Civil and Administrative Tribunal

New South Wales

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| Case Name: | Rosenthal v The Owners - SP 20211 |
| Medium Neutral Citation: | [2017] NSWCATCD 80 |
| Hearing Date(s): | 26 June 2017 |
| Decision Date: | 29 August 2017 |
| Jurisdiction: | Consumer and Commercial Division |
| Before: | Jeffery Smith, Senior Member |
| Decision: | 1. The respondent shall immediately take all steps to further investigate as necessary and to correct all sources of water ingress to lot 64 and in particular shall carry out the following work in addition to any other that is found necessary to achieve compliance with these orders;<br><br>(1) Replace entire waterproof membrane on level 20.<br><br>(2) Correct weep holes to brick cavity wall to main bedroom, correct as necessary flashing in brick cavity wall to main bedroom and investigate and correct as necessary water ingress from downpipe within column to south end of main bedroom.<br><br>(3) Waterproof the window hob to second bedroom, install or correct as necessary the flashing and weep holes to the wall between the second bedroom and study and perform all other steps necessary to correct the ingress of water to the second bedroom and study.<br><br>(4) In regard to the bedroom on level 20, install water-stop at top of hob, install or correct as necessary the flashing to the east of the window suite, correct as necessary failed end-stops at the end of the sub-sills and failed mitre joints. |

2. The respondent shall immediately take all steps to replace the fire rated front door to lot 64.

3. All work referred to in orders 1 and 2 shall be completed on or before 22 November 2017.

4. The respondent, The Owners-Strata Plan 20211, shall pay the applicants, Thomas Rosenthal and Joanne Rosenthal, jointly, the sum of $8,793.49 immediately.

5. If any party seeks an order for costs, leave is granted to file and serve a short written submission on that issue only within 21 days of the date of these orders.

6. Leave is granted for the other party to file and serve a short written submission in reply within a further period of 21 days.

7. In any such submission the parties are to address the issue of whether the Tribunal should dispense with a hearing on the issue of costs pursuant to the provisions of the Civil and Administrative Tribunal Act 2015 s 50(2).

8. The application is otherwise dismissed.

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| Catchwords: | Jurisdiction of Tribunal to award damages for breach of statutory duty, strictness of duty to repair and maintain, exculpations from duty to repair and maintain, burden of proof, definitions of lot property/common property |
| Legislation Cited: | Strata Schemes Management Act 2015,<br>Strata Schemes Management Act 1996,<br>Civil and Administrative Tribunal Act 2013,<br>Strata Schemes Development Act 2015 |
| Cases Cited: | Stolfa v Owners Strata Plan 4366 & ors [2009]NSWSC 589,<br>Seiwa Australia Pty Ltd v The Owners SP 35042[2006]NSWSC 1157,<br>The Owners SP 35042 v Seiwa Australia Pty Ltd [2007]NSWCA 272, |

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| | The Owners of Strata Plan 50276 v Thoo [2013]NSWCA 270,<br>Ridis v Strata Plan 10308 [2005] NSWCA 246, |
| Category: | Principal judgment |
| Parties: | Thomas Rosenthal and Joanne Rosenthal, applicants<br>The Owners – SP 20211, respondent |
| Representation: | Mr Galvin, of counsel, instructed by Dentons Lawyers for the applicants<br>Mr Young, of counsel, instructed by Grace Lawyers for the respondent |
| File Number(s): | SC16/55860 |
| Publication Restriction: | Nil |

# REASONS FOR DECISION

## INTRODUCTION

1 This application was filed in the Tribunal on 22 December 2016. The application is made pursuant to the provisions of the *Strata Schemes Management Act 2015* (the Act) and in accordance with the applicants' amended Points of Claim seeks orders pursuant to the Act s 232(1)(e) to settle the dispute between the applicants and the respondent regarding the respondent's alleged failure to exercise its duty under s 106(1) to properly maintain and to keep in a state of good and serviceable repair the common property and to take all necessary steps to

(a) remedy the waterproof membrane on the rooftop area

(b) remedy all water leaks into lot 64,

(c) replace the fire rated front door to the applicants' lot.

2 The application also sought an order pursuant to s 229 for damages allegedly arising from the respondent's breach of statutory duty

3 The application was listed for hearing before me on 26 June 2017 at which time the parties were represented as noted above pursuant to an order granting leave for the parties to be legally represented made on 23 January 2017.

4 At the conclusion of the hearing directions were made for filing and exchanging final written submissions and submissions in reply. As the period of time for filing submissions has now expired the application has been referred to me for determination.

**JURISDICTION**

5 There was no dispute that the Tribunal has jurisdiction to hear and determine the application pursuant to the provisions of the *Civil and Administrative Tribunal Act 2013 Part 3* and the *Strata Schemes Management Act 2015* except insofar as the application sought compensation in damages pursuant to s 106(5) of the Act.

6 The issue of jurisdiction for the Tribunal to award damages pursuant to the *Strata Schemes Management Act 2015* s 106(5) is dealt with below.

**APPLICANT'S SUBMISSIONS**

7 The applicants made relevant submissions to the following effect.

8 The applicants had purchased their lot in Strata Plan 20211 in February 2015 and took up occupation on or about 7 April 2015. The lot occupies parts of the top three floors of the strata scheme.

9 Shortly after taking possession of lot 64 the applicants noticed water ingress to the kitchen area, the master bedroom, the spare bedroom and the office and immediately notified the strata managing agent.

10 Over the ensuing months the applicants noticed continuing water ingress to their lot and continued to notify the respondent of the issue.

11 The respondent has taken no action to correct the water ingress despite the fact that the respondent was on notice of the issue when it had been raised by the previous owner of lot 64 in 2013 and the need for further investigation had been brought to the respondent's attention in February 2014.

12 In March 2014 the respondent had been provided with an engineering report that identified possible deterioration in the waterproof membrane as the likely cause of water ingress to lot 64.

13 Despite the advice of a previous owner of lot 64 and the continuing complaint to the respondent of the current owners, the respondent has taken no steps to investigate the cause of water ingress or to repair and maintain the common property so as to prevent further water ingress. It was not until the applicants commenced these proceedings that the respondent finally sought reports to identify the source of water ingress.

14 The applicant relied on the obligations imposed by the Act s 106 and the decision of the Supreme Court in *Stolfa v Owners Strata Plan 4366 & ors* [2009]NSWSC 589 and of the Court of Appeal in *The Owners SP 35042 v Seiwa Australia Pty Ltd* [2007]NSWCA 272 as authority for the proposition that the duty imposed by the Act is a strict one.

15 The applicants acknowledged that by-law 6 had been made in general meeting in October 2000 and provided for construction of a pergola and installation of glass bricks and a sliding door. By-law 23 had been made in December 2007 and provided for relocation of the pergola referred to in by-law 6.

16 The responsibility for maintenance placed on the owners of lot 64 by these by-laws was said to be minimal and ought not to result in the applicants being held responsible for any contribution to repairs or replacement of the waterproof membrane or for repairs to other areas of water ingress.

17 The applicants relied on the witness statement of Dr Thomas Rosenthal and the reports of Mr George Drakakis and Mr Haimish McGill.

18 Both the expert for the applicants and the expert for the respondent agreed that the rooftop waterproof membrane has exceeded its service life. Mr Drakakis for the applicants was of the opinion that it should be replaced.

19 Both the expert for the applicants and the expert for the respondent identified the source of water ingress to the kitchen as a pipe penetration for mechanical ducting that had resulted in tears to the polyester matting and bituminous sheeting. Mr Drakakis was of the opinion that previous repairs had been unsuccessful and that further patch repairs were unlikely to succeed.

20 Water ingress to the main bedroom is said to be occurring by bypassing flashing and through partially blocked weep holes. The applicants also

accepted the respondent's expert opinion that the tiles outside the main bedroom need to be removed and waterproofing undertaken.

21 The applicants' expert was also of the view that the waterproof membrane above the master bedroom had failed and required replacement.

22 Both the expert for the applicants and the expert for the respondent agreed that there was water ingress to the second bedroom through the masonry wall, from the sides of the door frame and as a result of failure of the waterproof membrane adjacent to the second bedroom.

23 The experts were also in general agreement in regard to the water ingress to the study. There was agreement that there was lack of flashing between the second bedroom and the study and a likely failure of the waterproof membrane adjacent to the study. Other factors were also involved in the opinion of Mr Drakakis.

24 There was also general agreement by the experts as to the likely source of water ingress to the bedroom on level 20.

25 It was submitted that the evidence of Mr Drakakis should be accepted that it was necessary to replace the whole of the waterproof membrane on the roof. No contribution to that repair should be borne by the applicants due to the failure to demonstrate that the obligations imposed on the applicants pursuant to by-laws 6 and 23 had any relationship to the cause of water ingress.

26 In addition to the opinion of Mr Drakakis relied on by the applicants, it was the applicants' submission that the un-controverted expert evidence of Mr McGill established that the stormwater drainage system for the external roof top area lacked sufficient capacity and failed to comply with legal requirements and if not corrected may result in further flooding even if the other issues identified by Mr Drakakis were attended to.

27 In addition to the water ingress issues it was the applicants' submission that the front door to lot 64 is non-compliant and defective as agreed by the experts. The front door is part of the common property and should therefore be addressed with the other maintenance required.

28 It was acknowledged by the applicants that prior to the commencement of the current Act the previous legislation and the decision of the NSW Court of Appeal in *The Owners of Strata Plan 50276 v Thoo* [2013] NSWCA 270 (*Thoo*) prevented an adjudicator from making an order for damages arising from a breach by the Owners Corporation of its statutory duty to repair and maintain the common property.

29 However, s 232 of the Act now provides an opportunity for the Tribunal, in making an order or orders to settle a dispute, to also make an order for compensation for damages arising from a breach of statutory duty.

30 A costing of the consequential damage suffered by the applicants as a result of the breach by the respondent of its statutory duty was provided in the sum of $8,793.49.

**RESPONDENT'S SUBMISSIONS**

31 The respondent made relevant submissions to the following effect.

32 The respondent does not deny that it has an obligation pursuant to the Act s 106(1) "*to properly maintain and keep in a state of good and serviceable repair the common property*" but properly points out that the obligation is limited to "*common property*" and is, pursuant to s 106(7), "*subject to the provisions of any common property memorandum adopted by the by-laws or any by-law made under s 108"*

33 It is therefore necessary, on the respondent's submission, to embark on an investigation of whether the orders the applicants seek arise from disrepair of the common property and that the common property involved is not the subject of an exclusive use or special privilege by-law.

34 The respondent's submission identified the alleged defects as

(a) Water leaks in :
    (i) the kitchen
    (ii) the main bedroom
    (iii) the second bedroom
    (iv) the study
    (v) the bedroom on level 20

(b) Failure of the hydraulic drainage system

(c) The front fire door on level 19

35 It was the respondent's evidence that extensive alterations were made to lot 64 when occupied by the developer and those alterations were never the subject of a special by-law. The alterations made at that time are described at [14] of the affidavit of Alan Richard Cavenagh.

36 Additional works were carried out between 1990 and 1997 by subsequent owners of lot 64. A description of those works is found at [17] of Mr Cavenagh's affidavit.

37 In 2000 further works, the subject of special by-law 6, were carried out to lot 64 by previous owners of the lot. The respondent acknowledged that the documentation provided with by-law 6 was of such a small scale that it is difficult to determine the extent of works carried out pursuant to that by-law but submitted that it included the master bedroom, pavilion, roof terrace and all structures referred to in the plans.

38 Even if the master bedroom and pavilion are not covered under by-law 6 it was submitted that the works are located above the upper surface of the membrane and are accordingly in the applicants' lot.

39 In 2008 special by-law 23 was made which deals with the relocation of the pergola and attachment to the slab. Again the documentation attached to the by-law is so small as to be difficult to interpret but does require the fixings to be waterproofed.

40 Although special by-law 23 requires the applicants to repair and maintain any area covered by the by-law the respondents' submission was that it is difficult to accurately identify the areas intended to be covered.

41 Contrary to the applicants' submission that the water ingress issue has been ignored by the respondent, it was the respondent's position that attempts had been made to discuss the uncertainty of responsibility for repairs and maintenance with the applicants and to address the issue by way of new by-laws. New by-laws proposed by the respondent to address the issue had been rejected by the applicants.

42 The respondent's submission acknowledged its responsibility for rectification of the water ingress issue in regard to the second bedroom and study.

43 It was the respondent's submission that the waterproof membrane over the entire level 20 roof slab did not need replacement despite the expert evidence that it had exceeded its service life. Although replacement of the membrane was a better solution it was the respondent's expert evidence that a practical solution was to patch the membrane.

44 The respondent submitted that the decision on whether or not to replace the membrane should not be influenced by the difficulty in establishing the source of water ingress in some locations. The applicants, it was said, have been unable to identify the specific sources of leaking which has resulted in uncertainty as to the responsibility for repairs. That is, the applicants have failed to prove the replacement of the entire membrane by the respondent is justified.

45 In regard to the kitchen the applicants had failed to identify the mechanism of water penetration relative to the common property and had therefore failed to establish that it was the respondent's responsibility to repair. The experts agreed the point of ingress is through a pipe penetration and the respondent's expert was of the opinion that further repairs would be successful.

46 The DA drawings provided to the Tribunal did not identify whether the pipe penetration was present at the time of registration of the strata plan but because the pipe penetration is located within the area covered by by-law 23 it is the applicants' responsibility to repair.

47 The respondent's expert accepted that the consequential damage to the kitchen was caused by the water ingress. However, because the applicants had failed to prove the respondent liable to rectify the water penetration the respondent is not liable for the cost of consequential damage.

48 The water ingress to the main bedroom was said to originate from the bedroom wall. The wall has been relocated from its original location and is therefore part of the lot property, not common property. Further, the waterproof membrane

located above the main bedroom was said not to have been the cause of water ingress and does not require replacement.

49 The water ingress to the second bedroom and into the study was agreed to be a defect for which the respondent is liable.

50 The rectification method suggested by the respondent's expert on this issue (and his opinion generally) should be accepted in preference to that of the applicants' expert because of errors in the evidence of Mr Drakakis and because he acted in some instances as an advocate for the applicants.

51 The third bedroom (also referred to as the level 20 bedroom) was constructed after the strata plan was registered. It was the respondent's evidence that the water ingress originated from a hob installed on top of the original tiles and membrane. The area is located in the lot space above the original slab surface and is therefore part of the applicants' lot.

52 The waterproof membrane adjacent to the area was, according to the respondent's expert, not a source of water ingress. Although the membrane in that area has passed its service life there is no requirement for its immediate replacement.

53 The respondent's submission acknowledged that the front door to lot 64 is common property and is related to fire safety. However the damage to the fire door was caused by contact with a skirting board installed by the owners of lot 64 which is not part of the common property.

54 It is not clear from the application or the applicants' submissions whether the applicants seek orders in relation to the alleged defects in the drainage system identified in the report of Mr McGill.

55 Mr McGill did not identify in his evidence any water ingress as a result of defects in the drainage system.

56 It was the respondent's submission that the Tribunal ought to make orders for specific remedial works in relation to those items conceded by the respondent and any additional items for which the Tribunal finds the respondent liable.

57 As to the issue of the true meaning and effect of s 106(5) and its application to the applicants' claim for consequential damages the respondents submission, shortly stated, was that

(1) The introduction of the new s 106(5) did no more than reverse the decision of the Court in Thoo,

(2) The subsection has no impact on the Tribunal's jurisdiction,

(3) None of the provisions to which the applicants have referred confer jurisdiction on the Tribunal to determine claims under s 106(5),

(4) The historical context of the new s 106(5) and its relationship to determinations by adjudicators under the previous s 138 is relevant

58 The respondent further submitted that as the alleged breach of statutory duty and the applicants' knowledge of all defects was extant prior to the commencement of the *Strata Schemes Management Act 2015* it is "inappropriate" pursuant to the transitional provisions of that Act Schedule 3, Part 2 clause 3(2)(b) to apply the damages provisions in this case.

59 It was not disputed by the respondent that the Tribunal has the power pursuant to s 229(a) to make an order for compensation for consequential losses upon breach of s 106(1).

**FACTS**

60 Some important historical facts relevant to the determination of liability for particular sources of water ingress were established by the evidence of Mr Cavenagh. The applicant of course was not in a position to contest the majority of that evidence.

61 It is noted from the Strata Plan 20211 attached to Mr Cavenagh's statement (p 155) that the strata scheme was first registered on 12 May 1983.

62 Alterations to lot 64 were made between 1983 and 1990 without the benefit of an appropriate by-law. On Mr Cavenagh's evidence those alterations included

- Enclosure of the pergola on level 20 and conversion of it to a bedroom, which work included demolition of common walls, bricking in areas of the pergola and installation of windows and sliding doors,
- Conversion of the bar and toilet on level 20 to an en-suite spa and toilet,
- Extension and enclosure of a fountain on level 20 to convert into a studio which work included building new walls and roof,

- Erection of a wooden deck on the south-east side of level 20,
- Extension of the bedroom on the south side of level 19 which included demolition of a common wall and construction of another wall, windows and a raised wooden floor.

63 Whilst it is accepted, based on the evidence of Mr Cavenagh that the work was carried out at that time there is no detail of the construction methods, materials used or plans provided.

64 Mr Cavenagh also gave evidence that further works, unapproved by any application to the Owners Corporation, were conducted by the then owners of lot 64 between 1990 and 1997. That work included,

- Installation of the skirting boards at the entrance to lot 64,
- Installation of brass bolts on the entry door,
- Installation of air conditioning equipment on the roof of the level 20 bedroom and on level 20 common property,

65 Again, there is no detail of the plans available.

66 Mr Cavenagh agreed under cross-examination that although it is known that previous owners of lot 64 had carried out unauthorised alterations to the lot the extent of the alterations and when they were done remains unclear.

67 In 2000 special by-law 6 was created to deal with further alterations to lot 64. The respondent's submissions acknowledged that it was very difficult to understand the meaning of the "building works" to which that by-law refers due to the very small scale of the attached plan.

68 I have taken the opportunity to examine the plans provided with special by-law 6 with a magnifying glass. Although the by-law, under "*C. Conditions"*, purports to place on the owners from time to time of lot 64 the obligation to repair and maintain the building works I am unable to determine the precise scope of the works contemplated by the by-law. The difficulty in interpretation of the by-law is exacerbated by the previous alterations mentioned above and the consequent lack of a finite delineation of the extent of lot property and common property from which some understanding of the changes proposed by by-law 6 could be extrapolated.

69 I am unassisted by the submissions of the parties' representatives in that regard who were under the same difficulty. Their opinions on the scope of the building works covered by by-law 6 other than in the broadest of terms could be no more than speculation.

70 Special by-law 23 suffers from the same difficulty. It was said to involve the relocation of the pergola from one location to another and to deal with fixing of it in place. The plan provided with the by-law is again of unfortunately small scale. It has some hand written notations and arrows on it. Without some explanation from the person who made those notations and without a larger scale version of the plan I find it impossible to determine with any confidence the scope of the work contemplated by the by-law and consequently am unable to determine the scope or extent of the obligation imposed by Conditions (a) and (b) of the by-law.

71 It was submitted for the respondent that the by-law includes the requirement that the fixing of it to the slab is to be waterproofed. The by-law, insofar as it refers to fixing, makes reference to "*Detail A"* which is the small scale plan already referred to. I am unable to determine by magnified examination of the "*Detail A"* that it does require any waterproofing of the fixing points.

**THE EXPERT EVIDENCE**

72 The Tribunal was assisted by the evidence of all of the expert witnesses. The experts were well qualified to give their opinions and appropriately acknowledged the Tribunal's Code of Conduct for expert witnesses and their obligation to the Tribunal.

73 It has not been necessary to generally choose the evidence of one expert over that of another. However, it should be noted that the experts, who may have been more accustomed to giving evidence in cases involving allegations of building defects made in the context of a building dispute have exceeded the bounds of relevant evidence by dealing with the costing of the work allegedly required to be done by the respondent.

74 This case is all about a duty of the respondent to repair and maintain the common property. It involves questions of what is the common property and whether the respondent is able to rely on any exculpatory by-laws. There was

never an application for orders that the respondent pay the applicants a sum to carry out the work.

**THE DUTY IMPOSED BY s 106 AND THE BURDEN OF PROOF**

75 The statutory duty to repair and maintain the common property is imposed on the respondent by the Act s 106, which provides

> **106 Duty of owners corporation to maintain and repair property**
>
> (1) An owners corporation for a strata scheme 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) (3) This section 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.
>
> (4) If an owners corporation has taken action against an owner or other person in respect of damage to the common property, it may defer compliance with subsection (1) or (2) in relation to the damage to the property until the completion of the action if the failure to comply will not affect the safety of any building, structure or common property in the strata scheme.
>
> (5) An owner of a lot in a strata scheme may recover from the owners corporation, as damages for breach of statutory duty, any reasonably foreseeable loss suffered by the owner as a result of a contravention of this section by the owners corporation.
>
> (6) An owner may not bring an action under this section for breach of a statutory duty more than 2 years after the owner first becomes aware of the loss.
>
> (7) This section is subject to the provisions of any common property memorandum adopted by the by-laws for the strata scheme under this Division, any common property rights by-law or any by-law made under section 108.
>
> (8) This section is subject to any common property memorandum adopted by the by-laws for the strata scheme under this Division, any common property rights by-law or any by-law made under section 108,

(9) This section does not affect any duty or right of the owners corporation under any other law.

76 The “common property” is defined by the *Strata Schemes Development Act 2015* as

> **"common property"**, in relation to a strata scheme or a proposed strata scheme, means any part of a parcel that is not comprised in a lot (including any common infrastructure that is not part of a lot).**"**

77 The decision of the Supreme Court in *Seiwa Australia Pty Ltd v Owners Strata Plan 35042* [2006] NSWSC 1157 to which I was referred is helpful in understanding how the duty should be applied.

78 In that case Brereton J was considering the duty imposed on an Owners Corporation pursuant to the provisions of the SSMA 1996 s 62 which was in the following terms and which is almost identical in wording (in regard to the duty imposed by the section) to the current Act,

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

(b) (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.

79 His Honour explained the duty in the following terms

> 3 There is no suggestion in this case that subsection (3) is applicable. It is subsection (1) that is relevant. Section 62(1) imposes on an owners corporation a duty to maintain, and keep in a state of good and serviceable repair, the common property. That duty is not one to use reasonable care to

maintain and keep in good repair the common property, nor one to use best endeavours to do so, nor one to take reasonable steps to do so, but a strict duty to maintain and keep in repair.

4 The duty to maintain involves an obligation to keep the thing in proper order by acts of maintenance before it falls out of condition, in a state which enables it to serve the purpose for which it exists [Hamilton v National Coal Board [1960] AC 633, 647 (Lord Keith of Avonholm); Haydon v Kent County Council [1978] QB 433, 464 (Shaw LJ); Ridis v Strata Plan 10308 [2005] NSWCA 246, [161]]. Thus the body corporate is obliged not only to attend to cases where there is a malfunction, but also to take preventative measures to ensure that there not be a malfunction [Greetings Oxford Koala Hotel Pty Ltd v Oxford Square Investments Pty Limited (1989) 18 NSWLR 33 (Young J); Ridis, [162]-[163]]. The duty extends to require remediation of defects in the original construction of the common property [Proprietors Strata Plan No. 6522 v Furney [1976] 1 NSWLR 412, 416 (Needham J); Ridis [164]-[165]]. And it extends to oblige the owners corporation to do things which could not be for the benefit of the proprietors as a whole or even a majority of them [Proprietors Strata Plan 159 v Blake (1986) CCH Strata Titles Cases ¶30-068 (Yeldham J); Ridis, [166]].

5 It follows that as soon as something in the common property is no longer operating effectively or at all, or has fallen into disrepair, there has been a breach of the s 62 duty [cf Ridis [177]]. Insofar as Ridis held that s 62 did not oblige an owners corporation to conduct or procure the conduct of an expert assessment of every possible source of danger in the common property, personal property vested in it, and fixtures and fittings comprised in the common property, that was in the context of a submission that by imposing the statutory duty to maintain and repair, s 62 had the ancillary effect of extending the common law duty of care of an owners corporation as an occupier of the common property to include rigorous duties of inspection. The Court of Appeal rejected the submission that s 62 expressly or implicitly resulted in the imposition of such a common law duty. But that is beside the point; in this case, unlike in Ridis, the plaintiff relies on a statutory cause of action said to arise on s 62, rather than a duty of care said to arise consequentially from s 62 [cf Ridis, [87]-[88]].

6 The duty of an owners corporation under s 62 is owed to each lot owner, and its breach gives rise to a private cause of action under which damages may be awarded to a lot owner for breach of statutory duty. This conclusion was reached by Young J, as his Honour the Chief Judge then was, in respect of the predecessor of s 62, namely Strata Titles Act 1973, s 68, in Lubrano v Proprietors Strata Plan No 4038 (1993) 6 BPR 97,457, at 13,310-13,311, upon a thorough consideration of earlier authorities to like effect [Jaklyn v Proprietors Strata Plan No 2795 [1975] 1 NSWLR 15, 24 (Holland J); Proprietors Strata 464 v Oborn (1975) 1 BPR 9623, 9624 (Holland J); Proprietors Strata Plan 159 v Blake, 50,654 (Yeldham J); Proprietors Strata Plan 30234 v Margiz Pty Ltd (NSWSC, Brownie J, 30 June 1993). Gzell J has since followed it in the context of the 1996 Act [Lyn v Owners Strata Plan No 50276 [2004] NSWSC 88, [90]].

80 Brereton J in *Seiwa* considered the argument in *Ridis v Strata Plan* 10308 [2005] NSWCA 246 that the duty imposed by the Act does not oblige an Owners Corporation to conduct an expert assessment of every possible source

of danger in the common property and pointed out that the argument was in the context of a submission that the section extended the common law duty of care and that the argument was rejected by the Court of Appeal.

81 That is, the duty imposed by the Act, as explained by *Seiwa* extends to the obligation on an Owners Corporation where it is necessary in order to comply with the duty, to engage expert assessment of the common property.

82 Lot property within a strata scheme is necessarily surrounded by common property. It would be rare indeed for lot property not to be separated from another lot by some form of common property. I am unable to contemplate any theoretical situation in which that may occur.

83 The very fact of water ingress from outside the lot property into lot property in normal circumstances would therefore indicate that the water is coming from common property. *Prima facie* that conclusion would be indicative of some failure of the common property that has resulted in the water escaping into the lot property and from that point on would place the obligation squarely on the Owners Corporation to investigate with whatever expert assistance is necessary the cause of the water ingress and to correct it.

84 The fact that the statutory duty imposed by s 106(1) is a strict one and that it requires the Owners Corporation to take preventative measures before a thing falls into a state of disrepair, I am satisfied, places the burden squarely on the Owners corporation, in the face of an apparent breach of that duty, to establish that it is excused in the particular circumstances of the case from its clear and strict obligation.

85 That is, if the Owners Corporation seeks to escape the strict duty imposed by s 106(1) by establishing that a lot owner has the duty to repair and maintain the common property from which the water ingress originates pursuant to a by-law in that regard, the burden is upon the Owners Corporation to establish the veracity of that claim.

**WHAT CONSTITUTES COMMON PROPERTY FOR THE PURPOSE OF s106(1)?**

86 From the discussion of the factual situation set out above I am able to draw the following conclusions.

87 The alterations carried out by previous owners of lot 64 between 1983 and 1997 were not done for the purpose of improving or enhancing the common property in accordance with a special resolution under s 65A of the 1996 Act (or its predecessor) and they were not done pursuant to s52 of the 1996 Act by making a special by-law conferring certain rights or privileges on the lot owner. Hence, the work done during that period became unauthorised additions of or alterations to the common property.

88 The alterations and additions carried out pursuant to special by-laws 6 and 23 purport to place on the owner of lot 64 from time to time the obligation for repair and maintenance that would otherwise be the responsibility of the Owners Corporation. However, as mentioned above, it is not possible from examination of the by-laws and the plans forming part of the by-laws to determine just what building work was intended to be covered by the by-laws.

89 Hence, the terms of the respective by-laws purporting to place an obligation for repair and maintenance on the lot owner are not capable of having any meaningful application.

90 I am satisfied, and indeed it is not disputed, that the applicants have demonstrated water ingress to lot 64 in the several locations referred to in their amended Points of Claim and in the report of Mr Drakakis.

91 I am satisfied for the above reasons that the water ingress in each case emanates from the common property.

92 The respondent has been unable to refer to any special privilege or exclusive use by-law that excuses it from its s 106(1) obligations.

93 It follows therefore that the respondent has a statutory duty pursuant to s 106(1) to carry out all necessary repairs and maintenance of the common property to prevent all identified water ingress to the lot.

**DAMAGES CLAIM – JURISDICTION OF TRIBUNAL**

94 The introduction of s 106(5), it was submitted for the respondent, did no more than reverse the effect of the decision of the Court of Appeal in *Thoo*. That decision was authority for the proposition that a breach of the duty imposed by

s 62 of the *Strata Schemes Management Act 1996* did not create a private cause of action for damages arising from a breach of that duty.

95 Whilst that submission is generally correct it is important to note that the breach of the duty imposed by s 62 under the 1996 Act (the equivalent to the duty imposed by s 106(1) of the current Act) *never* gave rise to a cause of action before an adjudicator under the 1996 Act. Section 138(3)(d) specifically excluded an adjudicator from making an order "*that includes the payment by a person to another person of damages*".

96 That is, there was never a right of action before an adjudicator (or in the Tribunal) under the 1996 Act for damages for breach of statutory duty. The decision of the Court of Appeal in *Thoo* simply ensured that there was no such cause of action in any other Court.

97 Section 106(5) does reverse that decision and now provides for a right of action for damages arising from the breach of the statutory duty imposed by s 106(1). Section 106 is silent on the issue of whether the owner of a lot may commence proceedings for recovery of those damages in the Tribunal.

98 The respondent's submission was that if it was intended that the Tribunal was to have jurisdiction to determine a claim for an award of damages for breach of statutory duty the legislature would have made it clear. In the absence of clear intention to the contrary the Tribunal should assume that it was not intended that it have jurisdiction.

99 I do not accept that argument.

100 Contrary to the respondent's submission, I am satisfied that had the legislature intended that the jurisdiction to make orders pursuant to s 106(5) was to be exercised in some place other than the Tribunal it would have done so in clear terms. That analysis is consistent with the 1996 Act s 138(3)(d) which specifically excluded the making of an order which would otherwise (prior to the decision in *Thoo*) have been available.

101 The respondent relied on Schedule 3, Part 2 clause 3 of the transitional provisions to the *Strata Schemes Management Act 2015* to argue that it would be "*inappropriate*" for the Tribunal to impose an order under the new Act for a

breach that occurred under the old Act and of which the applicants were fully aware. The argument was that the effect of making an order now under s 106(5) would be *inappropriate* because of the retrospectivity of such an order.

102 Clause 3 provides,

> **3 General savings**
>
> (1) Any act, matter or thing done or omitted to be done under a provision of the former Act and having any force or effect immediately before the commencement of a provision of this Act that replaces that provision is, on that commencement, taken to have been done or omitted to be done under the provision of this Act.
>
> (2) This clause does not apply:
>
> (a) to the extent that its application is inconsistent with any other provision of this Schedule or a provision of a regulation made under this Schedule, or
>
> (b) to the extent that its application would be inappropriate in a particular case.

103 I reject the respondent's argument on this point. The use of the word *"inappropriate*" in clause 3(2)(b) indicates that the Tribunal is to determine, by the judicial exercise of its discretion, whether or not to apply clause 3(1), which is designed to provide continuity and certainty in transition from the old Act to the new one.

104 The clause, simply put and in the context of this dispute, means that to the extent of any breach of duty under s 62 of the old legislation it is to be treated as a breach of duty under s 106 of the new legislation. It is noted that the legislature considered the effect of earlier actions and how they are to be dealt with under the new Act by inclusion at s 106(6) of a limitation period of two years from the lot owner becoming aware of the breach to bringing an action under the section.

105 I am satisfied that the legislature, if it considered that s 106(5) should not apply to those breaches of s 106(1) (or of s 62 under the 1996 Act) that had occurred in the two year period prior to the filing of the application it would have said so in clear terms. I am satisfied therefore that it is not "inappropriate" that s 106(5)

should apply to a breach of the duty to repair and maintain the common property in circumstances where the breach commenced as a breach of the 1996 Act s 62 and, pursuant to clause 3, became a breach under the 2015 Act and continued after the passage of the 2015 Act as a breach under the 2015 Act.

106 The respondent's further submission was that none of the provisions relied on by the applicants as a source of jurisdiction for the Tribunal (sections 229, 232 or 240) actually grants the Tribunal jurisdiction to determine claims made under s 106(5).

107 Section 229 refers to the "general order making power of the Tribunal" and specifically provides that the Tribunal may make an order to deal with any ancillary or consequential matters and to make an interlocutory decision.

108 Section 232 is headed "orders to settle disputes or rectify complaints" and grants the power to make an order to settle a complaint or dispute about a number of matters including (a) and (e) below

**232 Orders to settle disputes or rectify complaints**

(1) Orders relating to complaints and disputes The Tribunal may, on application by an interested person, original owner or building manager, make an order to settle a complaint or dispute about any of the following:

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

(b) an agreement authorised or required to be entered into under this Act,

(c) an agreement appointing a strata managing agent or a building manager,

(d) an agreement between the owners corporation and an owner, mortgagee or covenant chargee of a lot in a strata scheme that relates to the scheme or a matter arising under the scheme,

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

(f) an exercise of, or failure to exercise, a function conferred or imposed on an owners corporation under any other Act.

(2) Failure to exercise a function For the purposes of this section, an owners corporation, strata committee or building management committee is taken not to have exercised 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) Other proceedings and remedies A person is not entitled:

(a) to commence other proceedings in connection with the settlement of a dispute or complaint the subject of a current application by the person for an order under this section, or

(b) to make an application for an order under this section if the person has commenced, and not discontinued, proceedings in connection with the settlement of a dispute or complaint the subject of the application.

109 Section 240 provides for the Tribunal to make orders under a provision of the Act that may be different to the provision specified in the application.

110 Sections 229 and 240 have no application in this case. However, this application is all about the alleged mismanagement of the strata scheme by the Owners Corporation and its alleged failure to exercise the functions imposed on it by s 106(1) of the Act.

111 The Tribunal is empowered by section *232* to make an order to settle a complaint or dispute about the failure of the Owners Corporation to meet the obligations imposed on it by the Act (ss1(e)). In order to settle this dispute it is therefore necessary for the Tribunal to make orders pursuant to s 232 in relation to the alleged failure of the respondent to fulfil the obligations imposed by s 106(1) of the Act.

112 The dispute also raises the issue of whether or not the applicants are entitled to be compensated in damages arising from the alleged breach of the statutory duty.

113 That is, *if* the Act places a duty on the Owners Corporation to carry out certain repairs (which s 106(1) clearly does) the Tribunal is empowered by s 232 to make an order to settle a dispute in regard to the carrying out of those repairs. Similarly, to the extent that the dispute involves a claim for recovery of damages for alleged breach of the statutory duty (which is provided for under s 106(5) of the Act), clearly the Tribunal is empowered by s 232 to make an order in regard to that issue as well in order, to settle the dispute.

114 I am therefore satisfied that the Tribunal has the jurisdiction to make an order for payment of damages for breach by an Owners Corporation of the statutory duty imposed by s 106. It is noted in passing that there is no jurisdictional limit imposed on the order making power of the Tribunal under this section. Although other legislation does impose an upper limit on the Tribunal's order making powers in some matters dealt with by the Consumer and Commercial Division of the Tribunal (eg residential tenancy, home building) it is unlimited in others (eg retirement villages). The capacity of the Tribunal to make unlimited orders on application under s 106(5) is therefore entirely consistent with the Tribunal's wider powers.

**SCOPE OF THE REMEDIAL WORK TO BE DONE BY RESPONDENT**

115 The applicants' amended Points of Claim set out in general terms the orders that were sought [16]. Those orders were

(i) to remedy the rooftop waterproof membrane so as to prevent water entry,

(ii) to remedy all water leaks to the applicants' lot, and

(iii) to replace the front door

116 The amended Points of Claim gave further particulars of the water ingress issues at [5] through [9] which were contemplated by the orders sought. The written submission, to the extent that it identified with accuracy the orders sought, requested an order that the respondent carry out the works described at Appendix B (*sic* E1) of Mr Drakakis' report.

117 The respondent's submission was that in order to determine whether the respondent is in breach of the obligation imposed by s 106(1) it is necessary for the Tribunal to determine the nature, cause and effect of each of the alleged

defects and consequently whether each of the alleged sources of water ingress arises from disrepair of the common property which is not the subject of an exclusive use or special privilege by-law.

118 For the above reasons it is not necessary to examine the nature, cause and effect of each of the alleged defects in order to determine liability for remediation. In each case it is demonstrated that the water ingress originates on the common property and the respondent has been unable to refer to any by-law that transfers the respondent's duty to the lot owner. The identified water ingress issues must therefore be rectified by the respondent. However there is considerable disagreement between the experts in regard to the scope of work to be done in order to correct the water ingress.

119 In order to determine the scope of the necessary remedial work to the extent that I am able to do so, I will consider each of the items of alleged defect in turn. I have adopted the descriptive terms for each item from the respondent's list at [7(a)] of the respondent's submissions and have dealt first with the issue of whether the respondent is under a duty to replace the whole of the waterproof membrane on level 20.

**Waterproof membrane on level 20**

120 Mr Drakakis' report refers to four different areas of waterproof membrane on level 20. In each case his opinion was that the membrane has either failed already with resultant water ingress to lot 64 or has reached the end of its service life and should be replaced.

121 Giving concurrent evidence under cross-examination Mr Drakakis confirmed that the life cycle of the bituminous roofing membrane is 20 years and that the building is already more than 30 years old and that the roof is directly exposed to the weather. Mr Martyn, in his written report was initially reluctant to agree that the membrane had reached the end of its service life but under cross-examination he also agreed that all roof membranes relevant to lot 64 have exceeded their useful life. Mr Martyn also agreed that replacement of the roof membrane would eliminate one potential source of water ingress to lot 64. However, Mr Martyn persisted with his opinion that replacement of a large

proportion of the roof membrane was the sensible approach however some areas could be further patched.

122 Mr Martyn expressed the opinion under cross-examination that just because the membrane has reached the end of its service life it does not mean that it needs to be replaced.

123 However, we have already seen from the words of Brereton J in *Seiwa* (above) that the Owners Corporation "*is obliged not only to attend to cases where there is a malfunction, but also to take preventative measures to ensure that there not be a malfunction*" and "*the duty to maintain involves an obligation to keep the thing in proper order by acts of maintenance before it falls out of condition.*.".

124 In a situation in which it has been demonstrated that the roof membrane is more than ten years older than its expected service life, is exposed to the weather, has been unsuccessfully patched and is likely to further deteriorate and that further repairs are unlikely to be warranted I am satisfied the respondent would be in breach of its duty if it did not now replace the entire roof membrane on level 20.

**The kitchen**

125 The experts were in agreement as to the source of water penetration to the kitchen and the cause of the consequential damage. However, again Mr Martyn expressed the view that a repair by patching could achieve a satisfactory outcome whilst Mr Drakakis view was that there were multiple potential sources of water ingress and the bituminous waterproofing had reached the end of its service life.

126 It is noted that the area in question has been repaired twice before without success.

127 I am satisfied that replacement of the bituminous waterproof membrane over the kitchen area by the respondent is necessary in order that the respondent meet its obligations under s 106(1).

128 It appears that this work is already covered by my determination above that the whole of the waterproof membrane on level 20 is to be replaced.

**The main bedroom**

129 Mr Drakakis' report refers to weep holes not being properly formed and water by-passing the flashing allowing water to penetrate from the exterior to the interior of the wall. Mr Martyn opines that the water ingress relates to changes to the original slab level without evidence of waterproofing and a downpipe located inside a column to the south end of the main bedroom.

130 The respondent's submission was that the defect is in the bedroom wall which has been moved from its original position and that the respondent is therefore not responsible.

131 For reasons already given the Owners Corporation is responsible for necessary repairs and maintenance even if related only to moving the wall from its original position.

132 The Drakakis report (irrelevantly) referred to the cement render of the wall and the fact that it was not compliant with clause 9.02 of the Defects Guide but did not otherwise address the appropriate method of rectification of water ingress other than replacement of the waterproof membrane to the common property terrace balcony above.

133 I am satisfied that the respondent, in order to meet its obligations under s 106(1) in regard to water ingress to the main bedroom must replace the waterproof membrane on the common property balcony above the main bedroom, clear the weep holes to the external wall, correct as necessary the flashing in the brick cavity wall and investigate and correct as necessary a downpipe within the column to the south end of the main bedroom.

134 It would appear that my determination that the respondent is to replace the waterproof membrane to the whole of the level 20 will also cover the issue regarding the common property balcony above the main bedroom. The respondent must, in addition, clear the weep holes, correct the flashing as necessary and attend to the downpipe identified by Mr Martyn.

**The second bedroom and study**

135 It was not disputed that the respondent was liable for water ingress to the second bedroom and study.

136 There was some agreement by the experts as to the likely cause of the water ingress. It is appropriate therefore that the respondent is ordered to carry out that work for which there is no disagreement with the requirement that the respondent take any additional steps found necessary to correct that water ingress to the second bedroom and study should the measures taken not resolve the problem.

137 The experts were variously of the opinion that waterproofing of the window hob, installation or correction of flashing and weep holes to the wall between the second bedroom and the study were likely to resolve the issue.

**The bedroom on level 20.**

138 Again the experts are of opinion that there are multiple defects all of which are responsible to some degree for the water ingress to the bedroom on level 20.

139 Without being specific it is the respondent's obligation to take all necessary steps to resolve the water ingress to the level 20 bedroom. The experts are of the opinion that the absence of the water-stop to the top of the hob, lack of sufficiently upturned flashing to the east of the window suite, failure of end-stops at the end of the sub-sills and failure of mitre joints all contribute to the problem.

**Front door to lot 64**

140 It is not disputed that the front fire rated door has been damaged and is no longer compliant and needs replacement. Mr Cavenagh's evidence was that a previous owner installed skirting without the consent of the owners Corporation between 1990 and 1997. It is not disputed that the damage to the door was caused by contact with skirting. It is not disputed that the fire rated door forms part of the common property.

141 The Owners Corporation's duty to repair and maintain the common property is, as has already been pointed out, a strict one. That is, the Owners Corporation is bound to repair and maintain the common property irrespective of how the damage occurred.

142 However, the Owners Corporation may be able to recover the cost of carrying out that repair if it can establish who it was that caused the damage.

143 That is, the applicants are entitled to an order that the respondent fulfil its duty under s 106(1) in regard to the fire door by replacing it. The issue of whether the Owners Corporation is entitled to recover the cost of doing so and if so, from whom, is not a matter for the Tribunal on this application.

**The hydraulic drainage system**

144 The report of Mr McGill relied on by the applicants established that the rooftop drainage system is no longer compliant and lacks capacity to adequately drain the roof in a 1:20 or 1:100 year average rainfall.

145 It appears that the reason for the current non-compliance is related to unapproved alterations to the rooftop area and creation of altered catchment areas.

146 However, no orders are sought in regard to this issue either in the applicants' amended Points of Claim or in their final submissions.

147 In any event, whilst it is clear that the roof top drainage needs remediation it is not clear how the respondent should address the issue. Suffice to say that it is an urgent issue and that the respondent would be liable for consequential damage flowing from a breach of that statutory duty.

148 I am satisfied that it is sufficient to draw to the respondent's attention that it is, to the extent of any failure of the rooftop drainage system to comply with current building standards obliged under s 106(1) to investigate and rectify the issue. It is recommended that the respondent take action in regard to the issue however no orders are made in that regard.

**DAMAGES**

149 The applicants sought orders for payment of damages in the sum of $8,793.49 based on the evidence of Mr Drakakis on the cost of rectification of the damage consequential to the breach by the respondent of its duty under s 106(1).

150 Whilst the respondent challenged the jurisdiction of the Tribunal to make the order there was no serious contest in regard to the quantum. In fact, the evidence of Mr Martyn was that the consequential damage amounted to $9,478.83.

151 As I have determined that the Tribunal may order damages for the reasons already stated I am satisfied that an order should be made in favour of the applicants in the sum claimed, being $8,793.49

**COSTS**

152 As the applicants have been entirely successful in this application and it is an application to which Rule 38 of the *Civil and Administrative Tribunal Rules 2014* apply, it would appear that the applicants are entitled to their costs.

153 However, if the parties are unable to reach agreement on the issue or there are circumstances of which I am unaware I have made directions to deal with that issue.

**J Smith**

**Senior Member**

**Civil and Administrative Tribunal of NSW**

**29 August 2017**

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