

**JURISDICTION** : STATE ADMINISTRATIVE TRIBUNAL

**ACT** : STRATA TITLES ACT 1985 (WA)

**CITATION** : GIANATTI and THE OWNERS OF THE JAMES AT  
NORTHBRIDGE STRATA PLAN 31304 [2020]  
WASAT 131

**MEMBER** : DR B MCGIVERN, MEMBER

**HEARD** : DETERMINED ON THE DOCUMENTS

**DELIVERED** : 27 OCTOBER 2020

**FILE NO/S** : CC 146 of 2020

**BETWEEN** : ALLEN GIANATTI  
Applicant

AND

THE OWNERS OF THE JAMES AT  
NORTHBRIDGE STRATA PLAN 31304  
Respondent

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*Catchwords:*

Strata titles - Damage to window and carpets in applicant's lot - Whether 'damage to a building or any other property insured by the strata company' - Whether strata company unreasonably refused to make or pursue an insurance claim - Whether strata company otherwise has power, authority, duty or function to repair damage or to levy the cost of repairs against applicant - Whether strata company has power, authority, duty or function to recover commission paid to strata manager by insurance company

*Legislation:*

*Criminal Code Act Compilation Act 1913 (WA), s 2*

*Secret Commissions Act 1905 (WA) s 2(b)*

*State Administrative Tribunal Act 2004 (WA), s 60(2)*

*Strata Titles Act 1985 (WA) (prior to 1 May 2020), s 3(1), s 3(2)(a), s 32(1), s 35(1), s 36, s 37(1)(g), s 38, s 42, s 42(4), s 53, 54(1a), s 55, s 56, s 81(1), s 83, s 88, Pt VI, Div 3, Div 4, Sch 1, Sch 2, Sch 2A*

*Strata Titles Amendment Act 2018 (WA)*

*Result:*

Application partly successful

*Category:* B

**Representation:**

*Counsel:*

Applicant : In Person

Respondent : In Person

*Solicitors:*

Applicant : N/A

Respondent : N/A

**Case(s) referred to in decision(s):**

Bhalsod v Perrie [2016] WASC 412

Briginshaw v Briginshaw (1938) 60 CLR 336

CHU Underwriting Agencies Pty Ltd v Wise [2012] WASCA 123

Clark and The Owners of Waterfront Mews - Strata Plan 14082  
[2011] WASAT 110

Drexel London (a firm) v Gove (Blackman) [2009] WASCA 181

Dworakowski and The Owners of 63 Temple Street Victoria Park Strata Plan  
26070 [2020] WASAT 45

Giovannangelo and The Owners of College Park Survey Strata Plan 62783  
[2019] WASAT 10

Hamcor Pty Ltd & Anor v Marsh Pty Ltd & Anor [2013] QCA 262

Insurance Limited v Owners of Strata Plan No 69352 [2011] NSWCA 138  
Maludra Pty Ltd and Owners of Windsor Towers Strata Plan 80  
[2017] WASAT 112  
Randwick City Council v T and H Fatouros Pty Ltd [2007] NSWCA 177  
Seiwa Pty Ltd v Owners Strata Plan 35042 [2006] NSWSC 1157  
Shum v Owners Corporation SP30621 [2017] NSWCATCD 68  
T & H Fatouros Pty Ltd v Randwick City Council [2005] NSWSC 874  
The Owners of Habitat 74 Strata Plan 222 v Western Australian Planning  
Commission & Ors [2004] WASC 23  
Topic and The Owners of Raffles Waterfront Strata Plan 48545  
[2016] WASAT 27  
Transport Industries Insurance Co Ltd v NSW Medical Defence Union Ltd  
(1986) 4 ANZ Ins Cases 60-736  
Walton v National Employers' Mutual General Insurance Association Ltd  
[1973] 2 NSWLR 73

**REASONS FOR DECISION OF THE TRIBUNAL:*****Introduction***

1. This proceeding concerns a dispute between the applicant as the owner of a lot, and the strata company, in a strata scheme known as 'The James at Northbridge'. In very broad terms, the applicant claims that repairs to a broken window and water-damaged carpeting in his lot should be covered by policies of insurance held by the strata company, and that the strata company should claim against those policies for the cost of repairs or otherwise cover the costs itself. The strata company says the applicant should bear the repair costs. The applicant also seeks recovery of commission paid by the insurer to the strata manager engaged by the respondent, which the strata company resists.
2. The applicant is the proprietor of lot 16 (**Unit 16**) on strata plan 31304 (**Strata Plan**), which created a strata scheme known as 'The James at Northbridge' (**Scheme**), described on the Strata Plan as 'a seven level building including basement comprising 40 residential units, restaurants and car parking bays' situated at 203 James Street, Northbridge (but see [29] below).
3. The respondent is the strata company of the Scheme (**Strata Company**).
4. The applicant commenced the proceeding by an application to the Tribunal, dated 30 January 2020, brought under s 83(1) of the *Strata Titles Act 1985* (WA) (**ST Act**).
5. Because the proceeding commenced before 1 May 2020, the dispute is to be determined under the ST Act as it stood before that date (relevantly, unamended by the *Strata Titles Amendment Act 2018* (WA)). In these reasons, unless otherwise specified, any reference to legislative provisions or 'the Act' will be a reference to the ST Act as it stood before 1 May 2020.

***Evidence***

6. Pursuant to s 60(2) of the *State Administrative Tribunal Act 2004* (WA) (**SAT Act**), the matter is to be determined entirely on the documents, which comprise:
  - a) the application, as amended by orders dated 25 February 2020 and 2 October 2020 (**amended application**);



- b) copies (searches) of the Strata Plan, the Notifications of Change of By-laws registered on the Strata Plan, and Schedule of Title Volume 2078 Folio 336 (for the applicant's lot);
- c) submissions and documents filed with the Tribunal by the applicant on 12 February 2020, 29 June 2020, 6 July 2020 and 15 October 2020, notably including (but not limited to):
  - i) written submissions in relation to the broken window at Unit 16 filed 29 June 2020, in relation to the carpeting at Unit 16 filed 6 July 2020, and further submissions filed 15 October 2020 (referred to jointly as the **applicant's submissions**); and
  - ii) a CHU Underwriting Agencies Pty Ltd (**CHU**) product disclosure statement and policy wording, referenced as QM562-0619, and bearing the title 'Residential Strata Insurance Policy' (**Policy Wording**);
- d) submissions and documents filed with the Tribunal by the respondent on 20 February 2020, 21 February 2020, 22 July 2020 and 25 September 2020, notably including (but not limited to):
  - i) written submissions in relation to water damage affecting the Scheme filed 20 February 2020, and in relation to damage to the window and carpet at Unit 16 filed 22 July 2020, and further submissions filed 25 September 2020 (referred to jointly as the **respondent's submissions**);
  - ii) renewal certificate comprising the schedule for a policy of residential strata insurance, policy number 875487, issued by CHU for the policy period 23 August 2019 to 23 August 2020 (**Schedule**). (In these reasons, a reference to the **Insurance Policy** is a reference to the Schedule, read together with the Policy Wording);

- iii) minutes of an annual general meeting (**AGM**) of the Strata Company held on 20 August 2019; and
- iv) a Strata Management Agreement and Disclosure document dated 14 November 2017 between the respondent and the strata manager engaged by it (**Strata Manager**).

### ***Proposed orders***

7. By his amended application, the applicant seeks orders (**Proposed Orders**) that:
- a) the respondent repair the damaged carpet in the applicant's lot;
  - b) an insurance claim be submitted by the respondent in relation to the broken window of Unit 16;
  - c) the amount charged to the applicant in relation to repair of the window of Unit 16, along with all penalty interest and associated, on the levy statement be set aside;
  - d) the respondent submit (and pursue) an insurance claim for the cost of replacing the carpet at Unit 16, and in the event that they fail to do so or the claim is declined, that the respondent reimburse the applicant for the replacement carpet; and
  - e) the respondent recover from the Strata Manager any commission, bonus or other paid to them by CHU.

### ***Issues for determination***

8. Noting that the application was initially made only under s 83(1), in order to deal with the orders sought, not only in the application but also in the applicant's submissions (and the substance of the matters connected with those orders), the Tribunal made orders on 2 October 2020 that:
- a) the application be amended (with the effect of incorporating the Proposed Orders, as derived from the initial application and the applicant's submissions);

- b) in relation to matters connected with Proposed Orders (b) and (d), the application is to be dealt with as an application made pursuant s 88 of the ST Act and the issue to be determined is:

... whether, for the purposes of s 88 of the Act, the respondent has unreasonably refused to make or pursue an insurance claim in respect of damage to a building or any other property insured by the respondent under Part IV of the Act, such as to warrant the making of the orders sought.[;]

- c) in relation to matters with connected Proposed Orders (a), (c) and (e), the application is to be dealt with as an application under s 83 of the ST Act, and the issue to be determined is :

... whether, for the purposes of s 83(1) of the Act, the respondent has exercised or performed, or failed to exercise or perform, a power, authority, duty or function conferred or imposed on it by the Act or the by-laws of the respondent, such as to warrant the making of the orders sought.

9. In order to determine those issues, the Tribunal will need to consider:

- a) whether there is damage to the window and/or carpeting of Unit 16 that constitutes 'damage to a building or any other property insured by the respondent'; and
- b) if so (in relation to the matters in sub-paragraph (a) above), whether the respondent has unreasonably refused to make or pursue a claim against the Insurance Policy in respect of that damage;
- c) whether the Strata Company has the power, authority, duty or function (**power or responsibility**) to:
- i) repair damage to the windows and/or carpeting of Unit 16;
- ii) levy the cost of repairing damage to the windows of Unit 16 against the applicant; and

- iii) recover from the strata manager any commission, bonus or other paid to them by CHU;
  - d) if so (in relation to any of the matters in sub-paragraph (c) above), whether the Strata Company has failed to exercise or perform any relevant power or responsibility; and
  - e) whether the Proposed Orders should be made under s 83 or s 88, in the exercise of the Tribunal's discretion.
10. Those considerations require the Tribunal to have regard to:
- a) the facts as found on the evidence;
  - b) because much of the dispute centres on the scope of cover and the Strata Company's conduct as policy holder, the nature and relevant terms of the Insurance Policy;
  - c) the provisions of the ST Act and by-laws that are relevant to determining the powers and responsibilities of the Strata Company (and the applicant); and
  - d) the contentions of each party.

These are addressed in turn below.

### ***Material facts***

11. Based on the documents comprising the evidence before it, the Tribunal is satisfied of the facts that follow, and notes that, except as otherwise identified, they are not in dispute.
12. At all material times:
- a) the Strata Company engaged the services of the Strata Manager;
  - b) the applicant engaged an agent (**Rental Agent**) to effect and manage the lease of Unit 16; and
  - c) the Strata Company held, under the Insurance Policy with CHU, cover in respect of a range of risks under



several bundled policies, including (as appears from the Schedule):

- i) Policy 1 - Insured Property - Building: \$21,424,000; Common Area Contents: \$50,835; Loss of Rent & Temporary Accommodation (total payable): \$3,213,600. An excess of \$1,000 (**Excess**) applies to Policy 1;
- ii) Policy 2 - Liability to Others - sum insured: \$10,000,000; and
- iii) Policy 10 - Lot owners' fixtures and improvements (per lot) - sum insured: \$250,000.

### **Window damage**

13. On or about the night of 12 October 2019 (or the early morning of 13 October 2019), an object (propelled by someone or something) hit and broke a window pane of Unit 16 (**Window Damage**).
14. By email dated 14 October 2019, the Rental Agent notified the Strata Manager of the Window Damage, and requested that the Strata Manager 'organise repair through the insurance company'. On the same day, the Strata Manager raised a work order for a repairer, Action Glass & Aluminium, to repair the window (by replacing the broken pane), which repair was carried out at a cost of \$240.
15. By email dated 15 October 2019, the Strata Manager forwarded the repairer's invoice to the Rental Agent, stating:

Due to the amount being less than the excess on the policy which would have been on charge to the owner as all the windows are in ownership and not strata property, we will need to on charge this account.

We will issue an invoice shortly.
16. In subsequent email correspondence passing between the Strata Manager and the Rental Agent on or about 17 October 2019, the Strata Manager:
  - a) stated that the 'window is in the individual ownership of the unit owner';

- b) invoiced the applicant for the cost of repairing the window; and
  - c) reiterated the view that the costs to repair the window could not be claimed under the Insurance Policy because the excess, which 'would be payable by the owner anyway', was higher than the repair cost.
17. Costs associated with repairing the Window Damage have been levied by the respondent against the applicant.

### **Flood incident**

18. Early in the morning of 7 January 2020 the hot water system in another lot (known as Unit 26), directly above Unit 16, failed (Flood Incident).
19. Chartered loss adjusters and surveyors, Bradbury Sewell, who were engaged by CHU to investigate the Flood Incident, produced a report dated 22 January 2020 (Assessor's Report) containing the following account of the incident:

The cause of damage was a failed hot water unit in unit 26 on level 2. The resulting escape of water under pressure flowed into the entrance and kitchen areas of this unit. Water has been seeped through the floor slab into unit 16 directly below, into level 1 lobby and further down through the building to sealing of entrance lobby on ground floor.

20. On the morning of the Flood Incident:
- a) the tenant of Unit 16 advised the Strata Manager, by email and telephone message, of flooding and electrical failure in that unit; and
  - b) the Strata Manager arranged for a plumber (Charter Plumbing) and electrician (Precise Electrical) to attend the property on an urgent basis that morning, and also for cleaners to attend the property;
  - v) the works performed by those contractors (**Emergency Works**) included work in Unit 16, Unit 26 and the common property, and appears (unsurprisingly) to have been directed towards addressing the most urgent matters - identifying and repairing the source of the flooding, and making the property safe and habitable (by removing excess water and drying affected

surfaces, and isolating, repairing and restoring electrical systems to the property).

21. A claim (reference number 31304: **Claim**) in relation to the Flood Incident was lodged by the Strata Manager with CHU on 13 January 2020 (page 228, Exhibit 1). The Claim included, under 'Particulars of Loss', a description of the Flood Incident, an outline of the Emergency Works, and a request to assess the claim to determine cover under the Insurance Policy.
22. The Assessor's Report, prepared approximately two weeks after the Flood Incident:
- a) identifies the remaining damage to Unit 16 as follows:  
Lounge
    - Repair section of bulkhead ceiling
    - Paint flow through ceiling to living areas and passage
    - Paint east wall
    - Replace matching light fittings x 3Bedroom Passage:
    - Paint south wall
  - b) outlines additional damage to Unit 26, the level 1 lobby, the entrance lobby and to electrical systems in the Scheme; and
  - c) notes that there was no information to implicate another party being responsible for the Flood Incident, and that a \$1,000 excess would apply to any claim made under the Insurance Policy.
23. The Assessor's Report does not contain any reference to carpet damage in Unit 16. Notwithstanding this, the Tribunal does not understand there to be any real dispute in relation to the carpeting in Unit 16 having suffered water damage arising out of the Flood Incident, and is in any event satisfied that such damage arose, for the reasons outlined below.
- a) The Tribunal notes, in relation to the Assessor's Report that:

- i) the Assessor's Report was produced for, and on instructions from, CHU; and
    - ii) the assessor makes reference in the report to the terms of the Insurance Policy (such as the excess payable) and appears to have had regard to the carpet in Unit 16, but considered it was not within cover (see [25] below).
  - b) The applicant has produced photographs (marked C10, C11 and C12 at pages 134-136 of Exhibit1) depicting dark areas on the carpeting consistent with water damage. The nature and proximity in time of the Flood Incident, the location of the water damage to the walls and ceilings of Unit 16 identified in the Assessor's Report, and the contemporaneous email correspondence between the Rental Agent and the Strata Manager (see [24] below), satisfy the Tribunal that it is more likely than not that the areas of carpeting depicted in the applicant's photographs suffered water damage arising out of the Flood Incident (**Carpet Damage**).
24. In email correspondence passing between the Rental Agent and the Strata Manager on 16 and 17 January 2020:
- a) the Rental Agent advised and attached photographs of damage to the lounge room wall, ceiling, carpets and smoke alarm of Unit 16, and requested that the carpet be attended to promptly to minimise damage; and
  - b) the Strata Manager advised that an insurance assessor was being arranged to attend and assess several areas to determine the damage but, if there was damage to the carpet, then she recommended contacting the applicant's contents insurer since carpet inside individual units was 'most likely not covered under the building insurance'.
25. On 17 January 2020, the applicant emailed the Strata Manager to take issue with the opinion she had expressed in relation to insurance cover, and notifying that he sought to claim under the Insurance Policy for the Carpet Damage, as well as for loss of rent (in an amount of \$200 per week until all repairs had been completed). That email was



forwarded by the Strata Manager to CHU whose claims consultant responded, by email on 23 January 2020 that:

I have been advised by the assessor there is carpet to unit 16, not claimable as inside their lot.

26. On request of the Strata Manager (no doubt made because of the strength of the applicant's disagreement with her assessment of the likely insurance position), CHU confirmed its declinature of cover under the Insurance Policy for 'water damage to unit 16 carpets' by letter dated 30 January 2020.
27. The applicant has received quotes of between \$2,318 and \$3,795 to replace the damaged carpeting in Unit 16.

### ***The Insurance Policy***

28. The Schedule identifies, for the purposes of the Insurance Policy, the Strata Company as the Insured and the Situation as 191 James Street Northbridge WA.
29. The Tribunal notes that although the Strata Plan describes the Scheme as being situated at 203 James Street, Northbridge, it is common ground between the parties that the street address of the property is 191 James Street, Northbridge. The Tribunal finds that the Insurance Policy provides, subject its terms and conditions, strata insurance cover in respect of the Scheme.
30. Of most relevance to the dispute, Policy 1 - Insured Property - of the Insurance Policy:
  - a) provides, in the insuring clause, that:

[CHU] will insure You up to the Sum Insured ...  
against Damage to Your Insured Property which occurs  
during the Period of Insurance [.]
  - b) if the relevant Sum Insured is not exhausted, extends cover up to the Sum Insured to certain Additional Benefits (various costs and expenses, none of which are relevant to the resolution of the dispute);
  - c) provides cover, in addition to the Sum Insured, in respect of certain Special Benefits, which relevantly include loss of rent if a Lot/Unit is made unfit to be occupied for its intended purposes from Damage

covered by the Policy, or the cost of abating the rent if the tenancy is disrupted by an Event; and

- d) is, pursuant to the Schedule read together with clause 6 of the General Conditions in the Policy Wording, subject to payment of an Excess for each claim made.

31. Relevant to the construction of Policy 1:

- a) 'You' is defined as the Strata Company, including the interest therein of members (which in turn is defined to mean and be limited to the interest of proprietors in the ownership of the insured property in accordance with the ST Act, and except as otherwise specifically provided, not to include any interest or liability as an owner and/or occupier of a lot/unit);
- b) for the purposes of the 'Special Benefits' clauses, the definition of 'You' is extended to lot owners;
- c) 'Insured Property' is defined to include 'Building' and 'Common Area Contents'. 'Building' is defined to take its meaning from the Act (see [45] below). 'Building' and 'Common Area Contents' expressly exclude 'Lot Owners' Contents' which is, in turn, is defined to include carpets;
- d) 'Event' means 'a happening or an incident not intended to happen ... or results in Damage ... that is claimable under the Policy';
- e) 'Damage' means any 'partial or total accidental physical loss of, or destruction of property from any sudden and accidental cause not otherwise excluded by [the] Policy'; and
- f) 'Lot/Unit' means an area shown on a plan as a lot within the meaning of the ST Act.

32. Policy 10 - Lot Owners' Fixtures and Improvements - is subject to the same terms as Policy 1 and extends cover to damage, caused by an event claimable under Policy 1, to:

... any fixture or structural improvement, installed by a Lot Owner for their exclusive use and which is permanently attached to or fixed to Your Building so as to become legally part of it[.]

33. **Policy 2 - Liability to Others – provides cover for:**

... Liability to Others if You become legally responsible to pay compensation for Personal Injury or Property Damage resulting from an Occurrence in connection with the ownership of Your Common Area and Insured Property that happens during the Period of Insurance.

34. **For the purposes of Policy 2:**

- a) 'You' and 'Insured Property' are relevantly defined as outlined at [31(a)] and [31(c)] above; and
- b) cover is excluded in respect of 'damage to property belonging to, rented by or leased by You or in Your physical or legal control, other than as provided under the operative items of Policy 2'.

***The regulatory framework***

**Tribunal's power to make orders under s 83 and s 88**

35. Pursuant to the orders made on 2 October 2020, the amended application is to be dealt with under both s 83 (in relation to Proposed Orders (a), (c) and (e)) and s 88 (in relation to Proposed Orders (b) and (d)).
36. Section 83 and s 88 are both within Pt VI Div 3 of the ST Act and, pursuant to s 81(1), any order made under that Division 'may be expressed in terms different from the order sought, so long as it does not differ in substance from the order sought'.
37. Section 83(1), provides that the Tribunal:

[M]ay ... make an order for the settlement of a dispute, or the rectification of a complaint, with respect to the exercise or performance of, or the failure to exercise or perform, a power, authority, duty or function conferred or imposed by this Act or the by-laws in connection with that scheme on any person entitled to make an application under this subsection or on the council or the chairman, secretary or treasurer of the strata company.
38. The Tribunal's power to make orders under s 83(1) is general, and qualified by the sub-sections of s 83 that follow it. Relevantly:

- a) Sub-sections (2) and (3) contain particular provisions concerning the exercise by a strata company of any discretionary power, authority, duty or function under the ST Act. Read together, they have the effect that a strata company is only deemed to have failed or refused to exercise a discretion where, pursuant to s 83(3):
- (a) application is made to a strata company to exercise a discretion referred to in that subsection; and
  - (b) the strata company does not, before the expiration of the period of 2 months that next succeeds the making of the application -
    - (i) exercise or perform a power, authority, duty or function in accordance with the application; or
    - (ii) inform the applicant that it has decided not to exercise or perform the power, authority, duty or function in accordance with the application[.]
- b) Section 83(6) expressly excludes the use of the general power under s 83(1) to make an order in respect of any matter referred to in any other section of Pt VI of the ST Act.

39. Section 88 (which is in Pt VI of the ST Act) provides:

Where, pursuant to an application by a proprietor for an order under this section, the State Administrative Tribunal considers that the strata company for the scheme to which the application relates has unreasonably refused to make or pursue an insurance claim in respect of damage to a building or any other property insured by the strata company under Part IV, the State Administrative Tribunal may order the strata company to make or pursue the claim.

### **Power or responsibility of the Strata Company under the Act**

40. Section 32(1) provides that upon registration of a strata scheme, the proprietors from time to time shall comprise a strata company.
41. The general duties of a strata company are contained in s 35(1) and relevantly include duties: to enforce the by-laws; to control and manage the common property for the benefit of all the proprietors and to keep in good and serviceable repair, properly maintain and,



where necessary, renew and replace the common property; and to effect insurance in accordance with Div 4.

42. Further, under s 36(1), a strata company shall:
- (a) establish a fund for administrative expenses that is sufficient in the opinion of the company for the control and management of the common property, for the payment of any premiums of insurance and the discharge of any other obligation of the strata company; and
  - (b) determine from time to time the amounts to be raised for the purposes described in paragraph (a); and
  - (c) raise amounts so determined by levying contributions on proprietors -
    - (i) in proportion to the unit entitlements of their respective lots; or
    - (ii) where a by-law referred to in section 42B or an order under section 99A is in force, in accordance with that by-law or order; and
  - (d) recover from any proprietor, by action in a court of competent jurisdiction if necessary, any sum of money expended by the company for repairs or work done by it or at its direction in complying with any notice or order of a competent public authority or local government in respect of that portion of the building comprising the lot of that proprietor.
43. Section 36(3) provides that, except to the extent that the by-laws of a strata company may empower the council of that company to exercise the functions in s 36(1)(a), (b) and (c) and (2), those functions shall be performed by and in accordance with resolutions of proprietors passed at a general meeting of the strata company.
44. The duty of a strata company to effect and maintain insurance is dealt with in Pt IV Div4 of the ST Act. Specifically, because the Scheme is 'other than a single-tier strata scheme', s 54 applies and relevantly provides that:
- (1a) Subject to subsection (4) and section 103J, a strata company shall -
    - (a) insure and keep insured the building to the replacement value against fire, storm and tempest (excluding damage by sea, flood or erosion), lightning, explosion and earthquake; and

- (b) effect and maintain insurance in respect of damage to property, death, or bodily injury for which the strata company could become liable in damages in an amount of not less than \$5 000 000 or such other amount as may be prescribed in place of that amount[.]

(that cover referred to collectively as **Strata Insurance**).

45. 'Building' for these purposes is defined under s 53 to include:

... any building on the parcel for a scheme whether shown on the strata/survey-strata plan or not and also includes ... proprietors' improvements and proprietors' fixtures forming part of the building including paint and wallpaper but excluding carpet and temporary wall, floor and ceiling coverings[.]

46. Subdivision 4 of Div 4 applies to all schemes under the Act, pursuant to which:

- a) under s 55:
  - i) a strata company *may*, in addition to the Strata Insurance, insure the building against occurrences other than those specified, and *must* effect and maintain any insurance which is required by law (such as workers compensation) and against such other risks as the strata company may from time to time determine; and
  - ii) being a member of the strata company does not preclude a proprietor from bringing an action against the strata company
- b) under s 56, a proprietor may also effect insurance and, if so, any such cover does not affect, and shall not be taken into consideration in determining, the amount payable to a strata company under its policy.

47. The powers (as opposed to duties) of a strata company include the following:

- a) to make an agreement with any proprietor or occupier of a lot for the provision of amenities or services by it to that lot or to the proprietor or occupier of that lot: s 37(1)(g);

- b) under certain circumstances, to carry out works in relation to a lot if the proprietor fails to carry them out (which circumstances include when the work is required by a local government or authority, by the order of a court or tribunal, or to remedy certain breaches of the ST Act) and to recover monies associated with those works from the proprietor: s 38;
- c) to make by-laws, not inconsistent with the ST Act, for its corporate affairs, any matter specified in Sch 2A (which matters include 'insurance of the common property'), and other matters relating to the management, control, use and enjoyment of the lots and any common property: s 42.

#### **Power or responsibility of the Strata Company under the by-laws**

48. Default by-laws contained in Sch 1 and Sch 2 of the ST Act are deemed to be the by-laws of every strata company, but may be amended or replaced by by-laws passed and registered in accordance with the requirements under s 42. Registration is effected by lodging a Notification of Change of By-Law form with Landgate and these are recorded on the encumbrance schedule of the relevant strata plan (each a **Notification**): s 42(4).
49. In the case of the Scheme, five Notifications are registered against the Strata Plan, as follows:
- a) Notification G524519 (registered 7 July 1997) which:
    - i) amended the wording of by-law 1(b) in Sch 1 (see [50(a)] below);
    - ii) amended the wording of paragraph (c) of by-law 12 in Sch 2; and
    - iii) added by-law 3A (power of strata company regarding increased premium) to Sch 1 (see [50(b)] below).
  - b) Notification L794681 (registered 28 November 2011) which, in relation to Sch 2, repealed the standard by-laws and added new by-laws 1 to 18;

- c) Notification N999018 (registered 2 October 2018) which, in relation to Sch 1, added by-law 17 (recovery of costs of strata company);
- d) Notification O074029 (registered 18 January 2019) which, in relation to Sch 1, added by-law 18 (control and preservation of essence and theme of the development); and
- e) Notification O245558 (registered 26 September 2019) which, in relation to Sch 2, repealed By-law 16 and added a new By-law 19 (prohibition on smoking).

50. Of potential relevance to the dispute:

- a) By-law 1 of Sch 1 (as amended) provides:

A proprietor shall ... (b) repair and maintain his lot, *including any window, windowframe, door, doorframe or architrave surrounding a door or doorway*, and keep it in a state of good repair, reasonable wear and tear, and damage by fire, storm, tempest or act of God excepted[.]

[*italicised words added pursuant to Notification G524519*];

- b) By-law 17 of Sch 1 (see [49(c)] above) relevantly provides:

If the proprietor of a lot refuses or fails to pay the Strata Company any amount due for levies (whether under Section 36(1) and/or Section 36(2) of the Strata Titles Act) or any other amounts due under the Strata Titles Act which are overdue for more than 90 days, the strata company may take such lawful action as it deems necessary to recover that amount from the proprietor (including proceedings in any court of competent jurisdiction). All costs incurred in taking such action ... Are an administrative expense of the strata company and become a debt due and payable by the proprietor to the strata company, and shall be recoverable by the strata company when recovering due levies.

- c) By-law 18 of Sch 2 (see [49(b)] above) provides:

Any person in breach of the strata company by-laws shall, pursuant to Section 42A of the Act be subject to a



penalty not exceeding \$400. Any person who is in breach of the by-law shall pay all costs incurred by the strata company to enforce the by-laws including legal fees and the costs of application to the State Administrative Tribunal.

### **Lot boundaries**

51. As can be seen above, a number of the powers and responsibilities (including in relation to insurance) of the Strata Company, and correlating rights and responsibilities of Scheme proprietors, are determined by reference to the identification of, and the distinction between, common property and lots. Accordingly, determining the boundaries between those areas is important to the disposition of the dispute.

52. Pursuant to s 3(1):

- a) the common property of a strata scheme is that part of the land which does not comprise the lots on the strata plan; and
- b) lot, in relation to a strata scheme (other than a single tier scheme to which s 3AB applies), relevantly means:

one or more cubic spaces forming part of the parcel to which a strata scheme relates, the base of each such cubic space being designated as one lot or part of one lot on the floor plan forming part of the strata plan ... being in each case ... cubic space the base of whose vertical boundaries is as delineated on a sheet of that floor plan and which has horizontal boundaries as ascertained under subsection (2), but does not include any structural cubic space except where ... that structural cubic space -

- (i) has boundaries described in accordance with the regulations; and
  - (ii) is shown in that floor plan as part of a lot;
- c) 'floor plan' is relevantly defined as a plan, consisting of one or more sheets, which defines by lines the base of each vertical boundary of every cubic space forming the whole of a proposed lot, or the whole of any part of a proposed lot, to which the plan relates; and

- d) 'wall' includes a door, window or other structure dividing a lot from common property or from another lot.

53. As noted in *Maludra Pty Ltd and Owners of Windsor Towers Strata Plan 80* [2017] WASAT 112 at [197], the 'ordinary position' in relation to lot boundaries, which arises from s 3(2)(a) read together with the definition of 'lot' and 'floor plan', is that:

[T]he inner surface of the walls of a lot that correspond with the lines on the strata plan comprise the vertical boundaries of the lot and the horizontal boundaries of the lot comprise the underside of the ceiling and the upper surface of the floor[.]

54. However, that 'ordinary position' is subject to s 3(2)(b), which:

- a) is in terms that the boundaries of any cubic space referred to in the definition of floor plan are:

... such boundaries as are described on a sheet of the floor plan relating to that cubic space (those boundaries being described in the prescribed manner by reference to a wall, floor or ceiling in a building to which that plan relates or to structural cubic space within that building)[;]

- b) applies in this case because, in relation to the Scheme, the Strata Plan contains the following relevant boundary description:

The external face of the walls defining the lot within the building are the boundaries except where the wall is common then the centreline of said wall is the boundary.

### ***Parties' Contentions***

#### **Applicant's Contentions**

55. The applicant's submissions in relation to the Window Damage may be summarised as follows:
- a) the Window Damage constitutes Damage to Insured Property within the meaning of Policy 1 of, and is therefore covered by, the Insurance Policy;

- b) the Strata Company, not any individual proprietor, is the insured and is therefore the appropriate entity to make a claim under the Insurance Policy in respect of the Window Damage;
  - c) any excess payable in respect of claims made under the Insurance Policy are payable by the insured, being the Strata Company;
  - d) the Strata Company has no power or authority to:
    - i) require the applicant, as a lot proprietor, to pay the Excess in respect of any claim made under the Insurance Policy; or
    - ii) to levy the amount incurred by the Strata Company in repairing the Window Damage to the applicant;
  - e) the Strata Company has made claims under the Insurance Policy for similar damage, and has paid the Excess. All proprietors should be 'treated equally' in this regard;
  - f) it is unreasonable, in circumstances where the Insurance Policy is expected to respond to the Window Damage, for the Strata Company to decline to make a claim;
  - g) the Excess being of higher value than the amount claimed is not a sufficient reason for the Strata Company to decline to make a claim.
56. The applicant's submissions in relation to the Flood Incident and Carpet Damage run to 12 pages (pages 137 - 148, Exhibit 1), but may be broadly summarised as follows:
- a) the applicant does not contend that the carpeting in Unit 16 is part of the building (page 137, Exhibit 1) and therefore that the damage to it may be claimed under Policy 1 - Insured Property of the Insurance Policy;

- b) rather, loss has occurred and 'someone is clearly liable' (page 138, Exhibit 1) to the applicant in respect of the Carpet Damage, being:
    - i) the Strata Company is liable because it failed to maintain the common property by failing to 'ensure that water does not pass through the slab between levels of the building';
    - ii) further or alternatively, the proprietor of Unit 26 is liable for failing to maintain the hot water system which failed;
  - c) the Strata Company has, pursuant to s 55, elected to take out insurance that extends beyond the requirements of s 54(1a) and, where the Strata Company holds insurance cover that responds to a loss, then lot proprietors within the Scheme are entitled to the benefit of that cover;
  - d) in light of the liability contended in sub-paragraph 0 above, Policy 2 - Liability to Others of the Insurance Policy responds (page 144, Exhibit 1);
  - e) the Strata Company, not any individual proprietor and not the Strata Manager, is the insured under the Insurance Policy and is therefore the appropriate entity to make and pursue any claim in respect of the Carpet Damage;
  - f) the Strata Company has submitted a claim in respect of the Flood Incident, which has been accepted by CHU save in respect of the carpets in Unit 16; and
  - g) the Strata Company has a duty of care to act in the best interests of lot proprietors in the Scheme, and it is in the applicant's best interest to pursue the claim against CHU for damage to the carpet in Unit 16, which was caused directly by water discharge from the failed hot water system in Unit 26 (page 146, Exhibit 1).
57. More generally, the applicant contends that he is not being treated fairly by the Strata Company or the Strata Manager and that they, by their conduct:



- a) demonstrate bias against him; and
- b) are not acting in the applicant's best interests;
- c) prefer the interests of CHU over the applicant's interests, with an associated allegation against the Strata Manager that this results from the Strata Manager receiving a commission or other benefit from CHU in respect of the Insurance Plan (**Commission**).

58. As to the Commission, the applicant contends that:

- d) absent the consent of all owners in the Scheme, the Strata Manager may not receive a Commission and, by doing so, is in breach of her obligations to the owners (including the applicant); and
- e) pursuant to s 2(b) of the *Secret Commissions Act 1905* (WA), receipt of a Commission by the Strata Manager is forbidden.

### **Respondent's Contentions**

59. The respondent's submissions in relation to the Window Damage may be summarised as follows:

- a) the Strata Company is responsible for the repair and maintenance of the common property, not individual lots, within the Scheme;
- b) by reason of the boundary description on the Strata Plan, the window that was broken comprised part of Unit 16, not part of the common property;
- c) the funds expended by the Strata Company to repair the Window Damage were funds expended by the Strata Company, not on its own behalf, but on behalf of the applicant and, accordingly, those funds may be recovered from the applicant;
- d) window breakage is an insurable event and may be the subject of a claim made by the Strata Company under Policy 1 – Insured Property of the Insurance Policy;

- e) since the Excess payable under the Insurance Policy exceeds the cost of repairing the Window Damage (being the loss giving rise to the claim) the Strata Company has not made a claim in respect of it (since any such claim would be denied); and
- f) the availability of insurance cover in respect of a part of the building that comprises part of a lot (a window) does not, without more, oblige the Strata Company to pursue such a claim, and in any event, if such a claim were to be pursued then the Excess would be payable by the individual lot proprietor, not by the Strata Company.

60. The respondent's submissions in relation to the Carpet Damage may be summarised as follows:

- a) a claim has been made by the Strata Company against the Insurance Policy for property damage arising out of the Flood Incident;
- b) CHU has denied cover in respect of the Carpet Damage; and
- c) the applicant has indicated an intention to sue the proprietor of Unit 26 in respect of the Flood Incident and associated Carpet Damage; and
- d) the Strata Company has acted diligently in relation to the management of the common property and promptly in arranging repair works following the Flood Incident.

61. More generally, the respondent's submissions:

- a) deny bias against the applicant or that the Strata Company has, by its conduct, preferred the interests of CHU to the interests of the applicant; and
- b) contend that:
  - i) the Strata Company, not the Strata Manager, decided to place Strata Insurance in respect of the Scheme with CHU;

- ii) the Strata Manager has disclosed to the Strata Company any benefit obtained as a result of the Strata Company placing its Strata Insurance with CHU; and
- iii) the decision of the Strata Company to arrange and maintain cover under the Insurance Plan with CHU was reasonable.

### ***Tribunal's consideration***

62. The meaning given to written laws is to be approached in accordance with the general principles of construction, relevantly summarised by Le Miere J in *Bhalsod v Perrie* [2016] WASC 412 (*Bhalsod*) at [19] as follows:

The applicable principles of statutory construction include the following. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The context and purpose of a provision are important to its proper construction because the primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The legal meaning of the relevant provision is to be decided by reference to the language of the instrument viewed as a whole. The purpose of the statute resides in its text and structure. The purpose of legislation must be derived from what the legislation says, and not from some a priori assumption about its purpose or any assumption about the desired or desirable reach or operation of the relevant provisions.

63. The respondent is required to exercise its duties in respect of the management of common property and the administration fund; and
- a) holds the Insurance Policy,
- for the benefit of all proprietors of the Scheme.

### **Strata Company to make or pursue an insurance claim**

64. Proposed Order (b) is in terms that would require the respondent to make an insurance claim (in respect of the Window Damage) and Proposed Order (d) is in terms that would require the respondent to pursue an insurance claim (in respect of the Carpet Damage). Accordingly, insofar as the application is made in respect of those Proposed Orders it:

- a) must, by reason of s 83(6), be considered as an application for relief under s 88 rather than under s 83(1); and
  - b) in that context, will involve consideration of the scope and application of the Insurance Policy.
65. It follows that any consideration of the terms of the Insurance Policy that follows is directed to the determination of whether the respondent has acted unreasonably for the purposes of s 88, rather than to determine the liability of the insurer to cover the loss in question.

### **Window Damage - making an insurance claim**

66. The applicant asserts that:
- a) the Insurance Policy responds to the Window Damage;
  - b) the Strata Company has previously made claims against the Insurance Policy for similar damage;
  - c) in the circumstances, it may be inferred from the refusal of the Strata Company to make a claim against the Insurance Policy for the Window Damage, that the respondent (and its agent, the Strata Manager) is:
    - i) biased against him; and/or
    - ii) prefers the interests of CHU to his interests.
67. The Tribunal declines to make findings consistent with [65(c)] above.
- a) To make findings of bias or male fides, which are of a serious nature, the Tribunal would seek to feel an 'actual persuasion' of the occurrence or existence of such conduct (this approach is in keeping with the principle stated in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361-2 which, even if not strictly applicable in this context, is a useful touchstone for findings of this nature).
  - b) Far from being so persuaded, the Tribunal considers that such findings are not open on a reasonable or rational inference to be drawn from the documentary evidence before it. As outlined below, there are other



inferences consistent with the respondent's conduct that are inherently more likely on the evidence.

68. As noted above, the respondent concedes that the Window Damage is (or is likely to be) an 'insurable event' (page 371, Exhibit 1).
69. Contemporaneous communications between the parties identify that the reason stated by the Strata Manager (acting for the respondent) for not submitting a claim in respect of the Window Damage is that the Excess exceeds the repair costs (see [15] above). The underlying facts are objectively correct (it is clear, and not disputed, that an Excess of \$1,000 would apply to any claim made under Policy 1 - Property Damage of the Insurance Policy, and that the amount invoiced for repair of the Window Damage is less than that amount, being \$240).
70. In those circumstances, a reasonable and rational inference to be drawn, consistent with the explanation offered by the respondent and accepted by the Tribunal, is that the respondent declined to make a claim because it assessed there would be little point in doing so given the cost of repair relative to the Excess.
71. Further, that decision is, on its face, reasonable. As observed in *Vero Insurance Limited v Owners of Strata Plan No 69352* [2011] NSWCA 138 at [55], the purpose of an excess is to discourage minor or frivolous claims. Any claim made by the Strata Company in respect of repairing the Window Damage would, in the circumstances, be frivolous.
72. It follows that, for the purposes of s 88 of the Act, in relation to the Window Damage, the Tribunal:
- a) is satisfied that the Window Damage is damage to a building or any other property insured by the respondent under Pt IV of the ST Act; but
  - b) is not satisfied that the respondent has unreasonably refused to make or pursue an insurance claim in respect of such damage.
73. Accordingly, the Tribunal declines to make orders in terms of Proposed Order (b).

74. That does not, however, dispense with the whole of the application as it pertains to the Window Damage. The remaining issue is whether the respondent is entitled to levy the cost of repairs against the applicant.

### **Window Damage - levying the cost of repairs**

75. The Tribunal finds that, by reason of the boundary description on the Strata Plan (see [54] above), the applicant's lot extends to the external surface of the building walls (including any windows) defining Unit 16. Further, under by-law 1 of Sch 1 (as amended by Notification G524519), the applicant is responsible for maintaining his lot, including any windows, in a state of good repair. Accordingly, and subject to any successful claim for cover under the Insurance Policy, the applicant would ordinarily be responsible for the repair of the Window Damage.
76. However, as noted above, the respondent arranged and paid for those repairs and have now sought to recover those costs by means of a levy against the applicant.
77. The ability of the Strata Company to levy monies (as opposed to making a claim) against proprietors is not at large; rather, any such authority must derive from the ST Act or relevant by-laws.
78. As outlined in [42] above, the principal reason to issue levies is to raise contributions to the Scheme's administrative fund established under, and for the purposes identified in, s 36(1). Under that provision:
- a) the administrative fund is to be used for the control and management of the common property, payment of any premiums of insurance, and the discharge of any other obligation of the strata company; and
  - b) contributions to the administrative fund for the purposes in (a) are to be made by all proprietors, in proportion to the unit entitlements of their respective lots (noting that the exceptions under s36(1)(c)(ii) do not apply); and
  - c) provision is otherwise made for recovery from a proprietor by a strata company of monies expended for repairs or work done by it on part of the building comprising the lot of the proprietor, but only if the repair or work was carried to comply with a 'notice or

order of a competent public authority or local government'.

79. The power to levy monies under s 36 is not engaged in relation to the costs of the Window Damage repairs, because any such charge is not:

- a) a contribution to the administration fund levied against all proprietors in proportion with lot entitlements (whether or not it is otherwise possible to characterise the charge as being for the purpose of an 'obligation of the strata company'); nor
- b) for works carried out to comply with any notice or order of a competent public authority or local government.

80. The Tribunal notes that the respondent is empowered by s 37(1)(g) to make an agreement with any proprietor or occupier of a lot for the provision of amenities or services by it to that lot or to the proprietor. That power does not assist the respondent because:

- a) even though the Rental Agent, on behalf of the applicant, requested that the respondent organise the repairs, that request was made in terms that they be organised 'through the insurance company'. There is no evidence that the applicant intended or understood there to be an agreement that repairs be carried out by or at the direction of the Strata Company other than as part of an insurance claim;
- b) the repair of the Window Damage would not readily be characterised as 'the provision of amenities or services' to the applicant. Given that there are provisions in the ST Act that are particularly addressed to 'repairs or work done' to a lot by or at the direction of a strata company (see s 36(1)(d) and s 38), the phrase 'the provision of amenities or services' is more naturally construed as being directed to matters other than repairs or work done to a lot; and
- c) in any event, s 37 does not make particular provision for the levying of any costs associated with such an agreement.

81. While s 38 empowers the respondent, in certain circumstances, to carry out works on a lot and to recover monies from the lot proprietor, that provision also does not assist the respondent since the qualifying circumstances (see [47(b)] above) do not apply.
82. Finally, there are no by-laws that empower the respondent to recover monies incurred in carrying out works or repairs on part of the building comprising a lot by means of a levy.
83. By-law 17 of Sch 1 (see [50(b)] above) does not apply because the cost associated with the window repair is not an amount 'due for levies' under s 36(1) or s 36(2), nor is it an amount 'due under the [ST Act]'.
84. By-law 18 of Sch 2 (see [50(c)] above) does not apply because there has been no relevant breach of a By-law (including by-law 1 of Sch 1) by the applicant.
85. The Tribunal finds that the respondent is not empowered to levy the costs incurred in repairing the Window Damage against the applicant.

#### **Carpet Damage - making and pursuing an insurance claim**

86. The applicant asserts a duty of care on the part of the respondent to act in his best interests, and that it is in his interests for the respondent to pursue an insurance claim against CHU in respect of the Carpet Damage.
87. The duties with which the Tribunal is concerned are those under the ST Act and by-laws. There is nothing in the ST Act or by-laws that imposes any generalised duty on a strata company to act in a proprietor's best interests. In relation to the making and pursuit of insurance claims, it may be discerned from the wording of s 88 that the respondent is required to act reasonably (since the failure to do so may sound in relief under that provision).
88. The respondent has made a claim against the Insurance Policy (specifically, Policy 1 - Insured Property) in respect of the Carpet Damage, and that claim has been declined.
89. As noted above, the applicant is explicit that he does not assert that the carpeting in Unit 16 is part of the building (and therefore that it is covered under Policy 1 - Insured Property). In the Tribunal's view, that concession is appropriately made, noting:



- a) the Tribunal's findings in *Topic and The Owners of Raffles Waterfront Strata Plan 48545* [2016] WASAT 27, referred to by the applicant, to the effect that, even under the 'ordinary position' in relation to lot boundaries (see [53]-[54] above), carpets (as distinct from tiles) within a unit are part of the lot, not the common property;
  - b) the definition of 'building' for the purposes of Pt IV Div 4 of the ST Act, explicitly excludes carpets (see [45] above); and
  - c) in relation to the question of insurance cover, that on a proper construction of the Policy Wording (see, in particular, [31(c)] above), it would not be open to contend that the Strata Company should reasonably expect the Carpet Damage to be covered under Policy 1 - Insured Property.
90. The principal question raised by the applicant's submissions in relation to Proposed Order (d), therefore, is whether the respondent has unreasonably failed to make and/or pursue a claim in relation to the Carpet Damage under Policy 2 - Liability to Others of the Insurance Policy. Relevant to the determination of that question is whether the Strata Company should reasonably expect the policy to respond in the circumstances, and therefore, the threshold conditions of cover.
91. As noted in *Hamcor Pty Ltd & Anor v Marsh Pty Ltd & Anor* [2013] QCA 262 (*Hamcor*) at [11]:
- A policy of insurance is a commercial contract and should be given a businesslike interpretation. The ordinary rules of contractual interpretation apply. The construction of policies is to be determined by what a reasonable person in the position of the parties to the policies would have understood by the language in which the parties expressed their agreement.
92. The insuring clause of Policy 2 - Liability to Others makes it clear that the policy responds in the event that the Insured becomes 'legally liable to pay compensation' (for 'Property Damage' resulting from an 'Occurrence'). This kind of cover is known as liability insurance, which provides indemnity to the insured for liabilities the insured has to a third party.

93. The insuring clause in question requires that, to trigger its operation, there must be a 'legal liability [of the insured] to pay compensation'. This requirement is to be distinguished from a requirement that there be a claim made for compensation.

- a) A 'claim' for compensation has been held, in an insurance context, to be an unequivocal demand or assertion of right to compensation (see *Walton v National Employers' Mutual General Insurance Association Ltd* [1973] 2 NSWLR 73 at 82). Further, a 'claim' is to be distinct from the 'occurrence' giving rise to it (see *Transport Industries Insurance Co Ltd v NSW Medical Defence Union Ltd* (1986) 4 ANZ Ins Cases 60-736). A claim is more than a mere assertion of entitlement.
- b) The requirement that there be a 'legal liability to pay compensation' goes well beyond there being a claim for such compensation. Given their ordinary meaning, the words of the insuring clause require that there be some formal adjudication against an insured of liability, and a compulsion to pay compensation, to a third party claimant (see, for example, *Hamcor* at [14]).

94. The applicant's contentions that:

- a) the Strata Company is liable for the Carpet Damage because it 'failed to ensure that water does not pass through the slab between levels of the building'; and/or
- b) the proprietor of Unit 26 is liable for the Carpet Damage because the hot water system in that unit failed,

are mere assertions of liability. There has been no determination of any legal liability to pay compensation, and the facts relied upon by the applicant are insufficient to found any assessment of the potential liability of any party (even if such an assessment were within the Tribunal's jurisdiction).

95. The applicant relies on *Seiwa Pty Ltd v Owners Strata Plan 35042* [2006] NSWSC 1157 in support of his claim. That case:

- a) involved a finding, by the NSW Supreme Court, that an owners corporation in a strata scheme:
  - i) had breached its duty to maintain the common property by failing to repair the waterproofing membrane that sealed the floor of an external patio so as to prevent water from the surface of the patio entering into the claimant's unit; and
  - ii) was liable to pay the plaintiff \$150,000 loss of use damages;
- b) does not assist the applicant because:
  - i) the substance of the matter before the court was whether there had been a breach of s 62(1) of the *Strata Schemes Management Act 1996* (NSW), being a duty to properly maintain and keep in state of good and serviceable repair common property;
  - ii) the determination of such breach requires findings of both fact and law; and
  - iii) although there is a similar duty on the Strata Company under s 35(1), the breach of a statutory duty under another State's legislation, based on findings of different facts and involving different parties, cannot be determinative of any liability to pay compensation of any party to the present dispute.

96. In the absence of there being any (determined) liability of any insured to pay compensation, there is no reasonable basis upon which to expect Policy 2 - Liability to Others to respond.

97. Accordingly, for the purposes of s 88 of the Act, in relation to the Carpet Damage, the Tribunal:

- a) is not satisfied that the Carpet Damage is damage to a building or any other property insured by the respondent under Pt IV of the ST Act; and

- b) is not satisfied that the respondent has unreasonably refused to make or pursue an insurance claim in respect of such damage.

98. It follows that relief is not available under that provision.

### **Carpet Damage - repair or reimbursement**

99. The applicant has sought orders that:

- a) the respondent repair the Carpet Damage; or
- b) in the absence of the respondent making or pursuing an insurance claim in respect of the Carpet Damage, the respondent reimburse him for replacement carpeting.

100. The principal basis for the applicant's claim that the respondent should repair the Carpet Damage appears to be the asserted responsibility or liability of the respondent in relation to the Flood Incident.

101. The applicant appears to rely, as the basis for the asserted responsibility of the respondent, on the its obligations under s 35(1) to keep in good and serviceable repair, properly maintain and, where necessary, renew and replace the common property.

102. The evidence to support the applicant's claim in this regard is limited. While the Tribunal can be satisfied that the hot water system in Unit 26 failed and that water was able to permeate from level 2 into the floors below, there is insufficient evidence for the Tribunal to make any finding in relation to:

- a) the underlying causes of the hot water system failure or the permeation of water into Unit 16; or
- b) the knowledge and conduct of the respondent in relation to any of those causes (see for example: *Drexel London (a firm) v Gove (Blackman)* [2009] WASCA 181 at [232]).

103. To the extent that there is evidence going to the question of fault, that evidence does not support the applicant's contentions. Rather, as noted above, the Assessor's Report includes an observation that there was no information to implicate another party being responsible for the Flood Incident (see [22(c)] above).



104. The Tribunal cannot be satisfied, in relation to the assertions made by the applicant, that for the purposes of s 83(1) of the Act, the respondent has exercised or performed, or failed to exercise or perform, a power, authority, duty or function conferred or imposed on it by the ST Act or the by-laws such as to give rise to the Carpet Damage.
105. Further, there is nothing under the ST Act or the by-laws that requires the Strata Company to carry out repairs to carpeting within a lot (noting that carpets do not comprise either the common property or building in the Scheme). Indeed, in the absence of an agreement to recover the monies, doing so may well breach its obligations in relation to the management and expenditure of the administration fund.
106. Accordingly, the Tribunal declines to make orders in terms of Proposed Order (a) or Proposed Order (d).

### **Recovery of Commission from the Strata Manager**

107. Finally, the applicant seeks an order that the Strata Company recover from the Strata Manager any Commission paid by CHU arising from the placement of the Scheme's Strata Insurance with that insurer.
108. The Tribunal notes that it is not in contention that the Strata Manager receives or received a Commission from CHU.
- a) The applicant contends that this is improper, and in breach of the Strata Manager's obligations to him (as a lot proprietor).
  - b) The respondent contends that:
    - i) the Strata Manager disclosed to the respondent that she would receive a Commission if the respondent insured with CHU;
    - ii) the respondent, and not the Strata Manager, made the decision to place the Scheme's Strata Insurance with CHU; and
    - iii) the premiums and level of cover offered by CHU to the respondent were competitive, and no disadvantage results from the decision.
109. The applicant has been unable to point to anything in the Act that would require the disclosure/s made by the Strata Manager in relation

to the Commission to be accepted by every proprietor (see [57(d)] above).

110. The Tribunal notes that the applicant refers to s 2(b) of the *Secret Commissions Act 1905* (WA) in support of his contention that the Commission was improperly received. That provision does not, however, assist the application, for the reasons below.
- a) First, the *Secret Commissions Act 1905* (WA) was repealed in 1914 (*Criminal Code Act Compilation Act 1913* (WA), s 2).
  - b) In any event, its provisions were directed to creating offences for corrupt conduct and those matters are not within the jurisdiction of the Tribunal (even if it had evidence of corruption, which it does not).
  - c) Further, the concern of the Tribunal in this proceeding is the conduct of the respondent in the exercise of its powers or responsibilities (which is dealt with below), not the conduct of the Strata Manager.
111. The question for the Tribunal is not whether the receipt of Commission by the Strata Manager is proper or improper, but rather whether, for the purposes of s 83, the respondent has exercised or failed any power or responsibility conferred or imposed on the it by the ST Act or the by-laws, such as to warrant the making of the order sought by the applicant.
112. The applicant has not pointed to:
- a) any particular power or responsibility in respect of which he asserts fault on the part of the respondent; or
  - b) facts, beyond the receipt of the Commission itself,
- that would support a finding of kind contemplated by s 83.
113. The only relevant function of the respondent under the ST Act is the power and duty to effect and maintain Strata Insurance, and the more general powers of the respondent to carry out its functions including by the appointment of an agent.
114. The respondent has provided the minutes of an AGM held on 24 August 2019 (notably, before the Window Damage and the Flood

Incident, and therefore before the current dispute between the parties arose). Those minutes demonstrate, at item 10, that:

- a) the Strata Manager disclosed that she is an authorised representative of CHU and receives a commission for insurance placed with that company; and
  - b) the Council resolved that the Strata Company should renew the Strata Insurance cover it held with CHU.
115. The applicant submits that the minutes cannot be relied upon because they were prepared by the Strata Manager. The Tribunal does not accept that submission. The minutes were prepared before the current dispute arose and have been provided by (and the contents are therefore known to) the respondent. They have been provided to the Tribunal as an accurate record of the meeting, and the Tribunal accepts them as such.
116. There is nothing before the Tribunal that, on the face of it, makes the respondent's decision to renew its Strata Insurance with CHU unreasonable or improper. There is nothing to suggest that the respondent has been, or the lot proprietors have been, prejudiced by that decision. There is, for example, no evidence that would suggest that the cost of the Commission was passed on to the respondent or that the terms of the Insurance Policy (including in relation to the Excess) were unusual in the marketplace.
117. Even if there were some fault in relation to the respondent placing its insurance with CHU when a Commission was paid to the Strata Manager (which has not been found), it is difficult to see how in those circumstances an appropriate order, made in the exercise of the Tribunal's discretion under s 83, would be in terms that required recovery of the Commission (as opposed to an order that required a different exercise of the power to effect Strata Insurance).
118. The Tribunal is unable to be satisfied that the respondent has any power or responsibility conferred or imposed on it by the ST Act or the by-laws relevant to the recovery of a commission paid by a third party to a strata manager. That is so particularly where there is no evidence that the interests of the respondent, and/or the proprietors in the Scheme, have suffered any detriment from the payment of the Commission to the Strata Manager.

119. Accordingly, the Tribunal declines to make orders in terms of Proposed Order (e).

***Additional case law***

120. For completeness, the Tribunal notes that it was referred by the applicant to a number of cases not dealt with in the reasons above. While the Tribunal considered them, they do not assist the applicant for the reasons that follow.
121. The applicant referred to ***Dworakowski and The Owners of 63 Temple Street Victoria Park Strata Plan 26070*** [2020] WASAT 45 in support of the proposition that denial of insurance cover for the cost of repairs does not absolve the strata company from reimbursing a proprietor who has incurred the cost of such repairs. That case is distinguishable because it concerned repairs to common property, not to a lot. The costs ought therefore to have been borne by the strata company (pursuant to its obligation to maintain and repair common property).
122. Other cases cited by the applicant were not of assistance because they:
- a) have no relevance to, or bearing upon, what must be decided here: ***The Owners of Habitat 74 Strata Plan 222 v Western Australian Planning Commission & Ors*** [2004] WASC 23; ***CHU Underwriting Agencies Pty Ltd v Wise*** [2012] WASCA 123; ***Giovannangelo and The Owners of College Park Survey Strata Plan 62783*** [2019] WASAT 10;
  - b) concern the duty of a strata company to maintain or repair common property, but in contexts that do not bear upon the issues for determination in this case: ***Clark and The Owners of Waterfront Mews - Strata Plan 14082*** [2011] WASAT 110; and
  - c) relate to findings of liability in unrelated or distinguishable legal contexts: ***Shum v Owners Corporation SP30621*** [2017] NSWCATCD 68; ***T & H Fatouros Pty Ltd v Randwick City Council*** [2005] NSWSC 874 (noting, in any event, that this decision was overturned in ***Randwick City Council v T and H Fatouros Pty Ltd*** [2007] NSWCA 177).



**Orders**

The Tribunal orders:

1. The respondent must not levy against the applicant the cost of works carried out on or about 14 October 2019 to repair the window of the applicant's lot, and any such cost, and any associated penalties or interest, levied against the applicant must be set aside.
2. The application is otherwise dismissed.

I certify that the preceding paragraph(s) comprise the reasons for decision of the State Administrative Tribunal.

DR B MCGIVERN, MEMBER

27 OCTOBER 2020