



Civil and Administrative Tribunal

New South Wales

Case Name: Gregg v The Owners –Strata Plan No. 80881

Medium Neutral Citation: [2022] NSWCATCD 17

Hearing Date(s): 30 November 2021

Date of Orders: 12 January 2022

Decision Date: 12 January 2022

Jurisdiction: Consumer and Commercial Division

Before: M Eftimiou, General Member

Decision: (1) The respondent is to pay the applicant \$33,250.00 on or before 11 February 2022.
(2) Any application for costs is to be made by providing written submissions to the Tribunal and the other party by 25 January 2022.
(3) Any response to any such application is to be made by providing written submissions to the Tribunal and the other party by 7 February 2022.
(4) Any such submissions are to address whether the parties agree that the application for costs should be determined on the papers, it without having a separate, additional hearing.

Catchwords: LAND LAW — Strata title — Breach of owners corporation’s obligation to repair and maintain common property — Measure of damages for breach — Mitigation

Legislation Cited: Civil and Administrative Tribunal Act 2013 (NSW)
Strata Schemes Management Act 1996 (NSW)
Strata Schemes Management Act 2015 (NSW)

Cases Cited: Siewa Pty Ltd v The Owners Strata Plan 35042 [2006]NSWSC 1157
The Owners Strata Plan 50276 v Thoo [2013]NSWCA

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The Owners- Strata Plan No 80412 v Vickery (No 2)
[2019]NSWCA 284

The Owners- Strata Plan No 36613 v Doherty
[2021]NSWCATAP 285

Texts Cited: Nil

Category: Principal judgment

Parties: Stephen Gregg (Applicant)
The Owners- Strata Plan No. 80881 (Respondent)

Representation: Mr O'Regan (Strata Committee Member)(Respondent)

Solicitors:
Sachs Gerace Lawyers (Applicant)

File Number(s): SC21/33241

Publication Restriction: Nil

REASONS FOR DECISION

1 By application filed with the Tribunal on 4 August 2021 the applicant sought orders pursuant to section 232 and 106(5) of the *Strata Schemes Management Act 2015* (SSMA) that the respondent pay damages to the applicant. The proceedings relate to a strata scheme in Caringbah NSW. The applicant is the owner of Lot 5 in Strata Plan 80811. The respondent is the Owners Corporation. For the reasons that follow, the Tribunal has determined that the respondent has breached its duty to maintain and repair common property pursuant to of s 106(1) of the SSMA and that pursuant to s 106(5) of the SSMA the applicant is entitled to an amount in damages totalling \$33,250.00 for lost rent.

Hearing

2 The applicant appeared at the hearing represented by Mr Sachs solicitor. The respondent was represented by Members of the Strata Committee including Mr O'Regan, Mr Ginns and Ms King.

3 The applicant sought to rely on the following documents:

- (i) Exhibit A-The applicant's documents, received on 16 September 2021(tabbed 1- 47 and an additional expert report of Ursula Delaney added as Tab 48).
- (ii) Exhibit B -The applicant's evidence in reply filed and served on 26 November 2021.
- (iii) The respondent sought to rely on the following document:
Exhibit R-The respondent's documents, received on 29 October 2021.

Jurisdiction

- 4 These proceedings relate to premises in Carringbah which are the subject of a strata scheme. As a result, the SSMA applies, and the Tribunal has jurisdiction to hear and determine the proceedings.
- 5 Section 106(6) imposes a time limit of two years for a claim for damages by a lot owner for a breach of s 106(1), with time commencing to run from when the lot owner "*first becomes aware of that loss*". The applicant first became aware of the loss, namely the loss of rent, on March 2021, when the applicant was unable to lease the premises and these proceedings were commenced in July 2021 and so the application has been made within time.

The relevant law

- 6 The obligation to repair and maintain common property is set out s 106 of the SSMA as follows:
- (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) 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 does not affect any duty or right of the owners corporation under any other law.

- 7 As the obligation imposed by the *Strata Schemes Management Act 1996* (the 1996 Act), which applied prior to the SSMA, is in the same terms as the wording of s 106(1), what was said in *Siewa Pty Ltd v The Owners Strata Plan 35042* [2006] NSWSC 1157 at [3] is still relevant:

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.

- 8 That the Tribunal has jurisdiction to hear and determine such a claim was recently confirmed in the Court of Appeal decision in *Vickery v The Owners – Strata Plan No 80412* [2020] NSWCA 284.

Applicant's Evidence and Submissions

- 9 The applicant is the owner of lot 5 in Strata Plan 80881. He resided in the property with his family until March 2021.
- 10 On 19 August 2019 the Owners Corporation commenced remedial works within the lot and the surrounding common property. ("Works").
- 11 The Works involved excavation, and creating a large crater in the courtyard of the lot. To date the Works remain incomplete and the crater in the courtyard of the lot remains open. The courtyard in its current condition is dangerous and unsafe.

- 12 The condition of the courtyard of the lot has prevented the lot from being rented by the applicant.
- 13 On 24 May 2021 the applicant presented a motion to the Annual General Meeting of the Owners Corporation seeking compensation for his loss of rent. That motion was rejected.
- 14 The applicant makes submissions that in breach of section 106(1) of the SSMA, the Owners Corporation has failed to properly repair and maintain the areas of common property affected by the Works. As a consequence, of the breach, the applicant has suffered and will continue to suffer loss and damage including:

“the costs of engaging Waugh Consulting Pty Ltd to identify and determine the method of rectification for the defective and incomplete works. Loss of rent, calculated at \$950.00 per week from 27 March 2021 to date and continuing until the works are complete and the lot is able to be rented.”

Respondent's submissions

- 15 The respondent concedes that works commenced in 2019 that resulted in excavation and a hole in the courtyard of the applicant's lot.
- 16 There have been a large number of ongoing defect issues within the entire building.
- 17 The Owners Corporation have used their best endeavours to try and resolve the issues.
- 18 Metrocorp were engaged to commence works in December 2020. However, the applicant was not happy with the works proposed to be undertaken by Metrocorp and insisted on obtaining a more suitable engineer.
- 19 The Owners Corporation then engaged JN Engineer to provide a more detailed scope of works. The applicant also engaged his own engineer, Waugh Consulting, to provide a scope of works.
- 20 The Owners Corporation have organised a number of rectification works to common property. Since 2019 the owners' corporation have spent \$90,000.00 on common property works relating to the applicant's property.

- 21 The works to the applicant's courtyard have not yet commenced. A draft tender has been prepared and an expert has been engaged to run the tender process.
- 22 The respondent rejects the suggestion that it has been slow in carrying out repairs or that it has breached its duty under s106 of the SSMA. The original builder who was engaged to carry out the works was told to stop by the applicant as he was not happy with the works. Since 2019 there have been 6 different engineers engaged to try and make the applicant happy. The respondent believes that it has done everything reasonably possible to get the works done. In addition the respondent submits that the applicant was secretary on the strata committee during 2019 and that he holds some responsibility for the works not being completed.

Consideration

- 23 As the applicant is the party making claims in these proceedings, he bears the onus of proof. To be entitled to recover any amount from the respondent as damages under s 106(5) of the SSMA, the applicant needs to establish:
- (i) That the Owners Corporation has failed to properly maintain and keep in a state of good and serviceable repair the common property
 - (ii) That he has suffered reasonably foreseeable loss as a result of the breach by the Owners Corporation.
 - (iii) The quantum of any loss and it is also necessary to consider whether there was a failure by the applicant to mitigate his loss

Chronology

- 24 The following summary of events is based on the documents provided by both parties:
- (a) On 19 August 2019 Project Plus commenced excavation works to Lot 5 courtyard.
 - (b) On 12 October 2019 the strata committee agreed to proceed with the required Ironbridge Engineering and Geotechnical investigations.
 - (c) On 18 November 2019 Project Plus provided revised quotations following further investigations.
 - (d) On 18 November 2019 the strata committee agreed to seek additional quotes.

- (e) From December 2019 until March 2020 a number of alternate builders were required to provide quotations for the works.
- (f) On 2 April 2020 LMW Engineers were engaged to provide alternate solutions to the rectification works.
- (g) Between April and July 2020 additional builders were invited to provide quotations.
- (h) On 29 October 2020 a quotation was obtained from Metrocorp remedial specialists.
- (i) On 26 November 2020 the EGM held a vote to consider quotes in relation to remedial rectification works. At this time Metrocorp advised they were able to start works on 1 December 2020. There were several solutions proposed at the EGM. The applicant declined six solutions. Project Plus were invited to review works and provide updated quotes.
- (j) On 21 December 2020 EGM it was resolved to accept Metrocorp quotation for works.
- (k) On 8 February 2021 JN Engineering were contacted to discuss the works and provide a fee proposal.
- (l) The owners corporation have now elected a Building Committee and have a draft tender document. This document needs to be finalised and then it is proposed to go out to four builders to provide quotations. There is no certainty as to when the works will be completed.

Breach

- 25 The Tribunal is satisfied that works were commenced by the Owners Corporation in the courtyard of the applicant's lot in August 2019. The Tribunal is satisfied that the works have resulted in a large excavation and crater remaining in the applicant's courtyard, which is common property, since 2019.
- 26 The works are still ongoing and there is no definite date for when the rectification works will commence or be completed.
- 27 As a result of the works, the premises are uninhabitable and are not able to be rented out.
- 28 The Tribunal is satisfied that the Owners Corporation has breached s 106(1) of the SSMA by failing to properly maintain and keep in a state of goods and serviceable repair the common property.
- 29 The owners corporation have argued that the repairs have not been done due to a number of reasons including:

- (a) The applicant was a member of the strata committee and obstructed the works being done or did not take reasonable steps for the works to be completed.
- (b) The applicant was not happy with the proposed works.
- (c) The owners corporation have taken reasonable steps to get the works done.

30 The Appeal Panel in *The Owners – Strata Plan NO 36613 v Doherty* [2021]NSWCATAP 285 at paragraph [173] citing Brereton J in *Seiwa* at [4] states:

“expressly referred to the duty as including keeping the premises ‘in a proper order by acts of maintenance before it falls out of condition, in a state which enable it to serve the purpose for which it exists’. This encompasses preventative maintenance and repair and financial provision for such preventative work. Reasonable steps are not a defence, nor are contributory negligence a consideration: *Owners SP345042 v Seiwa Australia PL* [2007]NSWCA 272 at [46].

The statutory provision is not in itself case in the form of a duty on an owners corporation to take reasonable care. It does not embody a range of reasonable excuses for inaction.”

31 And further at paragraph [175] the Appeal Panel stated;

Alleged restriction of access to, or interference with or resistance to, remediation by a lot owner as a matter of law does not qualify the owners corporation’s performance of its strict liability..... In accordance with SSMA as currently in force, as already canvassed, the OC can seek orders for access and non interference: SSM Ass 122 , 124. If faced with what it regarded as obstruction and interference it ought to seek orders for access and non interference , which is a concomitant of performance of its strict duties under SSMA s 106.

[176] It is clear that an owners corporation does not require approval by the owners in general meeting to carry out its strict duty under SSMA s 106, although it can gain dispensation from the strict statutory duty by a consent resolution under what is now SSMA s106(3).

32 The Appeal Panel decision of *Doherty* makes it clear that the liability of the Owners Corporation is a strict liability. The works have not been completed. It has been since August 2019 that the works were commenced. There is no starting date for the works to commence. The Tribunal accepts that the owners corporation have attempted to obtain various engineer reports and quotations for the works. However, as stated elsewhere the duty under s106 is a strict

duty and reasonable steps are not a defence to the owners corporations obligations nor is any alleged obstruction by the applicant.

- 33 Ultimately it was the Owners Corporation's responsibility to ensure that the works were carried out. There is no evidence that the applicant interfered or denied access to the builders to carry out the works. The applicant was the secretary of the strata committee from 2011 until 26 November 2020. The respondent states, "over this period, he was solely responsible and in charge of all works within his property". A secretary of the strata committee is simply an office bearer who is responsible in accordance with s43 of the SSMA for correspondence and administration. The secretary is not responsible to ensure that the owners corporation comply with its obligations under s 106 of the Act. The applicant is one of a number of people on the strata committee who share those responsibilities with other lot owners. It can be argued that during this time the applicant could have brought proceedings to the Tribunal to ensure compliance with s106 of the SSMA by the Owners Corporation. However, the applicant is not seeking damages for loss of rent during this period of time. There is no doubt that the applicant engaged in discussions with the owners' corporation regarding the works and the standard of the works however, there is no evidence that he impeded the works being undertaken. The Owners Corporation in its submissions refers to the applicant "blocking" works from proceeding and that he did not allow works to commence. There is little evidence to support these assertions. It is evident from the material that he asked questions and requested investigations but the owners' corporation is required to carry out their obligations to maintain and repair and there is little evidence that he has impeded the owners' corporation from carrying out its duty pursuant to section 106 of the SSMA. There is no evidence of any resolution of the owners' corporation to commence works being defeated because the applicant voted against any proposal. There is no evidence that he denied access to any builder to commence works. There is an allegation that the applicant did not allow the Secretary or the Treasurer to access his property, however, this is not evidence that he denied access to a builder. Even if the Tribunal is wrong in this finding, the respondent has not adequately explained why in over a 12 month period work has not commenced to rectify

the courtyard. The respondent is not even able to provide a commencement date for the works.

34 Having established a breach of s106 of the SSMA the Tribunal must now consider whether the applicant is entitled to damages.

35 The applicant is seeking loss of rent from 27 March 2021 to the date of the hearing being an amount of \$33,250.00. The applicant has provided ample evidence from various real estate agents as to the market rent of the premises being \$950.00 a week. An affidavit from Ursula Delaney dated 21 September 2021 states: she agrees to be bound by NCAT Procedural Direction 3 Expert Witness Code of Conduct.

“On inspection of the premises I have advised the owner of the property Stephen Gregg that property is currently unleaseable with the large hole that currently sits in the courtyard of the property.

The Residential Tenancy Act dictates that landlords have a duty to guarantee the safety of the rented properties. Of utmost importance is that no injury can be caused to a tenant should they lease the property. In this case, the landlord would be neglecting his responsibilities leasing a property with a large hole in the courtyard area that is exposed. A person or child has the potential to fall into this area and cause harm.

As an agency we also have an obligation to ensure a property is safe. Our advice is that the property is not safe that therefore not rentable as it currently stands.

Based on the market rent from 19 August 2021 the current rentable figure would be \$0. The figure of \$0 is due to the inability to lease to propriety is its current state of repair with the deep hole in the courtyard. However, should the hole be rectified the rental opinion would be \$900-\$950 per week. This is based on comparable rentals in the area that our office has leased.”

36 The respondent has provided little evidence to dispute that the premises are not able to be leased due to them not being habitable. The respondent has failed to provide any evidence as to the market level of rents of comparable properties in the locality.

37 Ms King a member of the strata committee and lot owner gave evidence that she also has been unable to lease her property and she has lost rental income due to the numerous defects in the building. Ms King acknowledges that the common property has not been properly maintained and kept in a state of good and serviceable repair. There appeared to be a suggestion from Ms King's

evidence and the owners corporation's evidence that many lot owners have been affected by the building works and that the applicant should therefore not be entitled to compensation for any loss.

- 38 On the uncontested evidence of the applicant the Tribunal is satisfied that the property is uninhabitable due to the ongoing building works. The Tribunal is satisfied that the weekly market rent for the property is \$950.00.
- 39 The Tribunal is satisfied that the owners corporation has breached its obligation to maintain and carry out repairs to the common property. There is little evidence that the applicant impeded the respondent by carrying out the works. As stated elsewhere he asked questions and requested investigations however, he did not deny access to builders or prevent the owners corporation from submitting motions at meetings and resolving from carrying out works. The Tribunal in exercising its discretion pursuant to section 106(5) of the SSMA determines that the applicant is entitled to damages.

Causation

- 40 If there is a breach of a duty to carry out repairs to address water penetration which results in a large excavation hole in the applicant's courtyard rendering the premises not habitable then it is clear the result may be a loss of rent. Accordingly, the chain of causation between the breach and the loss appears to be present in this instance.

Foreseeability

- 41 The applicant resided in the premises with his family until March 2021 when he moved out. The Tribunal is satisfied that the applicant has been in constant contact with the owners corporation to have the building works carried out. An email found at Tab 44 (5) of Exhibit A sent by the applicant to the owners corporation and all of the lot owners states in part." As you know I have asked numerous times to forward all correspondence regarding the remedial works, especially with regards to structural and drainage items affecting my person lot space and preventing me to lease my property." Makes it clear that the applicant was likely to suffer monetary loss due to the delay in carrying out works. Further at Tab 44 Email 15 dated 21 December 2020 the applicant again states: "The behaviours and actions of the Executive Committee has

caused myself and my family excessive undue stress. Any opportunity to productively move forward, ending the year with possible approvals to make our home safe and liveable again has taken away from us. Our personal needs, the ongoing safety concerns and significant inconvenience caused from the affected amenity, places us in a situation where we will be looking at relocating as soon as possible.”

- 42 The owners corporation held a meeting on 21 December 2020 where it was resolved to engage a Building Contractor Metrocorp to carry out works. This was not opposed by the applicant who had a Proxy vote recorded as Abstention. The Tribunal is satisfied that it was reasonably foreseeable to the owners corporation that if the works were not completed, the applicant and his family would move out of the premises and there would be a loss of rental income that would flow.

Mitigation

- 43 The correspondence between the parties indicates that the applicant has advised the owners corporation that the premises were not habitable and that he and his family had decided to move out. The applicant applied for mediation with the NSW Office Fair Trading in April 2021 to try and have the works carried out and the dispute resolved. Further in April 2021 the applicant engaged Waugh to inspect the works and provide a report with recommendations as to the remedial works that needed to be carried out. In May 2021 the applicant’s solicitor wrote to the owners’ corporation urging the owners’ corporation to accept its obligation to carry out remedial works.
- 44 On 21 December 2020 there was a motion before the Owners Corporation EGM to decide whether to accept the quote from Project Plus or Metrocorp to repair the courtyard in Lot 4. It was resolved at the meeting to accept the quotation of Metrocorp. With Lot 5 Abstaining. In February 2021 the owners corporation had engaged JN Engineering to investigate and prepare a report and recommendations regarding Unit 5 courtyard. A report was provided to the owners corporation from JN Engineering on 25 March 2021.

- 45 At AGM was held by the Owners Corporation on 24 May 2021 where it was resolved that a building committee would be reinstated to manage and oversee the remedial works to Lot 5 courtyard.
- 46 An EGM was held on 17 August 2021 where it was resolved to adopt the option proposed by JN Engineering referred to as Option A for remedial works for Lot 5. It was also resolved that the Owners Corporation appoint Mr Owen O'Brien of JN Engineering to Project Manage any and all common property major works.
- 47 In May 2021 the applicant proposed a motion for the AGM held on 24 May 2021 for the owners corporation to resolve in accordance with its statutory obligations under s106 to promptly engage a suitably qualified contractor to carry out works. The proceedings were commenced in July 2021 and to date the works have not been carried out and there is no estimated time for when the works will commence. This is notwithstanding the resolutions made by the Owners Corporation at its meetings of 21 December 2020, 24 May 2021 and 17 August 2021.
- 48 The Tribunal is satisfied that the applicant has complained formally and at length to the owners' corporation. The applicant warned the owners' corporation that he and his family would need to move out if the repairs were not carried out and it would result in a loss of rent. The Tribunal is satisfied that the applicant has taken all reasonable steps to mitigate any loss that has arisen as a result of the respondents' failure to carry out the works.

Orders

- 49 For the reasons set out above, the following orders are made:

The respondent is to pay the applicant \$33 250.00 on or before 11 February 2022.



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

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