



Civil and Administrative Tribunal
New South Wales

Case Name: Huang & Giang The Owners Strata Plan No.65865

Medium Neutral Citation: [2021] NSWCATCD 15

Hearing Date(s): 2 March 2021

Date of Orders: 31 May 2021

Decision Date: 31 May 2021

Jurisdiction: Consumer and Commercial Division

Before: J A Ringrose, General Member

Decision: 1. The respondent is to pay the applicant the sum of \$7,730.00 being compensation for loss of rent found to be due to failures to repair the common property.

Catchwords: LAND LAW - strata title – award of damages under s.106(5) of the Strata Schemes Management Act 2015 – foreseeable loss of rent through failure to repair

Legislation Cited: Civil and Administrative Tribunal Act 2013 (NSW)
Strata Schemes Management Act 2015 (NSW)

Cases Cited: Andrew Fletcher and Song Fletcher v Luke Burbury [2015] NSWCATCD 60
Carli v The Owners Strata Plan No.56120 [2018] NSWCATCD 55
Dupont v Lawrence RTT 97/022753
Felcher v The Owners Strata Plan No.2738 [2017] NSWCATAP 219
Greetings Oxford Koala Hotel Pty Ltd v Oxford Square Investments Pty Ltd (1989) 18 NSWLR 33
Hamilton v National Coal Board [1960] AC633
Koufos v C Czarnikow Limited (The Heron (ii) (1969) 1 AC 350
Overseas Tankership UK Ltd v Mort's Dock and Engineering Co Limited (the Wagon Mound (No.1))

1961 AC 388
Proprietors Strata Plan No. 6522 v Furney [1976] 1
NSWLR 412
Ranlan (Culworth) Pty Ltd v The Owners Corporation
SP 83405 [2017] NSWCATAP 223
Ridis v Strata Plan 10308 [2005] NSWCA 246
Rosenthal v The Owners SP20211[2017] NSWCATCD
80
Seiwa Australia Pty Ltd v the Owners Strata Plan 35042
[2006] NSWSC 1157
Shum v The Owners Corporation Strata Plan 30621
[2017] NSWCATCD 68
Wyong Shire Council v Shirt [1980] HCA 12

Category: Principal judgment

Parties: Jane Huang (First Applicant)
Andy Giang (Second Applicant)
The Owners- Strata Plan No. 65865 (Respondent)

Representation: Thomas Martin Lawyers (Respondent)

File Number(s): SC 20/21053

REASONS FOR DECISION

Application

- 1 By an application filed on 12 May 2020 the applicants as the owners of Lot 15 in Strata Plan 65865 sought orders for repairs to be undertaken to the common property along with claims for loss of rent as a result of water leaks into their unit which was tenanted.
- 2 The application was listed for directions on 30 June 2020 and directions were made requiring the applicants to file documents by 14 July 2020.
- 3 The matter was listed for directions before Senior Member Charles on 11 October 2020 and at that time the respondent requested to be legally represented. Directions were made for the respondent to file expert reports by 22 September 2020 and it was noted that the parties should be ready to take a hearing date thereafter.
- 4 On 6 October 2020 after an extension of time had been sought by the respondent and refused, orders were made requiring The Owners Corporation

to explain the delay in the preparation and filing of an expert report at the hearing for directions. The matter was stood over for further directions before Senior Member Thode on 8 December 2020. On that occasion both parties were granted leave to be legally represented. The applicant was required to provide documents by 15 December 2020 with the respondent to provide documents by 15 January 2021. A further direction was made noting that a failure to provide documents in accordance with the directions could result in documents not being admitted unless leave was granted by the Tribunal.

- 5 On 12 January 2021 the respondent filed a Notice of Change of Solicitor although it was noted that Mr Hindii continued to appear through a different firm.
- 6 On 13 January 2021 Mr Hindii on behalf of the respondent sought an extension of time to file evidence due to difficulty in finalising evidence over the Christmas period. That application was opposed but the time for filing documents was extended until 22 January 2021.
- 7 It is noted that no documents were filed within the extended period of time and on the date of hearing (2 March 2021) the solicitor for the respondent sought leave to rely upon documents which were filed in the Tribunal early in the afternoon of that date with the matter being listed for hearing at 1:15pm.

Applicants' evidence and submissions

- 8 It is noted that the applicants' evidence was filed in hard copy and in a folder on 14 December 2020 in compliance with the Tribunal's directions. That evidence was accordingly received in full for the purposes of the hearing.
- 9 The applicants are the owners of Unit 15 in Strata Plan 65865 situated at Homebush West. They requested the Owners Corporation to repair the common property due to water leaking from the top balcony into the kitchen and dining area of their property.
- 10 The issue was first reported in March 2018 and at that time the Owners Corporation sent a plumber (Connelly Plumbing Services) to carry out what the applicants described as "band aid work" undertaken on the balcony walls and along the sliding door frame.

- 11 The issue was reported to the Owners Corporation again in April 2019 and the same plumber came out again but was unable to locate and repair the source of the leaking which by that stage was coming through the ceilings of the property.
- 12 The applicants claim that the plumber was aware that there was damage to the waterproof linings under the balcony and it was noted that independent experts had commented that there was a previous failed attempt to seal the leak within the internal roof cavity of the balcony. The applicants claimed that evidence suggested that the leaking had been occurring earlier than the report in 2018 and with each incident of rain mould began to build up on the kitchen and dining room ceilings and paint began peeling off the kitchen ceiling.
- 13 The applicants observed that water was dripping down from the ceiling and the sliding door, especially during heavier rainfall. Photographic evidence of the ceiling and the mould taken in April of 2020 was attached to the applicants' evidence.
- 14 In late April 2019 the agents responsible for managing the letting of the applicants' property wrote to the Strata Manager pointing out that during the course of a routine inspection water was leaking from the kitchen ceiling which had damaged the paint causing it to deteriorate. Water was also leaking from the sliding door frame of the downstairs balcony and that there was a cracked tile in the upstairs bathroom.
- 15 Reports continued relating to leaking water and on 6 September 2019 a quotation was obtained for a sum of \$4,970.00 to undertake waterproofing works.
- 16 As a result of constant follow ups with the Strata Manager over a period of 6 months the Owners Corporation obtained a quotation from Direct Building Services date 25 September 2019 to undertake waterproofing works which included the connection of a new overflow drain and waterproofing procedures on the balcony. The quote was submitted in a sum of \$19,415.00. A further quote was submitted by Direct Building Services in relation to roof repairs followed by parapet wall repairs and ceiling repairs in Unit 15 at a total cost of \$7,697.80.

- 17 On 14 January 2020 a further quote was obtained from All Hands On to address the balcony slab and, following investigation, to undertake necessary works to waterproof the balcony area including tile rectification storm water rectification and internal ceiling repairs. The total of that quote was \$20,130.00.
- 18 The applicants claimed that they had requested the Strata Manager to call an EGM for the purposes of addressing the works or for the project needs to be taken to the next AGM which was usually held in August or September of each year. Up to the date of the applicants' submissions in December no AGM or EGM had been held and there was no response or reply from the Owners Corporation as to when an AGM would be held.
- 19 It is noted that in an email sent on 5 November 2020 Mr Malcom Hindii, then of Belgrave Lawyers, pointed out to the applicants that on 22 October 2020 The Shower Repair Centre conducted an investigation in relation to the balcony noting that there were no leaks and that all seals and grout on the balcony were intact. The new tenants had informed the technician that they had seen no signs of leaking. He pointed out that the Owners Corporation had fulfilled its obligations under s.106 of the Strata Schemes Management Act and that he would advise the Owners Corporation of their obligations in relation to damage caused by the leaks, including the mould in the ceiling, should other defects become apparent at a later stage. At that point in time Mr Hindii invited the applicants to withdraw their claim as the matter had been resolved. He threatened that if the matter proceeded to a directions hearing he would seek to have the matter dismissed and rely on his email to seek costs. It is appropriate to note that at that stage the respondent had been required to provide expert reports by 22 September 2020 and on 6 October 2020 Senior Member Sarginson refused a further extension of time and directed that the Owners Corporation would be required to explain delay in obtaining an expert report.
- 20 On 6 October 2020 the matter was adjourned by Senior Member Blake for further directions and on 8 December 2020 when Senior Member Thode conducted the directions hearing Mr Hindii did not answer a telephone. Further directions were given requiring both parties to file documents. It is noted at that

stage no documents had been filed by the Owners Corporation and the only documents which were ever attempted to be filed and relied upon were filed on the afternoon when the hearing commenced.

- 21 On 4 December 2020 The Shower Repair Centre reported that their technician did a flood test of the balcony at the premises and there was no leak from the balcony that had been sealed. He reported that the balcony was filled with water and there was no leaking, however a roof maintenance person arrived and suggested it was probably the flashing or the roof tiles. The technician from The Shower Repair Centre concluded that the leak must be coming from another source. The Shower Repair Centre indicated that they were not licenced plumbers and could not undertake any plumbing works as part of their scope of works to repair leaks.
- 22 The applicants have provided a detailed chronology of events from 19 March 2018 through to 4 December 2020 when it was noted that the applicants had tried to call the Strata Manager for discussion but had not received any reply.
- 23 The applicants have tabulated a rental loss claim from 2 January 2020 in various increments through to 27 November 2020. They have attached the relevant Residential Tenancy Agreement which commenced on 25 March 2018 for a period of 12 months. The rent ledger makes it clear that the tenants have continued to occupy the property and the ledger shows the reductions in rent along with gradual increases again after some repairs were undertaken. The initial tenants vacated the property on 15 July 2020 after mould had started to form on the kitchen pillar, ceiling and dining areas and a crack like line appeared in the kitchen pillar. From late July through to September 2020 the property was vacant for about seven weeks whilst issues were addressed concerning attempted repairs to the leaks. The property was rented again on 5 September through to 27 November which was the last date of the ledger, but in that period it is noted that leaking was again reported in September and November of 2020.
- 24 The applicants point out that the Shower Repair Centre has apparently accepted that there is still a leak problem in the roof and have agreed that it is

not part of the scope of works to repair leaks of that nature as they are not licenced plumbers.

- 25 The applicants claim, on the evidence, is limited to 27 November 2020 and there is no material from the applicants or the respondent which addresses the question of a cause of the further leaking referred to in the emails of December 2020.

Respondents submissions

- 26 Mr Hindii sought to appear for the respondent in this matter and to rely on documents which were filed on the day of the hearing, notwithstanding directions which prescribed that the last day for the respondent's documents was 22 January 2021. He sought leave to rely on the material claiming that he was unable to produce it until the day of the hearing due to difficulties in finalising evidence over the Christmas period notwithstanding that he sought an extension of time to 22 January 2021 which was granted. For reasons which will be outlined in the decision the Tribunal refused leave to Mr Hindii to rely on the evidence he sought to file on 2 March 2021. He claimed in particular that he was seeking to rely on a Statutory Declaration sworn on 26 February 2021 and two further Statutory Declarations which were not sworn until 1 March 2021. Leave was refused for the respondent to rely on that evidence as it would have necessitated a further adjournment of the hearing which would no doubt have occasioned considerable disadvantage to the applicants in this matter.
- 27 Mr Hindii also provided what was described as a Respondent's Aide Memoire in which he submitted that the respondent denied that the common property continued to be in a state of disrepair and he criticised the building report provided by the applicants prepared by Australian Property and Building Inspections and dated 7 May 2020. He claimed that the author of the report had provided findings which were subjective and that different persons undertaking such a report may reach different conclusions. He observed that it was based upon a visual inspection of the premises only and no invasive testing had been carried out. These submissions suggest that Mr Hindii did not have a full understanding of the concept of an expert report which must

necessarily constitute a subjective opinion of that expert providing that the author of the report can qualify as an expert. It is noted that the respondent has never provided an expert report notwithstanding that it was a requirement of the Tribunal that such a report be provided initially by 22 September 2020 and finally by 15 January 2021. The respondent was further required to explain the delay in obtaining the relevant expert report at a hearing listed for 6 October 2020.

- 28 Mr Hindii submitted that the applicant did not have standing to claim a loss of rent as the claim was filed outside the prescribed statutory period within the meaning of s.106(6). He noted that the applicants were aware of water ingress since March of 2018 but that the application was filed out of time in May 2020. The is submission does not take into account the fact that the applicants do not claim to have suffered a loss until the rent was reduced as a result of water ingress in 2020.
- 29 Reference was made to the initial decision in *Shum v The Owners Corporation Strata Plan 30621* [2017] NSWCATCD 68 which does not appear to be relevant in the present situation. It refers to the obligation of the Tribunal to apply the rules of evidence in proceedings for the imposition of a civil penalty, in proceedings in exercise of its enforcement jurisdiction and in s.128 of the Evidence Act relating to self incrimination. It makes no reference to s.38(2) wherein the Tribunal is not bound by the Rules of Evidence and may enquire into and inform itself of any matter in such manner as it thinks fit, subject to the rules of natural justice.
- 30 Mr Hindii drew the Tribunal's attention to a decision in *Carli v The Owners Strata Plan No.56120* [2018] NSWCATCD 55 where the Tribunal found that a lot was uninhabitable on account of a complete collapse of the ceiling which caused by frequent and substantial water damage. He submitted it followed that a claim in relation to build up of mould, water excess and pooling would not satisfy a claim for damages as there was no genuine reason to vacate the property.
- 31 Reference was also made to a failure on the part of the applicants to mitigate their loss and it was submitted that attending to the loss of facilities in a lot,

including mould on the ceiling, with regular cleaning of the premises and offering consistent reduced rent would demonstrate the required attempts to mitigate the loss.

- 32 It should be noted that the submissions provided by Mr Hindii which could not be based upon any evidence filed on behalf of the respondent should be considered upon an assumption that the evidence and submissions made by the applicants have not been refuted by any evidence provided by the respondent notwithstanding the multiple opportunities which the Tribunal gave the respondent to provide the necessary evidence between 22 September 2020 and the date of the hearing almost six months later. It is noted further that the respondent has been represented by Mr Hindii since 11 August 2020.

Decision

- 33 On the day of the hearing Mr Hindii, solicitor on behalf of the respondent sought leave to rely on documents which had been filed a little earlier on that day. In determining whether leave should be granted, the Tribunal noted that the application was filed on 12 May 2020 and that initial directions required the applicants to file material by 14 July 2020. On 11 August 2020 the respondent sought and was granted leave to be represented by a solicitor. It was noted at that time that the respondent was directed to provide its expert report by 22 September 2020 and the parties were advised that they should be ready to take a hearing at the next listing.
- 34 On 6 October 2020 after the respondent had sought a further extension of time which was refused it was noted that the respondent Owners Corporation should explain the delay in providing an expert report at the next hearing date.
- 35 On 6 October 2020 the matter was adjourned to a further directions hearing as no evidence had been filed on behalf of the respondent. When the matter came before Senior Member Thode on 8 December 2020 it was noted that Mr Hindii who was acting for the respondent was not available to answer his phone. Both parties were then granted leave to be legally represented and further directions were made requiring the applicants to file all of their documents by 15 December 2020 with the respondent to file all of its documents by 15 January 2021. The directions cautioned parties that failure to provide documents in

accordance with the directions could result in a party not being able to rely on documents unless leave was granted.

- 36 On 12 January 2021 the solicitor for the applicants was changed to a different firm although it is noted that Mr Hindii continued to act on behalf of The Owners Corporation.
- 37 On 13 January 2021 Mr Hindii on behalf of the respondent requested a further extension of time to file evidence claiming that there were difficulties filing evidence over the Christmas period. An extension of time was granted to 22 January 2021 notwithstanding objections by the applicants.
- 38 On 2 March 2021 Mr Hindii on behalf of the respondent indicated that he sought to rely on three Statutory Declarations with one apparently prepared on 26 February 2021 along with a Statutory Declaration from Mr Studdart of The Shower Repair Centre dated 1 March 2021 and a Statutory Declaration of Mr Gorgis of Direct Building Services Pty Ltd also dated 1 March 2021. Mr Hindii was unable to provide any reasonable explanation for the failure to provide all this material by the final extended date for the respondent on 22 January 2021. It would appear that no independent expert report was included in that material.
- 39 It is appropriate for the Tribunal to have regard to the provisions of s.36(1) of the *Civil and Administrative Tribunal Act 2013* (NSW) which requires the Tribunal to facilitate just, quick and cheap resolution of the real issues in the proceedings.
- 40 Section 36(2) requires the Tribunal to give effect to the guiding principle when exercising any power given to it by the Act and procedural rules whilst s.36(3) provides that parties and their legal representatives are under a duty to cooperate with the Tribunal to give effect to the guiding principle “and for that purpose to participate in the processes of the Tribunal and to comply with the directions and orders of the Tribunal” .
- 41 It is noted that the respondent has had legal representation by Mr Hindii since 11 August 2020 yet the Owners Corporation did not comply with any of the directions or extensions of time in those directions in respect of an expert report or of other evidence relevant to the issues between the parties.

42 In *Ranlan (Culworth) Pty Ltd v The Owners Corporation SP 83405* [2017] NSWCATAP 223 the Appeal Panel considered a Tribunal member's refusal to admit a necessary expert report in the proceedings and observed

52. In our view the extreme unexplained lateness of an expert report which should have been obtained prior to and for the purposes of launching proceedings means that the report should not be permitted to be placed into evidence on the final hearing. The fact that there has been some delay by reason of the primary decision and this appeal does not change that situation. There has been no occasion during the process of resistance and challenge for the developer (other party) to be required to spend time effort and cost to meet a report.

43 For the purposes of considering a grant of leave it is appropriate to have regard to the provisions of Schedule 4 Clause 10 under the Act which provides:

10 Proceedings causing disadvantage

- (i) The Tribunal may exercise the powers conferred by this clause if the Tribunal is of the opinion that a party in any proceedings for the exercise of a division function is conducting the proceedings in such a way that unreasonably disadvantage another party in the proceedings by any conduct (including by failing to comply with an order or direction of the Tribunal);
 - (ii) The Tribunal may:
 - (a) If the party causing the disadvantages the applicant - order that proceedings (or part of the proceedings) be dismissed or struck out, or
 - (b) If the party causing the disadvantage is not the applicant
 - (i) determine the proceedings (or part of the proceedings) in favour of the applicant and make any appropriate orders or
 - (ii) order that the party causing disadvantage be struck out of the proceedings (or part of the proceedings)
- (3) before making any order under subclause(2) against a party the Tribunal is to have regard to the following:-
- (c) (a) The extent to which the party is familiar with the procedures of the Tribunal
 - (d) (b) the party's capacity to understand an act on a direction of the Tribunal
 - (e) (c) Whether the party suffers from a disability
 - (f) (d) Whether the party is acting deliberately in failing to comply with the Tribunal's order

(g) (4) The provisions of this clause are in addition to and do not limit the provision of s. 55.

44 In addressing the issues for consideration under subclause (3) it is to be noted that the respondent is represented by a solicitor who is expected to be familiar with the proceedings of the Tribunal and his capacity to understand and act on a direction should be beyond doubt. There is no suggestion that he would in any way be suffering from a disability and there is no evidence to assist the Tribunal to determine whether he was actively failing to comply with the directions.

45 Based on these principles leave to rely on evidence which was filed only a matter of hours before the hearing commenced is refused.

46 Mr Hindii was a critical of the expert material provided by the applicant yet it is clear that the respondent had failed to provide any material to refute those reports and has failed to provide material in proper time to address any issues set out in the applicants' material.

47 Mr Hindii submitted in his Aide Memoire that the Tribunal had no credible basis on which to conclude that the common property was in a state of disrepair. Whilst it is clear that some of the evidence goes back to a point in time before any works were attempted, the chronology provided on behalf of the applicant indicates that following the earliest complaint in April 2018 plumbers attended the site to carry out repair work and thereafter painting work was undertaken. By 26 April 2019 a routine inspection conducted by the property manager on behalf the applicants found that the kitchen ceiling was leaking and the sliding door frame downstairs near the kitchen balcony was also causing leaks which were then reported to the Strata Manager. Evidence was provided of paint bubbles appearing on the kitchen ceiling.

48 A history of reports were then put through to the Strata Manager in June and July with a notation from the Strata Manager on 2 July that a plumber is aware that there is a waterproofing issue.

49 By September 2019 The Shower Repair Centre provided a quote but by 24 September it was noted that the Strata Scheme had held off on a quote because they were waiting to see whether water proofing had been

successfully completed before proceeding with ceiling repairs. The tenants reported that following rain there was still water coming in from the gap in the sliding door and going into the lounge room and they indicated that the repair work had been a “band aid job” which had not been successful.

- 50 By 11 November 2019 quotes had been received from Direct Building Services but a second quote was regarded as necessary and a further quote was obtained from All Hands On a little later in November.
- 51 By 19 December 2019 quotes had been received but on 15 January 2020 the Strata Scheme advised that they were waiting on another quote from All Hands On. That report was received on 23 January 2020 and communicated to the Strata Committee who advised that the project would be deferred until the next AGM where all members would have a fair idea of the expenditure which would be necessary.
- 52 On 18 February 2020 photos and a video were forwarded to the Committee with a request that immediate action be undertaken noting that damage had worsened during the recent rain and tenants were using a bucket to collect dripping water.
- 53 No further feed back was received from the Strata Committee or the Strata Manager and by 23 March 2020 it was noted that the Strata Committee had organised for a work order from The Shower Repair Centre based on the quote of 6 September 2019.
- 54 Further photographs were provided by the applicants’ agent with a notation that following recent rain mould had spread and darkened in the dining area and kitchen. A further inspection in June of 2020 noted that mould had visibly darkened and further spread. By late July water was found to be dripping from the kitchen ceiling and buckets were necessary to collect water. Water marks also appeared outside under the top balcony ceiling near the kitchen window and the lower balcony. On 15 July 2020 the tenants had moved out as a result of the continual mould and water problems.
- 55 On 29 July 2020 it was noted that mould started to form on the kitchen pillar ceiling and in the dining area and that there was a crack like line in the kitchen

pillar. By August 2020 an email was sent to the Strata Manager concerning the AGM and the applicants were notified that although a date had not yet been set for the AGM it was likely to be in September.

- 56 On 12 September 2020 an email was sent to the Strata Committee with further photos and videos together with a request that a trades person be sent out to provide a permanent solution to prevent water ingress.
- 57 On 14 September 2020 the Strata Committee replied that they would need to send The Shower Repair Centre out to inspect and rectify the issue as it was still under warranty.
- 58 On 24 September 2020 an email was received from the solicitor for The Owners Corporation advising that an inspection was to be held on Friday 25 September 2020.
- 59 Following the inspection the Property Manager followed up with the Strata Manager seeking a time for reinspection and repair work to be undertaken. On 29 October The Shower Repair Centre referred to a reinspection and reported that there was no leak. There was however a suggestion that it was possible that a leak was coming from the next door balcony and pipe work.
- 60 On 6 November 2020 the Strata Scheme sent The Shower Repair Centre out again to inspect the property although no testing was done on that occasion.
- 61 By 9 November 2020 the property manager reported that during recent rains the leak was continuing and that the plumber had recorded a video of leaking inside the roof cavity with a request that repairs be undertaken immediately.
- 62 On 2 December 2020 The Shower Repair Centre suggested that they had attended the property for another inspection and a further flood test was carried out with a report that there were no leaks from the balcony. The report concluded that any further leak must be coming from another source. No response has been received from the Strata Manager in relation to further inspections.
- 63 The history set out in the applicants' material has not been challenged or refuted by any evidence filed on behalf of the Owners Corporation .

64 In addressing the submission by Mr Hindii that the applicants have no standing to bring the present claim, having been aware of a water problem in April 2018, it is appropriate to have regard to the provisions of s.106 of the *Strata Schemes Management Act* (NSW) 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)
- (4)
- (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 two years after the owner first becomes aware of the loss.

65 It is appropriate to note that in the present case the applicants are seeking compensation for loss of rent due to leaking issues between 1 April 2020 and 27 November 2020 and it is appropriate to note that the applicants did not become aware of the loss until a rent reduction was agreed upon because of issues with mould and water ingress from 2 January 2020.

66 In *Rosenthal v The Owners SP2021 1*[2017] NSWCATCD 80 which was referred to by Mr Hindii the Tribunal noted that the duties of an Owners Corporation to maintain and repair property under the 1996 Act were contained in s.62 of that Act and in *Seiwa Australia Pty Ltd v the Owners Strata Plan 35042* [2006] NSWSC 1157 Brereton J was considering the duty imposed on the Owners Corporation pursuant to the provisions of the Strata Schemes Management Act 1996 and he observed:-

[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] AC633; *Ridis v Strata Plan 10308* [2005] NSWCA 246.) Thus the Boy corporate is obliged not only to attend to case 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 Ltd* (1989) 18 NSWLR 33.) 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) and it extends to oblige the Owners Corporation to do things which could not be for the benefit of proprietors as a whole or even the majority.

67 Relying upon these principles the Tribunal found in Rosenthal (supra) that the respondent had 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 [93].

68 In *Felcher v The Owners Strata Plan No.2738* [2017] NSWCATAP 219 the Appeal Panel was required to address a claim for loss of rent as a result of water leaks and a delay on the part of the Owners Corporation in approving repairs. The Appeal Panel noted that the tenant provided a trust ledger report and a spread sheet showing payments that had been received after the leak had become apparent and noted that the material provided was sufficient evidence of the quantification of the loss.

69 In relation to the question of foreseeability the Appeal Panel noted:

60. The foreseeability of the loss is to be assessed at the date of the breach of statutory duty or at the earliest time thereafter until rectification of the breach: *Overseas Tankership UK Ltd v Mort's Dock and Engineering Co Limited (the Wagon Mound (No.1))* 1961 AC 388 the test is satisfied provided that the risk of damage occurring is not so slight as to be dismissive as a mere far fetched or fanciful possibility: *Wyong Shire Council v Shirt* [1980] HCA 12. Australian courts have adopted the observation of Lord Reid in *Koufos v C Czarnikow Limited (The Heron (ii))* (1969) 1 AC 350 that :

The defendant will be liable for any type of damage which is reasonably foreseeable as liable to happen even in the most unusual case, unless the risk is so small that a reasonable man would in the whole circumstances feel justified in neglecting it.

70 Section 44 of the *Residential Tenancies Act 2010* (NSW) provides that the Tribunal may, on the application of a tenant, make

- (a)
- (b) an order that the rent payable under an existing or proposed residential tenancy agreement is excessive, having regard to the reduction or withdrawal by the landlord of any goods, services or facilities provided with the residential premises and that from a

specified day the rent for the residential premises must not exceed a specified amount.

- 71 In *Andrew Fletcher and Song Fletcher v Luke Burbury* [2015] NSWCATCD 60 the Tribunal referred to the obligation of a landlord to provide and maintain residential premises in a reasonable state of repair in accordance with s.63 of the Act and the Tribunal noted that after a tenant provided details of a complaint the landlord had a duty to ensure the property was in a reasonable state of repair as a result of a strict obligation to ensure that repairs were carried (*Dupont v Lawrence* RTT 97/022753).
- 72 The Tribunal found that the landlord did not address a problem of damp/mould appropriately and accordingly breached its obligation to keep the premises in a reasonable state of repair having regard to the age and rent payable and as a result made orders reducing the weekly rental.
- 73 The evidence provided by the applicants in this case includes some 94 photographs taken between 19 March 2018 when the initial mould occurred then from July 2019 showing mould build ups in the dining area and water marks on the kitchen ceiling taken in July and August of 2019 along with some 54 photographs showing mould and damp between January 2020 and November 2020.
- 74 The photographs in conjunction with the evidence provided by the applicants are sufficient to satisfy the Tribunal that the applicants as landlords were likely to suffer reductions in rent on occasions when mould or water had an impact on the facilities which should have been available to tenants of the premises.
- 75 The Tribunal is satisfied on the uncontradicted evidence of the applicants that a rent reduction of \$50.00 per week occurred for a period of 13 weeks from 2 January 2020 and that the reduction was increased to \$150.00 per week from 2 April 2020 to 8 July 2020. The rent was then reduced by \$50.00 per week for one week and the property was vacated by the tenants between 16 July 2020 and 4 September 2020. There were then continuing disputes between the applicants and the Owners Corporation concerning necessary repairs. Thereafter painting and cleaning of mould was to be undertaken after the cause of the water ingress had been established and rectified. The Tribunal

is accordingly satisfied that a total loss of rent was incurred for a period of seven weeks from 16 July 2020 to 4 September 2020.

- 76 The Tribunal notes that the property was re-tenanted from 5 September 2020 but that a reduced rent was paid at that time as a result of continuing problems with water ingress until the testing was undertaken in November of 2020. The Tribunal is further satisfied on the evidence that repairs to the interior of the property were undertaken and it was appropriate for rent to return to its level prior to 2 January 2020.
- 77 It is noted that there are still continuing claims of some water leaks in heavy rain and the respondent is reminded that its obligation in accordance with s.106 of the Act obliges it to undertake investigations where necessary and ensure that a source of leaking is eliminated otherwise it may expose itself to a risk of further compensation claims.
- 78 The Tribunal is satisfied on the evidence that a loss of \$7,730.00 has been suffered by the applicants as landlords as a result of an agreement to reduce rental without the need to have the matter taken before the Tribunal. The Tribunal is satisfied that in doing so the applicants have acted on the advice of experienced property managers and have accordingly mitigated their own loss by avoiding the risk the tenants would leave or that a greater loss could be imposed on them through proceedings in the Tribunal.
- 79 It is clear that the provisions of s.106 of the Act impose a two year limitation period from the date when a loss arises and not from a point in time when a need to repair not productive of loss commences.
- 80 In relation to the applicants claim for costs by way of agent's fees it is noted that s.60 of the Civil and Administrative Tribunal Act 2013 provides that each party should bear their own costs unless special circumstances arise. No special circumstances have been demonstrated in the present proceedings and it is appropriate that each party should be ordered to pay their own costs.

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



Registrar

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

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.