extent of the problems, he rejected this.
- 201 In cross-examination, Ms Pursell accepted that other than on days when there was strong winds, the terrace area was able to be used now or then, other than when there was water ponding. She accepted that water ponding occurred only after rain events, and she would normally sweep it down the drain to move it,<sup>283</sup> although she also stated that it was impossible to clean the terrace because water ran down the stairs and leaked in the living room. The problem with water ponding appeared to arise from the placement of the water outlet.<sup>284</sup>
- 202 Overall, I am of the view that whilst there were issues with the terrace area I do not accept that the area has been totally unusable or that the issues arose with the frequency that was asserted.
- 203 The Owners Corporation itself was seeking to clarify the defects that needed repairing in respect of the whole building by seeking information and obtaining an independent report in 2014 from RHM consultants. There is evidence that suggests that that report was received on or around 12 June 2015 and was some 456 pages in length, and stated that many of the defects related to waterproofing and tiling.<sup>285</sup> Its contents were not in evidence.<sup>286</sup> However, it

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<sup>281</sup> Exhibit 4, Affidavit of Jeremy William Bridgen; Exhibit JB-1 at page 342-3.

<sup>282</sup> T 43.31-44.32.

<sup>283</sup> T 64.09-.32.

<sup>284</sup> The Plaintiff suggested lowering the drainage exit. See Exhibit A, Affidavit of Bruce Pursell; Exhibit BP-1 at page 25.

<sup>285</sup> Exhibit 4, Affidavit of Jeremy William Bridgen; Exhibit JB-1 at page 240 at [3]-[6].

can be established that a list of defects dated 6 February 2016 was sent to the lot owners with the agenda on 19 February 2016.<sup>287</sup>

- 204 At the Annual General Meeting held on 26 June 2015, the Owners Corporation resolved to obtain a prioritised defects rectification costs estimate schedule from RHM consultants. Once this was obtained, it was to be referred to the Executive Committee for review and as a guide in the possible event the Owners Corporation undertook at its cost, common property defects remedial work. Whilst the Executive Committee resolved in September 2015 to pursue legal action, this course was discontinued on 19 February 2016. Instead, it was resolved to proceed with the priority list of repairs after the EGM on 1 April 2016.
- 205 The Plaintiff's argument that the Defendant had available to it a number of simple steps which could have forced the cooperation of the Owners Corporation to undertake remedial work presupposes that those steps would have accelerated the process of repairs
- 206 The Plaintiff identified in its Reply that the defects in the property included but were not limited to:-
- (a) Leaking doors and windows in the three bedrooms and living rooms; and
  - (b) No apparent waterproofing on the outside terrace area; and
  - (c) Insufficient fall in the terrace area tiling, which caused water to pool and rendered the terrace area useable.<sup>288</sup>
- 207 The evidence of Strata Professionals indicates that there were widespread issues relating to water penetration in the building extending beyond the subject property.
- 208 To an extent, the Strata was seeking to identify the extent and nature of the problem before determining how to address the issue. Its own actions, however, were clearly left open and were prepared on the basis that it might have to bear the cost itself. The ultimate course it took, which involved the

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<sup>286</sup> There is an extensive list of defects which it appears that the builder was commented on to Fair Trading in 2014. See Exhibit 4, Affidavit of Jeremy William Bridgen; Exhibit JB-1 at pages 250-252.

<sup>287</sup> Exhibit 4, Affidavit of Jeremy William Bridgen; Exhibit JB-1 at pages 124-125.

<sup>288</sup> Plaintiff's Amended Reply at [2].

institution of a special levy and prioritisation of works, was not the subject of any criticism.

209 In *Northern Sandblasting Pty Ltd v Harris*,<sup>289</sup> Gummow J held:-

In general, there is no breach on an express covenant by a landlord to keep the demised premises in repair unless two criteria have been met. First, the landlord must have information as to the existence of the defect such as would put a reasonable landlord on inquiry as to whether works of repair are needed and, secondly, thereafter the landlord must have failed to carry out the necessary works with reasonable expedition. But, as Cussen J pointed out, this is a rule of construction to be considered with the text of the particular lease, not a rule of law.

210 I accept that in this instance the Defendant was on notice as to the existence of circumstances that would put it on enquiry as to whether works of repair were needed. The question that arises is whether the landlord thereafter failed to ensure that the necessary repairs were carried out with reasonable expedition. The fact that repairs were undertaken that did not resolve the issues does not equate with the Defendant undertaking the “necessary repairs.”

211 Nor am I satisfied that in carrying out the repairs after June 2016 they were carried out with reasonable expedition.

212 I accept that from at least late 2013,<sup>290</sup> water penetration was a significant issue that the Owners Corporation had not attended to when they were obliged to. I accept that the Agent was tasked with reporting matters to the Strata Manager however the minutes of the Strata Executive showed an approach to attending to the issue that was not reflective of reasonable expedition. The Defendant conceded as much.

213 Ms Constant conceded that there were complaints about works being undertaken on the common property by the Owners Corporation.<sup>291</sup> She did not recall whether or not there was a motion tabled by her or on her behalf, for rectification works.<sup>292</sup> She stated that she did write a letter to the body corporate about the water ingress problems in June 2015, although she indicated that she did not have a copy of that letter, due to a crash with her

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<sup>289</sup> (1997) 188 CLR 313; (1997) 146 ALR 572 at 612.

<sup>290</sup> T 84.12-.20.

<sup>291</sup> T 107.36-.38.

<sup>292</sup> T 107.44-.108.04.

personal computer.<sup>293</sup> That letter was acknowledged in the Strata minutes Ms Constant stated that she did not understand what it meant by putting a special resolution forward.<sup>294</sup>

214 Ms Constant's frustration with the Strata manager was subsequently acknowledged in an email she sent to Ms Blanch dated 25 February 2016,<sup>295</sup> and another email dated 28 April 2016,<sup>296</sup> complaining as to a lack of action on the part of the Executive Committee. However, apart from the letter to the Strata in June 2015, no documented effort to coerce the Strata in attending to the necessary repairs is apparent

215 Ms Constant readily conceded that the Strata had delayed attending to the issues that required attention on its part accepting that she wasn't aware of any capacity to bring proceedings against the Strata in either the CTTT or the NCAT or to initiate a special resolution.

### **Damages**

216 I accept the issue of repairs was complex and some investigation of the issue by the Strata would have been reasonable. However, I also accept Ms Constant's evidence that the Strata executive were seeking to avoid charging a special levy and prolonging the matter. Overall, I am of the view that at least by October 2014 the landlord should have taken further action as proposed by the Plaintiff rather than just correspond with the Agent and Strata. In these circumstances I am satisfied that the matter should have been escalated and at least brought to the Tribunal.

217 With regard to assessing the compensatory damages, the Plaintiff asserted that the failure to repair led to a loss of useability from the inception of the tenancy for a duration of 207 weeks. The period from 13 February 2013 to 19 January 2017 is actually 205 weeks.

218 During that period there were significant periods where the Agents records show an absence of complaints following repairs undertaken and the complaints that arose varied in their content. The Plaintiff's claim based on

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<sup>293</sup> T 98.30-.38.

<sup>294</sup> T 109.11-109.15.

<sup>295</sup> Exhibit 3, Affidavit of Lisa Lewis; Exhibit LL-1 at page 83.

<sup>296</sup> Exhibit 3, Affidavit of Lisa Lewis; Exhibit LL-1 at page 97.

80% of the area not being useable included the outdoor terrace. However the evidence of Ms Pursell in particular does not support that that the terrace was not useable in its entirety at all times. The intensity of the problems varied from time to time it being significantly greater after the storm of June 2016. Beyond this, the point at which the Plaintiff would have breached its obligation would have been at the time that it failed to take a more proactive approach such as pursuit of a special resolution or commencing the proceeding under s 140 of the *1996 Act*.

219 I do not accept that the property was uninhabitable to the extent the Plaintiff asserted. Even accepting the Plaintiff's desire not to relocate for reasons connected with his disability, it is inconceivable that persons in such claimed circumstances asserted would have continued to reside in the subject property for the length of time in question renewing the tenancy on two subsequent occasions. Contrary to the Plaintiff's submission, the extent of loss of use asserted was challenged by the Defendant.<sup>297</sup>

220 In its Amended Defence the Defendant asserted that there had been a failure of the part of the Plaintiff to mitigate his loss. Despite the content of that pleading, the only matter put to the Plaintiff was in respect of his failure to move out.<sup>298</sup> It was put to Ms Pursell that in May the Plaintiff had declined to accept a row of tiles to prevent water ingress. She did not concede this and no other evidence has been pointed to support this. The failure to accept the replacing of carpet was not pleaded as a failure to mitigate. I do not accept that a failure to move out or the renewal of the tenancy constituted a failure to mitigate in light of the obligation squarely placed on the landlord by clause 18.3.

221 In assessing compensatory damages payable, the Court in these circumstances can only do its best. I accept that from time to time the property was adversely affected, particularly 3 June 2016 to 28 October 2016 following the major storm that resulted in the lounge room and the master bedroom being unusable. This was a period of 21 weeks. For this period I would have

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<sup>297</sup> See T 43.21-45.16; 62.43-65.2.and T 55.37-56.49. Also see Exhibit 3, Affidavit of Lisa Lewis at [19] (not subject to cross-examination).

<sup>298</sup> T 51.6-.18.

allowed a sum of \$5,500 based on a 40% loss of use. In respect of the balance of the period I would allow a figure of \$6,400, which I acknowledge involves some estimation as to precisely when it would have been asserted that the claim should have been escalated,<sup>299</sup> but is also reflective of the extent of loss of use found by me.

222 My calculation of compensatory damages payable totals \$11,900.

223 These circumstance lead to the potential application of s 208 of the *2010 Act*. I accept, however, that the parties may wish to confer and reach an agreement as to costs, or in the event of disagreement, make submissions. An opportunity in either event should be afforded to do so.

## **ORDERS**

224 For these reasons, I defer entry of final orders pending the following:

- (1) I direct the parties to confer with a view to reach an agreement as to final orders, including costs and any interest claim, within fourteen (14) days by filing consent orders in the registry consistent with these reasons.
- (2) In default of agreement pursuant to order (1), the parties are to approach my Associate within the same fourteen days with a view of relisting the matter before me for any argument as to final orders as indicated.
- (3) In the case that (2) applies, each party is to submit proposed draft orders to my Associate within the time specified therein.

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<sup>299</sup> See [216].