



Civil and Administrative Tribunal

New South Wales

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Case Name: King as trustee for Cascade Trust v The Owners - Strata Plan No. 19410

Medium Neutral Citation: [2022] NSWCATCD 24

Hearing Date(s): 19 January 2022

Date of Orders: 24 January 2022

Decision Date: 24 January 2022

Jurisdiction: Consumer and Commercial Division

Before: G Blake AM SC, Senior Member

Decision: (1) The respondent is to carry out items 6 limited to the presence of mould on the outer wall of the second bedroom, and 7 when read with item 8, of the remedial works specified in [20] of these reasons for decision by 24 May 2022 at no cost to the applicants conditional on the applicants providing reasonable access to lot 43.  
(2) Conditional on the applicants providing reasonable access to lot 43, leave is given to the applicants to renew the proceedings under cl 8(1) of Sch 4 of the Civil and Administrative Tribunal Act 2013 (NSW), if the respondent fails to comply with order (1) above.  
(3) The respondent is to pay \$70,551.99 to the applicants by 24 May 2022.  
(4) The proceedings are otherwise dismissed.  
(5) If the parties are in agreement as to the costs of the proceedings, then they shall provide proposed consent orders to the Tribunal within 14 days of the date of the orders in these reasons for decision.  
(6) If the parties are not in agreement as to the costs of the proceedings, then:  
(a) if any party seeks a costs order, the applicant for costs (the costs applicant) must file and serve a costs application, submissions which shall be limited to five

pages, and any evidence in support by way of affidavit, within 14 days of the date of the orders in these reasons for decision;

(b) the respondent to the costs application is to file and serve any submissions which shall be limited to five pages, and any evidence in opposition by way of affidavit, within 14 days thereafter;

(c) the costs applicant is to file any submissions in reply limited to three pages within 14 days after receipt of the submissions and any evidence of the respondent to the costs application.

Catchwords:	LAND LAW - Strata title – Whether the owners corporation breached the duty to properly maintain and keep in a state of good and serviceable repair the common property - Whether the owners corporation is liable to carry out remedial works - Whether the owners corporation is liable for damages for loss of rent
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) Civil and Administrative Tribunal Rules 2014 (NSW) Strata Schemes (Freehold Development) Act 1973 (NSW) Strata Schemes Development Act 2015 (NSW) Strata Schemes Management Act 2015 (NSW)
Cases Cited:	Huang v The Owners - Strata Plan No 7632 [2020] NSWCATAP 278 Perkins v Barraket [2016] NSWCATAP 66 Symes v SP 31731 [2001] NSWSC 527 The Owners SP 35042 v Seiwa Australia Pty Ltd [2007] NSWCA 272; (2007) 13 BPR 24,789 The Owners Strata Plan No 30621 v Shum [2018] NSWCATAP 15 Vickery v The Owners Strata Plan 80412 (2020) 103 NSWLR 352; [2020] NSWCA 284
Texts Cited:	NCAT Procedural Direction 3 on Expert Evidence
Category:	Principal judgment
Parties:	Robert King and Victoria King as trustees for the Cascade Trust (Applicants) The Owners - Strata Plan No. 19410 (Respondent)

Representation: Counsel:  
J Mack (Applicants)  
T Harris-Roxas (Respondent)

Solicitors:  
Harris Freidman Lawyers (Applicants)  
Colin Biggers & Paisley (Respondent)

File Number(s): SC 20/46971

Publication Restriction: Nil

## **REASONS FOR DECISION**

### **Overview**

- 1 In these proceedings, the applicants, Robert King and Victoria King who are the trustees for the Cascade Trust and the owners of lot 43, seek orders under the *Strata Schemes Management Act 2015* (NSW) (SSM Act) relating to the presence of mould in their lot against the respondent, The Owners - Strata Plan No 19410, which is the owners corporation responsible for the management of the strata scheme related to strata plan no 19410 (SP19410).
- 2 I have decided that the respondent is to carry out certain remedial works to lot 43 by 24 May 2022 and to pay \$70,551.99 to the applicants by way of damages for loss of rent.

### **The factual background**

- 3 SP19410 was registered 8 November 1982, is a residential complex known as the Cascades at Paddington, and is comprised by common property and 43 lots.
- 4 Parts of lot 43 are situated below the terrace and interior of lot 40.
- 5 Lot 43, which had been occupied by tenants of the applicants, has been vacant since 7 November 2020 when the tenants left due to the presence of mould. From about October 2019, lot 43 had been managed by Bradfield Cleary on behalf of the applicants.
- 6 A dispute has arisen between the parties as to the responsibility for the presence of mould in lot 43.

- 7 On 16 March 2021, the parties reached agreement as to the scope of remedial works (the agreed remedial works) involving the following three elements:
- (1) installing insulation within false ceiling to lot 43, and investigating increasing ventilation to lot 43;
  - (2) installing flashing above the lintel to lot 43;
  - (3) removing plants and sealant works to the brickwork to the perimeter of lot 43.

### **The history of the proceedings**

- 8 On 11 November 2020, Isobel King commenced proceedings SC 20/46971 against the respondent by filing a strata schemes application, in which she sought an order under s 232 of the SSM Act, and attached documents.
- 9 On 4 December 2020, the Tribunal made procedural directions for the filing of evidence by the parties, amended the name of the applicant to Robert King and Victoria King as trustees for the Cascade Trust, and granted leave for legal representation to both parties.
- 10 On 24 March 2021, at a directions hearing:
- (1) the following notation was made:

“On 16 March 2021, a scope of remedial works was received from [Daniel Green of the] Landlay Consulting Group which the Respondent has agreed to carry out. The Applicant agrees that if the proposed remedial works are carried out this would satisfy the Applicant's claim for remediation of the water ingress. The parties agreed that, once the proposed remedial works were carried out, the only outstanding issue in these proceedings is the Applicant's claim for loss of past and future rent, which cannot be quantified until the proposed remedial works are carried out.”
  - (2) the Tribunal noted that there was an agreed scope of remedial works, made procedural directions for the carrying out of the remedial works, and further noted that they were expected to be completed by 11 June 2021.

### **The hearing**

- 11 The hearing took place on 19 January 2022. The applicants were represented by Mr J Mack of counsel. The respondent was represented by Ms T Harris-Roxas of counsel.
- 12 The applicants indicated that they were seeking the following four orders:

“(a) An order pursuant to s 232(1)(a) of the Strata Schemes Management Act 2015 that the Respondent carry out the remedial work necessary to prevent mould affecting unit 43, xxx Cascade Street, Paddington NSW 2021 (Property).

(b) An order pursuant to s 232(1)(a) of the Strata Schemes Management Act 2015 that the Respondent contract with suitably qualified contractors for the carry out of all work necessary to rectify damage to the Property within 30 days.

(c) An order pursuant to s 232(1)(a) of the Strata Schemes Management Act that the Respondent pay the Applicant a sum amounting to \$128.57 per day from 7 November 2020 until all works referred to in to in orders 1 and 2 are complete. Payment to be made immediately on completion of the works.

(d) Costs.”

13 The applicants relied on the following documents which were admitted into evidence without objection:

- (1) witness statement of Isobel King (Ms King) dated 2 December 2020 and Exhibit IK-1 (Ex A1);
- (2) witness statement of Emma Bettencourt (Ms Bettencourt) dated 22 February 2021 (the Bettencourt statement) (Ex A2);
- (3) witness statement of Ms King dated 22 February 2021 and Exhibit IK-2 (the second King statement) (Ex A3);
- (4) affidavit of Scott Maurice Freidman sworn on 4 August 2021 (Ex A4);
- (5) report of Ibrahim Ech (Mr Ech) dated 24 February 2021 (the Ech report) (Ex A5);
- (6) report of John Liddell (Mr Liddell) dated 10 June 2021 (the Liddell report) (Ex A6);
- (7) report of Grant Corry dated 1 November 2021 except for paragraph [1], the words “of mould” and “in the shower recess around the base and also” in paragraph [2], and paragraphs [3] and [5] (Ex A7);
- (8) strata plan 19410 dated 8 November 1982 (the strata plan) (Ex A8);
- (9) by-laws of SP83997 dated April 2020 (the SP19410 by-laws) (Ex A9).

14 The respondent relied on the following documents which were admitted into evidence without objection:

- (1) affidavit of Melissa Helen Fenton (Ms Fenton) affirmed on 6 August 2021 (the Fenton affidavit) (Ex R1);
- (2) report of Matthew Harriman dated 15 March 2021 (Ex R2);
- (3) report of Daniel Green (Mr Green) dated 16 March 2021 (the Green report) (Ex R3).

15 The parties relied on the joint report of Mr Green and David Hall (Mr Hall) dated 18 October 2021 (the joint report) (Ex J1).

16 There was no oral evidence.

17 The applicants relied on the following submissions:

- (1) opening submissions dated 27 October 2021 (the 27 October 2021 submissions);
- (2) outline of reply submissions dated 2 December 2021 (the 2 December 2021 submissions).

18 The respondent relied on its submissions dated 2 November 2021 (the 2 November 2021 submissions).

19 The applicants and the respondent each made oral submissions.

20 During the course of the hearing the applicants indicated they were seeking orders for the following items of remedial works as set out in the joint report and Green report (the remedial works):

- (1) treatment of mould (the joint report, p 4):

“It is agreed that after completion of the rectification that [Mr Liddell] be engaged to treat all the mould which has been identified within the unit and would make the unit fit for occupation. It is noted that minor mould is evident in some areas where there is no cause for moisture laden air, but this is a result of limited airflow within the unit as well as limited direct sunlight.”

- (2) kitchen (the joint report, p 5):

“Repairs 4.

In the first instance, the repairs shall involve the installation of ducting or venting to the rangehood, or relocation. The mould is to be treated.”

- (3) bathroom (the joint report, p 8):

“Repairs 5

The repairs involve the replacement of the exhaust fan and connect to the light switch. A timer is to be fitted to the fan. Additional air intake is to be provided to the door.”

- (4) bathroom (the joint report, p 10):

“Repairs 6

The repairs involve removal and replacement of the deteriorated shower screen and door. Remove the floor tiles within the shower and 1st row of wall tiles in the shower, re-membrane including water stop and retile.”

- (5) laundry (the joint report, p 13):

“Repairs 7

The repairs involve fitting an exhaust fan into the external window and connect the fan to the light switch. The mould is to be treated.”

- (6) treatment of mould (the joint report, p 14):

“It is agreed that on completion of the above works that [Mr Liddell] be engaged to treat the mould within Unit 43 in accordance with their quotation dated 10 June 2021”

- (7) external wall (the joint report, p 15):

“Repairs 9

The repairs involve substantial cutting back of the ivy and sealing at junction between brickwork and concrete as per [the Green report].”

- (8) removal of plants and sealant works to the perimeter of lot 43 (the Green report, p 26):

“5.3.1. General

There is currently a significant number of plants to the perimeter of Units 40 & 43. Accordingly, the Contractor shall allow to remove the plant growth from the facades of Units 40 & 43. As a part of these works the Contractor shall also allow to seal between head of brickwork and concrete to perimeter of Unit 40.

5.3.2. Access

The Contractor shall allow to erect access provisions as necessary to facilitate the works within this section.

5.3.3. Removal of plants

The Contractor shall allow to remove the entirety of plants growing from the facades of Units 40 & 43. Following the removal of the plants the Contractor shall allow to pressure wash (3000psi) the facades.

5.3.4. Sealing works

The Contractor shall allow to seal at junction of head of brickwork and concrete for the perimeter of Unit 43 and to perimeter of window and door openings. The Contractor shall allow to apply Parchem Fosroc Nitoseal MS250 in strict accordance with manufacturer's specifications and relevant standards. The Contractor shall liaise with the Superintendent and manufacturer's representative (as required) throughout the application of the sealant.

[photograph omitted]

5.3.5. Brickwork repairs

It is envisaged a number of brickwork repairs will be required to the façade upon removal of the plants, including brickwork reconstruction and brickwork repainting. Accordingly, for tender purposes a provisional sum of \$10,000.00 + GST has been allocated to carry out brickwork repairs as necessary whilst access provisions are on-site.”  
(bold print in original)

- 21 During the course of the hearing the issues in dispute were narrowed by the following concessions of the respondent:
- (1) if it is liable to repair the common property, then its liability in damages to the applicants for loss of rent is limited to the period from 7 November 2020 to 11 June 2021 at the rate of \$128.51 per day;
  - (2) if it is liable in damages to the applicants for loss of rent subsequent to 11 June 2021, then the loss suffered was \$128.51 per day;
  - (3) if it is liable to repair the common property, then it agrees to the remedial works.
- 22 During the course of the hearing the issues in dispute were also narrowed by the following agreements of the parties:
- (1) the respondent would carry out item 7 when read with item 8 of the remedial works with 120 days of the decision of the Tribunal;
  - (2) if it is liable to repair the common property, then the period of 120 days from the decision of the Tribunal is a reasonable time to carry out the remaining items of the repair works.
- 23 Each of the applicants and the respondent consented to the issue of the costs of the proceedings being dealt with on the papers.
- 24 At the conclusion of the hearing, I reserved my decision.
- 25 As the respondent in the 2 November 2021 submissions relied on the following photographs and the applicants the 2 December 2021 submissions did not object to this reliance, I have admitted them into evidence:
- (1) photographs of the bathroom of lot 43 (the lot 43 bathroom photographs) (Ex R4);
  - (2) photographs of bathrooms of SP19410 (the SP19410 bathroom photographs) (Ex R5).

### **The issues**

- 26 To identify the issues that arise for determination in the proceedings I have examined the closing submissions of the parties. The following issues arise for determination in the proceedings:
- (1) whether the Tribunal has jurisdiction to determine the proceedings;
  - (2) whether the respondent breached s 106(1) of the SSM Act;
  - (3) whether the respondent is liable to carry out the remedial works;



- (4) whether the respondent is liable in damages to the applicants for loss of rent, and if so for what period and in what amount;
  - (5) the costs of the proceedings.
- 27 Before considering these issues it is appropriate to set out the applicable statutory provisions.

### **The applicable statutory provisions**

#### *SSM Act*

- 28 Part 6 Division 1 (ss 106-108) contains provisions dealing with the management of common property. Section 106 deals with the duty of an owners corporation to maintain and repair property, and relevantly 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.

...

(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.

...

- 29 Part 12 Division 3 (ss 226-228) contains provisions dealing with the procedures for the making of applications to the Tribunal. Section 226 specifies the category of “interested persons”, and relevantly provides:

##### 226 Interested persons

(1) The following persons are interested persons for the purpose of making an application to the Tribunal under this Act—

...

(d) an owner of a lot in the scheme, a person having an estate or interest in a lot or an occupier of a lot,

...

- 30 Part 12 Division 4 (ss 229-238) contains provisions dealing with the orders that may be made by the Tribunal. Section 232 deals with orders that may be made to settle disputes or rectify complaints, and relevantly provides:

## 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,

...

## NCAT Act

31 Part 3 (ss 28-34) of the *Civil and Administrative Tribunal Act 2013* (NSW) (NCAT Act) contains provisions dealing with the jurisdiction of the Tribunal. Section 28 deals with the jurisdiction of the Tribunal generally, and relevantly provides:

### 28 Jurisdiction of Tribunal generally

(1) The Tribunal has such jurisdiction and functions as may be conferred or imposed on it by or under this Act or any other legislation.

(2) In particular, the jurisdiction of the Tribunal consists of the following kinds of jurisdiction—

(a) the general jurisdiction of the Tribunal,

...

32 Section 29 deals with the general jurisdiction of the Tribunal, and relevantly provides:

### 29 General jurisdiction

(1) The Tribunal has general jurisdiction over a matter if—

(a) legislation (other than this Act or the procedural rules) enables the Tribunal to make decisions or exercise other functions, whether on application or of its own motion, of a kind specified by the legislation in respect of that matter, and

(b) the matter does not otherwise fall within the administrative review jurisdiction, appeal jurisdiction or enforcement jurisdiction of the Tribunal.

...

33 Schedule 4 contains provisions dealing with the Consumer and Commercial Division of the Tribunal (the CC Division). Clause 3 deals with the functions allocated to the CC Division, and relevantly provides:

### 3 Functions allocated to Division

(1) The functions of the Tribunal in relation to the following legislation are allocated to the Division—

...

*Strata Schemes Management Act 2015*

...

34 Clause 8 deals with the renewal of proceedings, and relevantly provides:

8 Renewal of proceedings in respect of certain Division decisions

(1) If the Tribunal makes an order in exercise of a Division function in proceedings, the Tribunal may, when the order is made or later, give leave to the person in whose favour the order is made to renew the proceedings if the order is not complied with within the period specified by the Tribunal.

(2) If an order has not been complied with within the period specified by the Tribunal, the person in whose favour the order was made may renew the proceedings to which the order relates by lodging a notice with the Tribunal, within 12 months after the end of the period, stating that the order has not been complied with.

...

**Whether the Tribunal has jurisdiction to determine the proceedings**

35 In *Vickery v The Owners Strata Plan 80412* (2020) 103 NSWLR 352; [2020] NSWCA 284 (*Vickery*) Basten JA said at [28]:

“[28] ... The statutory scheme must be read as a whole. The terminology adopted in s 232 should be understood to cover claims and disputes with respect to any of the matters identified in subs (1), which are themselves in terms clearly intended to cover the full range of an owners corporation’s functions in operating, administering and managing the strata scheme, and exercising or failing to exercise any function under the Act, or the by-laws of the strata scheme.”

36 The source of the jurisdiction of the Tribunal to determine the two proceedings is ss 106 and 232 of the SSM Act which are picked by ss 28(1) and (2)(a) and 29(1)(a) of the NCAT Act. Pursuant to Sch 4 cl 3(1) of the NCAT Act this jurisdiction is allocated to the CC Division.

37 I am satisfied that the Tribunal has jurisdiction to determine the two proceedings for the following reasons:

- (1) the applicants as the owners of a lot in SP19410 are interested persons within the meaning of s 226(1)(d) of the SSM Act and as such have the right to make the strata schemes application;
- (2) the claims of the applicants against the respondent for the repair of the common property and for damages for its breach of the statutory duty in s 106(1) of the SSM Act are in accordance with *Vickery* at [28] claims within 232(1)(a) of the SSM Act;
- (3) the claims of the applicants against the respondent for damages for its breach of the statutory duty in s 106(1) of the SSM Act have been

brought within 2 years after they first became aware of the loss as required by s 106(6) of the SSM Act.

## **Whether the respondent breached s 106(1) of the SSM Act**

### *Introduction*

38 The parties are in agreement as to the presence of mould in lot 43, but disagree as the cause of the mould. The applicants' position is that there are the following multiple causes:

- (1) the exterior wall;
- (2) the slab between lot 43 and lot 40;
- (3) the slab below lot 43.

39 The respondent's position is that the mould in lot 43 is not causally related to any failure or defect in the maintenance or repair of the common property.

40 The applicants indicated that they did not contend that the presence of mould in lot 43 had been caused by the ingress of water from the planterboxes or the deck of lot 40.

41 Before considering this issue it is appropriate to set out the applicable statutory provisions and legal principles, and to summarise the evidence and submissions of the parties.

### *The applicable statutory provisions*

#### **1973 SSFD Act**

42 The *Strata Schemes (Freehold Development) Act 1973* (NSW) (1973 SSFD Act) was in force until 30 November 2016.

43 Section 5 contained definitions and relevantly provided:

#### 5 Definitions

(1) In this Act, except in so far as the context or subject-matter otherwise indicates or requires:

...

*lot* means one or more cubic spaces forming part of the parcel to which a strata scheme relates, the base of each such cubic space being designated as one lot or part of one lot on the floor plan forming part of the strata plan, a strata plan of subdivision or a strata plan of consolidation to which that strata scheme relates, being in each case cubic space the base of whose vertical boundaries is as delineated on a sheet of that floor plan and which has horizontal boundaries as ascertained under subsection (2), ...

...

(2) The boundaries of any cubic space referred to in paragraph (a) of the definition of floor plan in subsection (1):

(a) except as provided in paragraph (b):

...

(ii) are, in the case of a horizontal boundary, where any floor or ceiling joins a vertical boundary of that cubic space—the upper surface of that floor and the under surface of that ceiling, or

### **SSD Act**

- 44 The *Strata Schemes Development Act 2015* (NSW) (SSD Act) commenced on 30 November 2016 and repealed the 1973 SSFD Act. Section 4 contains definitions and relevantly provides:

4 Definitions

(1) In this Act—

...

*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 ...

...

- 45 Section 6 contains a definition of the boundaries of lot and relevantly provides:

6 Boundaries of lot

(1) For the purposes of this Act, the boundaries of a lot shown on a floor plan are—

(a) except as provided by paragraph (b)—

(i) for a vertical boundary in which the base of a wall corresponds substantially with a base line—the inner surface of the wall, and

(ii) for a horizontal boundary in which a floor or ceiling joins a vertical boundary of the lot—the upper surface of the floor and the under surface of the ceiling, or

### *The applicable legal principles*

#### **Boundaries of a lot in a strata scheme**

- 46 In *The Owners SP 35042 v Seiwa Australia Pty Ltd* [2007] NSWCA 272; (2007) 13 BPR 24,789 (*Seiwa*) at [38]-[39] Tobias JA stated with respect to the boundaries of a cubic space under the 1973 SSFD Act (Giles JA at [1] and Basten JA at [49] agreeing):

“[38] For completeness, I should make it clear that where s 5(2)(a)(ii) applies to define the lower horizontal boundary of a cubic space as the upper surface of the floor of that space, that surface fixes the boundary as at the date of

registration of the strata plan. If at that date the floor comprises only the bare concrete floor slab, then its upper surface will constitute the lower horizontal boundary.

[39] However, if at the date of registration a tile or timber floor has been laid over and affixed to the concrete slab, then the boundary will be the upper surface of the tiles or timber flooring. If that upper layer of flooring is later removed and replaced by tiles or timber flooring the upper surface of which is higher than the surface as at the date of registration of the strata plan, it is the level of the original surface which remains the lower horizontal boundary, not the level of the new surface. The boundary remains fixed: it is not ambulatory. The same principle applies to the determination of the upper horizontal boundary being the ceiling to the relevant cubic space as well as to a vertical boundary of that space being a wall.”

- 47 In *Symes v SP 31731* [2001] NSWSC 527 (*Symes*) at [59]-[60] Barrett J made the following findings as to the status of a certain wall and surface tiles:

“Status of the No 3 wall

[59] There was no evidence before the Board from which it could properly infer that the No 3 wall existed on 7 January 1987. The only evidence as to the nature and state of structures on Level 11 at that time denied the existence of any wall. It was therefore not open to the Board to reach and act upon the conclusion that the No 3 wall is common property. To have done so was erroneous.

Status of the surface tiles

[60] These conclusions with respect to the No 3 wall also apply to the surface tiles laid on the concrete floor of the part of Level 11 at the base of the No 2 wall. There was no evidence before the Board from which it could properly infer that those tiles had been laid on or before 7 January 1987. Indeed, the notation on the strata plan with respect to the height of unroofed areas on Level 11 refers explicitly to “concrete floors”. It was therefore not open to the Board to reach and act upon the conclusion that the surface tiles are common property. To have done so was erroneous.”

#### **Causation in an action for damages under s 106(5) of the SSM Act**

- 48 In *The Owners Strata Plan No 30621 v Shum* [2018] NSWCATAP 15 (*Shum*) at [132]-[134] an Appeal Panel made the following observations with to causation in an action for damages under s 106(5) of the SSM Act:

“[132] First, causation is a question of fact to be answered by common sense and experience: *March v Stramare (E & MH) Pty Ltd* [1991] HCA 12; (1991) 171 CLR 506 per Mason CJ at [17].

[133] Secondly, as long as a cause of the loss is the breach about which complaint is made, the fact there are multiple causes for the loss will not prevent a claimant recovering damage.

[134] In *Simonius Vischer & Co v Holt and Thompson* [1979] 2 NSWLR 322 the Court said:

It was, of course sufficient for the plaintiffs to establish that the defendants' breaches were a cause of the loss notwithstanding that there may have been other concurrent causes. Hence, the defendants' argument must show that the plaintiffs' lack of care was the sole cause of the loss, to the exclusion of any causative influence exerted by the defendants' breaches. I take the correct principle to be that stated in *Chitty on Contracts*, General Principles, 23rd ed.; p. 670, par. 1448:

"If a breach of contract is one of two causes, both cooperating and both of equal efficacy in causing loss to the plaintiff, the party responsible for the breach is liable to the plaintiff for that loss."

This statement is supported by the authority of Devlin J., as he then was, in *Heskell v Continental Express Ltd* [1950] 1 All ER 1033 at 1046-1048, and the cases there cited. In particular, I refer to what was said by Lord Wright with whom Lord Atkin agreed, in *Smith Hogg & Co Ltd v Black Sea and Baltic General Insurance Co. Ltd* [1940] AC 997 at 1007. His Lordship's remarks, although delivered in a context different from that which obtains here, are of undoubted application. Lord Wright said:

"The sole question apart from express exception, must then be: 'Was that breach of contract "a" cause of damage.'"

### *The evidence of the parties*

#### **The evidence of the applicants**

- 49 In the Ech report Mr Ech sets out his qualifications and experience as a certified occupational hygienist, agrees to be bound by NCAT Procedural Direction 3 on Expert Evidence, states that he carried out an inspection of lot 43 on 11 February 2021, and expresses the following opinions (pp 30-31):

“7.1.2 To what extent is the Property affected by mould?

The visible mould impacting the Property is identified in the Lounge/Dining (ceiling and sliding door), Kitchen (ceiling corner), Corridor (ceiling), Main Bedroom (window) and Bedroom 2 (window and outer wall). The mould appeared as old and largely embedded in the paint at some locations which could indicate that it had been painted over in the past and re-grew later or that the mould had colonised the surface deeply in the paint. The total surface area affected by the visible mould growth indoor is estimated to be approximately > 12m<sup>2</sup>. There may be other locations of walls and ceiling recently painted that may have covered active mould growth which could not be determined. The outdoor surfaces (eg. brick walls) impacted by mould are unable to be estimated. The indoor air is also impacted by *Aspergillus/Penicillium-Like* (elevated moisture indicator mould) of indoor sources that could be linked to the mould growth identified on surfaces indoors. No significant settled mould spores on surfaces were identified in Bedroom 2 (wardrobe shelf).

7.1.3 What is the cause of the mould that is present in the Property?

In the absence of dampness or elevated moisture being detected on walls and ceiling at the locations of the visible mould growth the cause of the mould

growth is likely attributed to condensation occurring on those surfaces when the dew point is reached for example when the surface is cold and the indoor air is warm with sufficient air humidity (eg. in winter). The visible mould was more evident on those surfaces closer to the glass door or window where temperature variation is more prevalent. The Scope of Works (SOW) prepared by Landlay in January 2021 for Unit 43 did not identify water intrusion from the above Unit 40 and only noted elevated dampness in Bedroom 2 outer wall that may be attributed to climbing plants. The SOW recommended installation of insulation to the concrete ceiling and then false ceiling to reduce the impact of condensation forming on the concrete ceiling. I am of the opinion of Landlay regarding condensation on the ceiling and wall surfaces being a cause, however, it does not preclude elevated dampness occurring from time to time due to site conditions of those locations. The water penetration testing undertaken by Landlay suggests that this is not the case at the time of the test. We suggest to undertake such test in winter months where drying is delayed. Although, this is not directly in my field of expertise.

The water ingress noted in the bathroom appeared to have been repaired. This should be monitored and confirmed.

The dampness in Bedroom 2 outer wall will require to be addressed as it appeared to be caused by the plants on the outer wall or other water intrusion point.

...

7.1.5 What steps should be taken to treat/remove the mould that is present in the Property?

...

Mechanical ventilation to assist in controlling condensation within the internal areas is required. This would include extraction hood within the kitchen and extraction fan within the bathroom. Where condensation cannot be fully prevented on surfaces in certain times of the year for example on walls and windows not insulated, dehumidification units and/or natural ventilation may be used to reduce air moisture and thus control condensation. Noting that after the removal of climbing vegetation from external walls, sealing of the external brick walls should reduce absorbed moisture."

50 In the Liddell report Mr Liddell:

(1) records the following observations (p 3):

"There is visible mould in the master bedroom, bedroom 2, hallway, kitchen, dining, and lounge room. Elevated relative humidity levels have been detected and should be reduced and maintained below 55% to prevent mould occurring. If left untreated, the mould can be a potential health hazard to the occupants."

(2) makes the following findings in relation to the master bedroom, bedroom 2, hallway, kitchen, dining and lounge: "visible mould" and "Relative humidity exceeds 55%" (pp 4-7).

51 The strata plan contains the notation in relation to the "paved terraces" and "planters" but no similar notation for level 6 on which lot 43 is situated.



52 The SP19410 by-laws relevantly provide:

“Special By-Law 9

Cosmetic work, minor and major renovations

...

2. Definitions & Interpretation

2.1 In this by-law, unless the context or subject matter otherwise indicates or requires:

...

h. "major renovations" means any work to an apartment or a common area in the building in connection with your apartment (such as the floor, ceiling or a boundary wall of your apartment) for the following purposes:

...

iii. work involving waterproofing such as a bathroom renovation involving the laying of a new waterproof membrane,

...

i. minor renovations" means any work to a common area in the building in connection with your apartment (such as the floor, ceiling or a boundary wall of your apartment) for the following purposes:

...

ii. renovating a bathroom in a manner that does not involve waterproofing,

iii. renovating any other room in your apartment in a manner that does not involve waterproofing or structural changes,

...”

#### **The evidence of the respondent**

53 In the Green report, which contains a scope of works for the agreed remedial works and does not include any record of his qualifications and experience, Mr Green:

(1) records the following observations (p 20):

“Mould was visible at multiple locations including the Kitchen and Hallway”

(2) expresses the following opinions (p 21):

“4.2 BACKGROUND

...

Email correspondence 2 - dated 29th January 2021

We concluded the investigation for water penetration to Unit 43 on Friday 22nd January.

As previously advised excavation and flooding of three (3) planterboxes to Unit 40 was carried out which did not result in any evidence of water penetration to Unit 43 with moisture meter readings being consistent before and after testing. This testing also revealed the drainage provisions to Unit 40 deck were suitably functioning. A visual inspection of the waterproof membrane was also carried out at locations of excavation and no deterioration of the sheet waterproof membrane was observed.

Following this testing we recommended the central paved deck area of Unit 40 be flood tested. The flood test to Unit 40 deck commenced on 21st January and an inspection on 22nd January revealed no evidence of water penetration with no change between moisture meter readings before and after the flood testing.

Prior to commencing testing, the moisture meter readings to the perimeter of Unit 43 were generally consistent, however there was one location which showed moisture level at maximum reading on the detector within second bedroom (as advised in 14th January email following first day of testing). On Friday 22nd January we carried out an inspection of the external façade opposite this location of high moisture via ladder. The external inspection showed significant dampness to the external brickwork with widespread plant growth. A concrete beam/lintel is located above the window which projects from the façade, which based on our visual inspection we believe likely continues through to internal skin of brickwork. We note that we did not observe any flashing or weepholes above this lintel and accordingly any water within the wall would saturate the concrete lintel and extend internally (where high moisture meter readings were recorded). Accordingly, we would recommend work platform i.e. scaffold, be installed at this location and new head flashing be installed to window. As a part of this work we would also recommend all plants be removed from brickwork in this area and brickwork repairs and sealant works be carried out as required. A planterbox drain also connects to downpipe adjacent the location of beam/lintel and accordingly the owners may consider engaging a plumber to carry out CCTV investigation of this drain to confirm any pipe failure.

Based on visual inspections and testing, it is our opinion that the majority of the mould throughout Unit 43 may be attributed to a lack of any thermal insulation installed to Unit 43 ceiling or Unit 40 deck. The lack of thermal insulation would result in environment conducive to mould growth given the difference between the cold external area to Unit 40 and warm internal area to Unit 43. This is further compounded by the sheltered position of Unit 40 which means the unit receives little sun. Lifestyle factors are also likely a contributing factor. Accordingly, it is our opinion to assist in managing the mould growth to Unit 43 thermal insulation would require to be installed to Unit 43 or Unit 40. This will provide a layer of material where the temporary difference will be controlled. To install thermal insulation to Unit 43 a false ceiling would be installed. Thermal insulation can be installed to the Unit 40 balcony however this will involve significant works, including removal of all finishes i.e. planters, fill material, paving etc, back to slab level and installing thermal insulation prior to reinstating finishes, which we would not consider feasible given the significant cost associated.

Accordingly, based on the above our office has prepared this Scope of Works which includes the following;

- Installation of insulation within false ceiling to Unit 43. As a part of these works we shall also investigate increasing ventilation to Unit 43.
- Installation of flashing above lintel to Unit 43.
- Removal of plants and sealant works to brickwork to perimeter of Unit 43.”

### **The joint evidence of the parties**

54 In the joint report Messrs Green and Hall do not include any record of their qualifications and experience, record their instructions and express the following opinions:

(1) as to their instructions (p 2):

#### **“2. BRIEF**

This joint report has been prepared in response to instructions from Scott Freidman of Harris Freidman, Solicitors and Melissa Fenton of Colin Biggers and Paisley Solicitors, to attend to the property and discuss and agree on the rectification required for the mould, which is evident within Unit 43, [address omitted], Paddington.”

(2) as to proposed lowered ceiling height of lot 43 (p 3):

#### **“3.1. Proposed lowered ceiling height to Unit 43.**

Reference has been made in the Land lay Scope of Works to lower the ceiling. The requirements in the Building Code of Australia for ceilings heights in residential buildings - Volume 1 for Class 2 buildings, Clause F3.1 is that the ceiling height in habitable rooms is a minimum 2.4 metres and in other rooms can be reduced to 2.1 metres. Refer to Table below. The current ceiling height of Unit 43 is 2.390 metres.

The previous proposal for a lowered ceiling would have been in breach of the requirements of the Building Code of Australia. There is a performance solution in place regarding the lowering of the ceiling height which is prepared by Enhanced Building Services.

(3) as to causes of mould in a building (p 4):

#### **“3.2. Agreed causes of mould within the building.**

Based on specialist knowledge and expertise, the following is agreed between the Experts to be an overview of the causes of condensation mould within a building.

Mould usually occurs during winter months and can be dormant over the warmer months. The reason that it occurs is that the "fabric" of the building i.e. the concrete slabs including the balcony above Unit 43 as well as brickwork, substantially cools during the winter months. This provides a cold surface to the building. Warm moisture laden air is confined within the unit and attaches to this cool surface. The moisture laden air comes from a hot shower in a bathroom, cooking in a kitchen (particularly with liquids) and to a lesser degree from a clothes dryer in

the laundry. This moisture laden air if not adequately ventilated to the outside of the unit will attach to the cool surface and over time form mould. In more extreme situations where there is heavy moisture laden air which attaches to a cold surface that water can run down a wall or glass. This is referred to as "dew point".

It is agreed that the mould problem can also be contributed to by the "lifestyle" of the occupants. That is during winter the windows and door are less likely to be opened to allow fresh air to the inside of the unit.

In determining a process for rectification, there is an agreement on works to be undertaken that would reduce the opportunity for mould to re occur within the unit.

This joint report will include works to be undertaken where it is known there would be issues with lack of ventilation. There are also contributing factors which are a lesser cause for moisture, but rectification should also be undertaken to reduce the risk of any future mould to a minimum.

It is agreed that after completion of the rectification that the Mould Doctor be engaged to treat all the mould which has been identified within the unit and would make the unit fit for occupation. It is noted that minor mould is evident in some areas where there is no cause for moisture laden air, but this is a result of limited airflow within the unit as well as limited direct sunlight."

(4) as to the kitchen (p 5):

"4. KITCHEN.

The mould issue is above the rangehood which is located above the stove. An inspection of the rangehood revealed that it is a recirculating type. That is any cooking including liquids are not vented externally of the unit and building.

4.1. This causes the moisture laden air from the cooking to be directed onto the ceiling and cause the mould. Refer photo 4.1.

4.2. There is only minor evidence of mould in other locations within the kitchen. This confirms that a cause is the lack of ventilation to the rangehood. Photo 4.2.

4.3. The repairs involve the replacement of the rangehood with a vented type which vents to an external wall.

4.4. It is agreed that if the kitchen cabinets are to be replaced, that the stove and rangehood be relocated to where the sink is currently so that the rangehood can be vented externally. Refer photo 4.4

4.5. It is agreed that having an exposed concrete balcony above the kitchen and adjoining lounge may be a contributing factor and exacerbates the growth of mould given the large temperature difference. The exposed upper surface would be subject to cooler conditions than if a unit was located above.

4.6. It is agreed that the results of the previous Land lay report which included flood testing of planter boxes and the balcony above be accepted. That testing found that there were no leaks or moisture identified from those locations which would contribute or cause the

mould in unit 43. It is recommended that any future remediation to the above balcony shall include the installation of insulation as a part of the re-waterproofing works.

Conclusion 4.

It is agreed that the lack of venting to the rangehood is a cause of the mould in this area.”

(5) as to the bathroom (p 8):

“5. BATHROOM.

It was agreed that moisture laden air from a shower in a bathroom was the usual main source of moisture laden air within a building. Refer to item 4 above, agreed causes of mould. An inspection of the bathroom did not reveal any obvious issues. We were informed that there had been a mould treatment in this room which was still effective. The issue with mould is that it will re occur if the cause of the mould was not attended to. It is noted that the bathroom features a functioning window however we question as to whether it is opened by unit occupants, particularly in winter months.

5.1. There is an exhaust fan in this bathroom which vents to the external wall. The exhaust fan has a separate switch to activate to the of the light within that room. Refer photo 5.1.

5.2. Not having the fan connected to the light would allow an occupant to switch on the light but not the fan. That would result in elevated moisture laden air within the unit.

5.3. It is agreed that the exhaust fan be replaced and be connected to the light to that room.

5.4. It is agreed that a timer be fitted to the exhaust fan so that when the fan is switched off, then the fan will continue to operate for either 3 or 5 minutes to exhaust additional moisture laden air.

5.5. There is no clearance below the door to this room . The issue is that if air cannot enter into the bathroom, then the exhaust fan cannot extract air. Refer photo 5.5.

5.6. It is agreed that door be either cut down at the bottom to provide a 20mm air gap or a slotted air grill be fitted.

Conclusion 5

It is agreed that the ventilation of this room be improved.”

(6) as to the shower in the bathroom (p 10):

“6. BATHROOM - CONTRIBUTING FACTORS

There is evidence that there are leaks from the shower area.

6.1. Slightly elevated moisture readings were identified in the kitchen wall fridge area. Refer photo 6.1.

6.2. Additionally, there is evidence of "cupping" of the timber flooring outside the bathroom. This is consistent with water in that location. See Photo 6.2.

6.3. The shower appears original to the building and is a hobless type shower. At the time of construction, the use of hobless showers was relatively new and there was not sufficient experience to properly waterproof a shower enclosure. Leaks from the early hobless showers are known to be common.

6.4. The grout joints within the shower are uneven and can contribute to moisture collection. Refer photo 6.4.

6.5. There have been various patches and reseals at the base of the shower screen. Refer photo 6.5

6.6. The door architraves are affected by water damage. Refer photo 6.6.

6.7. It was agreed onsite as a precaution, that a plumber be engaged to check for leaks from the toilet. Also, a check that there are no leaks from water pipes which are likely within the concrete floor slab.

#### Conclusion 6

It is agreed that repairs be undertaken for a leaking shower. Also, a plumber be engaged to ensure there are no leaks from the toilet and other water pipes.”

(7) as to the laundry (p 13):

#### “7. LAUNDRY.

7.1. There is evidence of condensation mould to the ceiling outside the door to the laundry. Refer photo 7.1

7.2. This would indicate that there has been a lack of ventilation for a clothes dryer which would exhaust moisture laden air into the unit.

7.3. The moisture from a clothes dryer is less than that from a shower in a bathroom, but still requires attention.

7.4. It is agreed for the installation of an exhaust fan in the glass of the external window and with the fan being connected to the light switch.

7.5. The mould evident is to be treated on completion of these works.

#### Conclusion 7

It is agreed that an exhaust fan be fitted to the laundry to remove moisture laden air.”

(8) as to the external wall (p 15):

#### “PREVENTATIVE WORKS.

9.1. There is evidence of substantial ivy growth from the balcony of the units above. Refer to photo 9.1

9.2. The issue is that the ivy root system can penetrate through the join between the brick wall and the upper concrete slab. Refer photo 9.2

9.3. The root system can also act as a "wick" where water travels along the root system and then enter the building.

9.4. It is agreed that as a maintenance issue, that this ivy be cut back substantially to reduce the risk of water entry unit Unit 43.

#### Conclusion 9

It is agreed this is an essential maintenance issue that is required to reduce the risk of water entry to Unit 43.”

### *The submissions of the parties*

#### **The submissions of the applicants**

55 In the 2 December 2021 submissions the applicants made the following submissions:

- (1) the respondent’s attempt to split out the mould damage into three discrete areas reveals itself as inconsistent and opportunistic;
- (2) the respondent’s case on causation is also inconsistent. There is nothing in the joint report which detracts from Mr Green’s earlier opinion in the Green report. To the contrary, the joint report, explicitly adopts the Green report and affirms Mr Green’s reasoning on causation. Both the joint report and the Green report need to be read together. The overwhelming evidence in relation to causation has always been that the mould emanated from the common property;
- (3) the respondent’s case that the ivy growth from the balcony of the units is not a cause of the mould issue ignores the contrary evidence in the Green report, the Ech report and the joint report;
- (4) the respondent’s case that the slab between lot 43 and lot 40 is not a cause of the mould issue ignores the contrary evidence in the Green report, the Ech report and the joint report;
- (5) the respondent is the sole custodian of information concerning historical issues of SP19410. It is something which the respondent should prove. In the absence of the respondent being able to prove positively that that the membrane and surface tiles were not laid before the registration of the strata plan applicants are entitled to an inference that they were. They rely on the result reached in *Huang v The Owners - Strata Plan No 7632* [2020] NSWCATAP 278 (*Huang*) at [30] where there was a plan but no notation. They also rely on special special by-law 9 in the SP19410 by-laws.

#### **The submissions of the respondent**

56 In the 2 November 2021 submissions the respondent made the following submissions:

- (1) the Tribunal on the basis of the joint report should make the following findings:
  - (a) the mould in the kitchen is causally related to dampness and moisture which emanates from cooking, lifestyle factors and behaviours within the lot. It is not causally related to any

- structural defect or failure of the common property, such as water ingress from external walls;
- (b) the mould in the laundry is causally related to dampness and moisture which emanates from historical use of the dryer, lifestyle factors and behaviours within the lot. It is not causally related to any structural defect or failure of the common property, such as water ingress from external walls;
  - (c) the mould issue in the bathroom is causally related to dampness and moisture emanating from the shower. It is not causally related to any structural defect or failure of the common property;
  - (d) the ivy growth from the balcony of the units is not considered to be a cause of the mould issue, though it is recommended that the external works be carried out to reduce the risk of water ingress at the lot;
- (2) there is no evidence before the Tribunal from which it can properly infer that the membrane and surface tiles laid on the shower floor of lot 43 had been laid on or before 8 November 1982. The strata plan does not include any notations which refer to concrete or tiled floors;
- (3) on the basis of the lot 43 bathroom photographs and the SP19410 bathroom photographs is not open to the Tribunal to conclude that the membrane and surface tiles in the shower of lot 43 are common property.

### *Consideration*

- 57 Having regard to the principles in *Shum* at [132]-[134], the applicants can establish that the respondent breached s 106(1) of the SSM Act by proving that at least one of the multiple causes on which they rely is a cause of the presence of mould in lot 43.
- 58 The respondent will have a defence to this claim of the applicants if none of the multiple causes on which they rely is a cause of the presence of mould in lot 43. The essential submission of the respondent was that the opinions of Mr Green in the Green report had been superseded by the opinions of Messrs Green and Hall in the joint report, and that Mr Ech in the Ech report did not endorse the opinions of Mr Green in the Green report so far as the external wall of lot 43.
- 59 I am satisfied that Mr Green in the Green report, which was tendered as part of the respondent's evidence, expressed at [4.2] the opinion that any water within the wall would saturate the concrete lintel and extend internally to the second bedroom and provided reasons for this opinion. In the light of the Ech report at



[7.1.2], the Liddell report at p 3, and the outgoing condition report at p 6/68 referred to in [72] below, I am also satisfied that mould was present on the window and outer wall of the second bedroom. It follows that there is a direct and rational connection between the ingress of water from the external wall and the presence of mould in the second bedroom. While his qualifications as an expert were not recorded in the Green report as required by NCAT Procedural Direction 3 on Expert Evidence, I am satisfied on the basis of the 5 August 2021 letter referred to in [77] below which records his occupation and qualifications as “Remedial Engineer” and “B.Eng (Civil)” that Mr Green had the qualifications as an expert to express this opinion.

60 I am not satisfied that this opinion in the Green report was superseded by his joint opinion with Mr Hall in the joint report for the following reasons:

- (1) section 3.2 of the joint report was expressed to be “an overview of the causes of condensation mould within a building”;
- (2) the opinion about “moisture laden air if not adequately ventilated to the outside of the unit will attach to the cool surface and over time form mould” and “the mould problem can also be contributed to by the “lifestyle” of the occupants” in [3.2] of the joint report was a general opinion and not specifically stated to be applicable to lot 43;
- (3) the joint report did not address the causes of mould in lot 43 except in the kitchen, the bathroom including the shower, and the laundry;
- (4) the opinion in [9.4] of the joint report “that as a maintenance issue, that this ivy be cut back substantially to reduce the risk of water entry unit Unit 43” is not contrary to the opinion at [4.2] in the Green report as it addresses the risk of water entry rather than the ingress of water.

61 If Mr Green had changed his opinion at [4.2] in the Green report, then it would be expected that, as required by NCAT Procedural Direction 3 on Expert Evidence at [19], he would have provided a supplementary expert report in which he provided reasons for his change of opinion.

62 I am satisfied that Mr Ech at [7.1.3] in the Ech report endorsed the opinions of Mr Green in the Green report so far as the external wall. He not only noted that Mr Green at [4.2] in the Green report had noted “elevated dampness in Bedroom 2 outer wall that may be attributed to climbing plants”, but also confirmed the need to remedy the bedroom 2 outer wall, stating “The

dampness in Bedroom 2 outer wall will require to be addressed as it appeared to be caused by the plants on the outer wall or other water intrusion point”.

- 63 In the light of the opinions of Mr Green at [4.2] in the Green report and Mr Ech at [7.1.3] in the Ech report I am satisfied that the applicants have established that that the respondent breached s 106(1) of the SSM Act as to the presence of mould on the bedroom 2 outer wall of lot 43 by water ingress through the external wall. However, in the absence of dampness or elevated moisture being detected on walls and ceiling at the locations of the visible mould growth, I am not satisfied that this breach led to the presence of mould elsewhere in lot 43.
- 64 In the light of the opinions of Mr Green at [4.2] in the Green report and Mr Ech at [7.1.3] in the Ech report I am satisfied that the applicants have established the presence of mould elsewhere in lot 43 was caused by condensation occurring on the ceiling and wall surfaces when the dew point was reached. However, I am not satisfied that this condensation has resulted from a failure by the respondent to properly maintain and keep in a state of good and serviceable repair the common property in breach of s 106(1) of the SSM Act.
- 65 I am not satisfied that there is any evidence that the slab below lot 43 is a cause of the mould in lot 43.
- 66 I am satisfied on the basis of [6.1] and [6.2] of the joint report that there are leaks from the shower area. I infer from a comparison of the lot 43 bathroom photographs with the SP19410 bathroom photographs that the bathroom of lot 43 has been renovated since the registration of the strata plan. Having regard to the absence of any relevant notation on the strata plan, the principles *Seiwa* at [38]-[39], and the approach in *Symes* at [59]-[60], I am not satisfied that the shower of lot 43 contained surface tiles when the strata plan was registered. I do not consider that the finding in *Huang* at [30] has any relevance to whether the shower of lot 43 contained surface tiles when the strata plan was registered as each case must depend on the particular facts. Further, I do not consider that the definitions of “major renovations” and “minor renovations” in the SP19410 by-laws have any relevance to the question of whether the shower of lot 43 contained surface tiles when the strata plan was registered. Accordingly,

the leaks from the shower area have not resulted from a breach of s 106(1) of the SSM Act for which the respondent is responsible.

### **Whether the respondent is liable to carry out the remedial works**

67 In view of the agreement of the parties as to the carrying out of item 7 when read with item 8 of the remedial works and my finding as to the breach of s 106(1) of the SSM Act by the respondent limited to the external wall of lot 43, I am satisfied that the respondent is liable to carry out items 6 limited to the presence of mould on the outer wall of the second bedroom, and 7 when read with item 8, of the remedial works pursuant to 232(1)(a) of the SSM Act by 24 May 2022, which is 120 days after 24 January 2022, but not the remaining remedial works.

### **Whether the respondent is liable in damages to the applicants for loss of rent, and if so for what period and in what amount**

#### *Introduction*

68 The concession of the respondent that if it is liable to repair the common property, then its liability in damages to the applicants for loss of rent is limited to the period from 7 November 2020 to 11 June 2021 at the rate of \$128.51 per day is based on its contention that the applicants failed to mitigate their loss by not proceeding with the agreed remedial works.

69 Before considering this issue it is appropriate to set out the applicable legal principles, and to summarise the evidence and submissions of the parties.

#### *The applicable legal principles*

70 In *Perkins v Barraket* [2016] NSWCATAP 66 (*Perkins*) at [23]-[26] an Appeal Panel set out the principles applicable to the duty to mitigate a loss arising from a breach of contract:

“[23] The tenants relied on the decision of the New South Wales Court of Appeal in *Karacominakis v Big Country Developments Pty Ltd* [2000] NSWCA 313 where Giles JA said:

A plaintiff who acts unreasonably in failing to mitigate his loss from the defendant’s breach of contract will have his damages reduced to the extent to which, had he acted reasonably, his loss would have been less. This is often misleadingly referred to as a duty to mitigate, although the plaintiff is not under a positive duty. The plaintiff does not have to show that he has fulfilled his so called duty, and the onus is on the defendant to show he has not and the extent to which he has not.

[24] Similarly in *Portbury Development Co Pty Ltd v Ottedin Investments Pty Ltd* [2014] VSC 57 Garde J said that the onus of proof is on the defendant to show that the plaintiff has not acted reasonably in minimising loss arising from the defendant's breach of contract.

[25] The tenants submit that the reasonableness of the plaintiff's conduct is judged upon the information the plaintiff possessed at the relevant time: *Arnott v Choy* [2010] NSCA 259 and a plaintiff does not act unreasonably merely because his or her impecuniosity prevents him or her from taking steps that a person with sufficient funds would undertake: *Burns MAN Automotive (Aust) Pty Ltd* 1986 (161) CLR 653.

[26] The tenants also relied upon the decision of Glass JA in *Munce v Vinidex Tube Makers Pty Ltd* [1974] 2 NSW LR 235. In that case Glass JA said that there is an exception to the principle that the plaintiff bears the onus of proving all matters relating to damages. That exception relates to any disputed question which is truly a matter of mitigation of damages. In relation to questions properly so classified the defendant must not only introduce the evidence that the plaintiff has failed to minimise his loss, but also persuade the jury that the balance of testimony favours this conclusion."

### *The evidence of the parties*

#### **The evidence of the applicants**

- 71 In the Bettencourt statement Ms Bettencourt states that she is a Senior Property Manager employed by Bradfield Cleary and gave the following evidence:
- (1) during May and June 2020, she regularly received telephone calls from each of the tenants in which they complained about mould in lot 43 as a "health and safety issue" (at [8]);
  - (2) in about late October 2020, one of the tenants telephoned her and advised her that they were moving out as the mould problem had not been resolved (at [12]).
- 72 In the second King statement Ms King exhibited documents relevant to the lease of lot 43 including an Outgoing Condition Report dated 9 November 2020 and signed by Ms Bettencourt (the outgoing condition report) which including the following entries:
- (1) in relation to Balcony Off Dining Room: "Overgrown vine roots" and "Mould to door frame, vine growing into frame; Mould to door vine into 32 covering door frame" (p 5/68);
  - (2) in relation to Balcony Off Lounge: "Rotted timber deck to be replaced by strata" "Overgrown vines from above apartment" "Mould to door frame" (p 5/68);
  - (3) in relation to Bedroom 1: "Dehumidifier provided; Mould on all cupboard doors Dehumidifier provided; Mould on all cupboard doors 65 and

frames” “[blinds and curtains] Covered in mould” “[ceiling] Mould spores visible to ceiling” (pp 5-6/68);

- (4) in relation to Bedroom 2: “Mould on walls” “Mould on shutters and frame” “Ceiling recently treated and painted for mould” (p 6/68);
- (5) in relation to Bathroom: “Tiles discoloured. Mould in grout directly below leak” “Mould to grout directly below leak” “Mould in grout” “Mould in light switch panel, water stains and rust to in and rust to light fitting” (pp 6-7/68);
- (6) in relation to Kitchen: “Mould visible around fridge” “Mould visible to high corner” “Mould spores on ceiling” (pp 7-8/68);
- (7) in relation to the Lounge: “Mould to shutters and frame” (p 8/68);
- (8) in relation to the Hall “Yellow mould spores visible” “Mould to ceiling outside laundry and bathroom” (p 9/68);
- (9) in relation to Front Entrance: “Mould to door and frame” “Plants overgrowing from above apartment” (p 9/68).

73 The applicants adduced no evidence on the question of whether they had failed to mitigate their loss.

#### **The evidence of the respondent**

74 In the Fenton affidavit Ms Fenton annexed correspondence between the applicants’ lawyers, Harris Freidman Lawyers, and the respondent’s lawyers, Colin Biggers & Paisley.

75 On 22 July 2021, the respondent’s lawyers in their letter to the applicants’ lawyers (the 22 July 2021 letter) relevantly referred to events after the directions hearing on 24 March 2021 and stated:

#### **“Recent Events**

Since the above orders were made by NCAT, we understand that:

1. Landlay received tender submissions from JBuild Construction Group, Renfay Projects and Structural Building Maintenance (SBM) to carry out the agreed scope of remedial works, and a contract was signed with SBM in April 2021.
2. At the time of the pre-start meeting on 3 May 2021, the Applicant advised Landlay that they no longer wished to proceed with the agreed scope of remedial works because of the impact on the ceiling height. Instead, the Applicant requested that the scope be altered to provide the maximum ceiling height and was prepared to sign a waiver to release the Owners from any future liability if mould was to redevelop.
3. On 11 May 2021, we sent a draft waiver to your office for the Applicant’s consideration. We did not receive a response.

4. On 17 May 2021, the Applicant sent an email to Landlay advising that a stink pipe had been identified upon removal of the bulkhead which they considered to be the source of the moisture in Unit 43, and that they considered the agreed scope of remedial works would not rectify the problem.

5. Subsequently, Landlay arranged to meet with the Applicant to inspect the area and take moisture meter readings on 10 June 2021. Landlay did not record elevated moisture meter readings adjacent the stink pipe, and the pipe itself was dry to the touch.

6. During this meeting on 10 June 2021, the Applicant advised Landlay that:

(a) they believed the moisture within Unit 43 was related to or caused by Unit 40's irrigation system; and

(b) they were not interested in lowering the ceiling height and installing installation, and preferred instead to install screen doors, a dehumidifier system and additional venting.

7. We note that in its report dated 16 March 2021, Landlay set out that:

(a) it carried out water dye testing to three of the planter boxes by flooding them with a hose for two hours each. During the testing no physical water penetration was observed to Unit 43 and no elevation in moisture meter readings was observed. Accordingly, Landlay concluded that the existing waterproofing provisions to the planter boxes were functioning.

(b) It carried out flood testing to the central paved deck area of Unit 40. This flood test did not reveal any evidence of water penetration, nor was there any change between moisture meter readings before and after the flood testing.

8. Despite these findings from previous investigations, and as a result of the 10 June 2021 meeting, Landlay asked the Owners to have Unit 40 reactivate its irrigation system, which had been switched off for some time, in order to determine whether the system is contributing to the moisture and mould in Unit 43 or whether there was a potential breach in the irrigation system. We understand the irrigation system has been running for some weeks now.

9. On 25 June 2021, Landlay attended Unit 43 though was unable to detect any consequential change that could be measured to the moisture readings or detect any leak as a result of the irrigation system's reactivation.

10. On 16 July 2021, Landlay re-attended Unit 43 and carried out further moisture readings. Landlay confirmed there was no significant change in the moisture meter readings, and advised that based on this testing they do not believe there to be a leak from the Unit 40 irrigation system to Unit 43.

It is apparent from the above chain of events that the agreed scope of remedial works have not been completed in accordance with the NCAT orders. The Respondent considers this is largely attributable to frustration by the Applicant in:

1. Withdrawing her consent to the formerly agreed scope of remedial works; and

2. Requiring additional investigations be carried out despite the conclusions already reached as to the planter boxes and the central paved deck area of Unit 40.

We also wish to put the Applicant on notice that, in light of the above events, the Respondent denies any entitlement to loss of rent beyond the initial projected completion date of 11 June 2021.”

- 76 On 28 July 2021, the applicants’ lawyers in their letter to the respondent’s lawyers (the 28 July 2021 letter) responded to the 22 July 2021 letter and relevantly stated:

“It is true that there was an agreed scope of remedial works before NCAT on 24 March 2021 which included a proposal to reduce the ceiling height of the apartment. However, we are instructed that on 4 May 2021, following an onsite meeting attended by, amongst others, SBM on 3 May 2021, SBM acknowledged that it would not be possible to lower the ceiling because the proposed solution had not factored in that lowering the ceiling would result in the ceiling height being lower than the doors, the windows and the built in joinery. It is our understanding that the parties have agreed that an alternative solution is required.

...

Your correspondence suggests that our client has set out to frustrate the respondent in effecting the remedial works. That is not the case. The true position is that despite the belief of both parties at the hearing before NCAT that reducing the ceiling height would provide a solution, it will not. Further, the cause of the mould in the vicinity of the kitchen was unknown (and appears to remain unknown) and is unlikely to be solved by the agreed scope of remedial works.

Our client wants to work co-operatively with the respondent to achieve a solution that will solve the problem once and for all and suggests a further onsite meeting be appointed to discuss an amended scope of remedial works. That meeting should be attended by solicitors.”

- 77 On 5 August 2021, the respondent’s lawyers in their letter to the applicants’ lawyers attached the letter dated 5 August 2021 of Mr Green (the 5 August 2021 letter) which records his occupation and qualifications as “Remedial Engineer” and “B.Eng (Civil)”, responded to the 22 July 2021 letter and relevantly stated:

“1.0 SBM project commencement

The letter alleges the following;

*“SBM acknowledged that it would not be possible to lower the ceiling because the proposed solution had not factored in that lowering the ceiling would result in the ceiling height being lower than the doors, the windows and the built in Joinery”*

SBM are able to proceed with the proposed works, noting that the lowering of the doors and joinery would be carried out as a variation to the works. No variation has been requested from SBM as yet given the owner of Unit 43 has yet to approve with the lowering of the ceiling "proposed methodology". It is our understanding the internal works will not be proceeding at this point in time.” (bold print and italics in the original)

*The submissions of the parties*

**The submissions of the applicants**

78 In the 2 December 2021 submissions the applicants made the following submissions:

“a. Loss of rent:

- i. Unit 43 has been untenanted since 7 November 2020. The hearing is set down for 19 January 2022. By this time Unit 43 will have been untenanted for 438 days. The uncontested evidence of Ms King is that the rent is \$128.57 per day. This equates to \$56,313.66 in lost rent. The Tribunal should order that this amount (adjusted to reflect any time the judgment is reserved) be paid (plus interest) and also that the same amount be paid until the repairs are complete plus interest;
- ii. Even if the Owner is unsuccessful the Tribunal, should award damages for the lost rent up until the OC’s change in position, being 2 November 2021 (the date the OC Submissions were filed). This is 361 days and equivalent to \$46,413.77 in lost rent.”

**The submissions of the respondent**

79 In the 2 November 2021 submissions the respondent made the following submissions:

“20. The Respondent respectfully submits that any rental loss suffered by the Applicant due to mould is causally unrelated to any breach (which is denied) by the Respondent of its statutory duty to maintain and repair common property pursuant to section 106 of the 2015 Act.

21. In the alternative, the Respondent denies that it ought to be responsible for any loss of rent beyond 11 June 2021 by which time the formerly agreed Landlay scope of works ought to have been completed , as per the orders made 24 March 2021.

...

23. ... This is particularly the case where the Applicant:

...

(e) Has failed to progress the proceedings in a timely manner and mitigate its claim for damages in loss of rental income, thus exposing the Respondent to a greater claim for damages;”

*Consideration*

80 When I invited counsel for the respondent to elaborate upon the 2 November 2021 submissions she indicated that she made no additional submissions.

81 I have already found at [63] above that the respondent breached its statutory duty in s 106(1) of the SSM Act to maintain and repair the common property in



relation to the external wall of lot 43 and that this breach was a material cause of the presence of mould on the outer wall of the second bedroom of lot 43.

- 82 I am satisfied on the basis of the unchallenged evidence of Ms Bettencourt and the outgoing condition report that the presence of mould on the outer wall of the second bedroom of lot 43 was a material factor in lot 43 being uninhabitable due to the presence of mould.
- 83 I am satisfied that the principles applicable to the duty to mitigate a loss arising from a breach of contract set out in *Perkins* at [23]-[26] are equally applicable to the breach by an owners corporation of its statutory duty in s 106(1) of the SSM Act to maintain and repair the common property.
- 84 I am not satisfied that the respondent has established that it was unreasonable for the applicants not to proceed with the agreed remedial works when they became aware on 3 May 2021 that that the lowering of the ceiling of lot 43 would result in the ceiling height being lower than the doors, the windows and the built in joinery. It is obvious that these remedial works would have had a serious adverse impact on the amenity of lot 43. It follows that the respondent has failed to establish its defence that the applicants failed to mitigate their loss by not proceeding with the agreed remedial works.
- 85 I am satisfied that the applicants have established that they are entitled to recover damages for loss of rent from the period from 7 November 2020 to 24 May 2022, which is 120 days after 24 January 2022. The quantum of damages is \$70,551.99 (549 days x \$128.51 per day).
- 86 I am not satisfied that the applicants have established that the Tribunal has power to award interest on their loss of rent. In any event, even if the Tribunal has such a power, the applicants adduced no evidence as to any loss of interest. It follows that I dismiss the applicants' claim so far as interest on their loss of rent.
- 87 Having regard to my findings the respondent is liable to pay \$70,551.99 to the applicants by way of damages loss of rent pursuant to s 106(5) when read with s 232(1)(a) of the SSM Act.

## **The costs of the proceedings**

88 My preliminary view is that r 38 of the Civil and Administrative Tribunal Rules 2014 (NSW) is applicable to the proceedings, and in view of the substantial success of the applicants the respondent should pay their costs of the proceedings.

89 I will deal with the costs of the proceedings as follows:

- (1) if the parties are in agreement as to the costs of the proceedings, then they shall provide proposed consent orders to the Tribunal within 14 days of the date of the orders in these reasons for decision;
- (2) if the parties are not in agreement as to the costs of the proceedings, then:
  - (a) if any party seeks a costs order, the applicant for costs (the costs applicant) must file and serve a costs application, submissions which shall be limited to five pages, and any evidence in support by way of affidavit, within 14 days of the date of the orders in these reasons for decision;
  - (b) the respondent to the costs application is to file and serve any submissions which shall be limited to five pages, and any evidence in opposition by way of affidavit, within 14 days thereafter;
  - (c) the costs applicant is to file any submissions in reply limited to three pages within 14 days after receipt of the submissions and any evidence of the respondent to the costs application.

## **Orders**

90 I make the following orders:

- (1) the respondent is to carry out items 6 limited to the presence of mould on the outer wall of the second bedroom, and 7 when read with item 8, of the remedial works specified in [20] above by 24 May 2022 at no cost to the applicants conditional on the applicants providing reasonable access to lot 43;
- (2) conditional on the applicants providing reasonable access to lot 43, leave is given to the applicants to renew the proceedings under cl 8(1) of Sch 4 of the NCAT Act, if the respondent fails to comply with order (1) above;
- (3) the respondent is to pay \$70,551.99 to the applicants by 24 May 2022;
- (4) the proceedings are otherwise dismissed;
- (5) if the parties are in agreement as to the costs of the proceedings, then they shall provide proposed consent orders to the Tribunal within 14 days of the date of the orders in these reasons for decision;

- (6) if the parties are not in agreement as to the costs of the proceedings, then:
- (a) if any party seeks a costs order, the applicant for costs (the costs applicant) must file and serve a costs application, submissions which shall be limited to five pages, and any evidence in support by way of affidavit, within 14 days of the date of the orders in these reasons for decision;
  - (b) the respondent to the costs application is to file and serve any submissions which shall be limited to five pages, and any evidence in opposition by way of affidavit, within 14 days thereafter;
  - (c) the costs applicant is to file any submissions in reply limited to three pages within 14 days after receipt of the submissions and any evidence of the respondent to the costs application.

\*\*\*\*\*



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.