Civil and Administrative Tribunal

New South Wales

Case Name:	The Owners - SP 80881 v Gregg
Medium Neutral Citation:	[2022] NSWCATAP 172
Hearing Date(s):	9 May 2022
Date of Orders:	25 May 2022
Decision Date:	25 May 2022
Jurisdiction:	Appeal Panel
Before:	R C Titterton OAM, Senior Member D Goldstein, Senior Member
Decision:	1. To the extent that the appeal raises a question of law, the appeal is dismissed. 2. To the extent that the appeal raises any other error, leave to appeal is refused. 3. Each party is to file any submissions on costs within 14 days. 4. The other party may respond within a further 14 days.
Catchwords:	APPEALS – errors other than errors of law – no question of principle
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) – s 80; cl 12 of Sch 4 Strata Schemes Management Act 2015 (NSW) – s 106
Cases Cited:	Beisner v Bratt [2004] NSWCA 22 Bobolas v Waverley Council [2016] NSWCA 139 Collins v Urban [2014] NSWCATAP 17 Malouf v Malouf [2006] NSWCA 83 Overseas Tankship UK Limited v Mort's Dock &

	Engineering Co Limited (The Wagon Mound [No 1]) [1961 AC 388 Pholi v Wearne [2014] NSWCATAP 78 Pollock v Hicks [2015] NSWCA 122 Prendergast v Western Murray Irrigation Ltd [2014] NSWCATAP 69 Ridis v Strata Plan 10308 [2005] NSWCA 246; 63 NSWLR 449 Seiwa Australian Pty Ltd v Owners Strata Plan 25042 [2006] NSWSC 1157 Shih v The Owners – Strata Plan No 87879 [2018] NSWCATAD 74 Shum v Owners Corporation SP30621 [2017] NSWCATCD 68 The Owners Strata Plan No 80412 v Vickery [2021] NSWCATAP 98 Vickery v The Owners - Strata Plan No 80412 [2020] NSWCA 284; 103 NSWLR 352 Westinghouse Electric & Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd [1912] AC 673 Wyong Shire Council v Shirt (1980) 146 CLR 40 ZDB v The University of Newcastle [2017] NSWCATAP 70
Category:	Principal judgment
Parties:	The Owners - SP 80881 (Appellant) Stephen Gregg (Respondent)
Representation:	Counsel: J P Knackstredt (Respondent) Solicitors: Bannermans Lawyers (Appellant) Sachs Gerace Lawyers (Respondent)
File Number(s):	2022/0038298
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Citation:	Not Applicable

Date of Decision:	12 January 2022
Before:	M Eftimiou, Member
File Number(s):	SC 21/33241

REASONS FOR DECISION

Summary

1 The appellant appeals from a decision of the Consumer and Commercial Division of the Tribunal (**Tribunal**) of 12 January 2022 in matter SC 21/33241 (**Decision**).

2 The Tribunal ordered the appellant to pay the respondent $33,250.00 by 11 February 2022.

3 The appellant did not do so. Instead, on 9 February 2022 it filed a Notice of Appeal and an application for a stay of the Decision. The application for the stay was dismissed on 23 February 2022.

4 For the following reasons, leave to appeal is refused, and the appeal otherwise dismissed.

Background

5 The background to the appeal sufficiently appears in paragraphs [10] to [15] of the Decision:

> 10. The [respondent] is the owner of lot 5 in Strata Plan 80881. He resided in the property with his family until March 2021.
>
> 11. On 19 August 2019 the [appellant] commenced remedial works within the lot and the surrounding common property. ("Works").
>
> 12. 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.
>
> 13. The condition of the courtyard of the lot has prevented the lot from being rented by the [respondent].
>
> 14. On 24 May 2021 the [respondent] presented a motion to the Annual General Meeting of the [appellant] seeking compensation for his loss of rent. That motion was rejected.
>
> 15. The [respondent] makes submissions that in breach of section 106(1) of the SSMA, the [appellant] has failed to properly repair and maintain the areas

> of common property affected by the Works. As a consequence of the breach, the [respondent] 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."

Grounds of Appeal

6 There are in effect five grounds of appeal, which are amplified in lengthy written submissions.

7 In summary, the first ground of appeal is that the Tribunal erred in law by making orders pursuant to s 106(5) of the *Strata Schemes Management Act 2015* (NSW) (**SSMA**) when it had no jurisdiction to do so, "as the loss suffered was not reasonably foreseeable".

8 The second ground of appeal is that the Tribunal erred in finding that the respondent had mitigated his loss.

9 The third ground of appeal is that the Tribunal erred in law as the Decision was against the weight of the evidence.

10 As part of this ground of appeal, the appellant notes that it was not legally represented at the hearing whereas the respondent was. The appellant submits that the Tribunal should have been aware that the appellant was at a "strong disadvantage" in the proceedings and taken one of a number of steps described below at [65]. For convenience, we will refer to this as the fourth ground of appeal.

11 The fifth ground of appeal, agitated in the appellant's submissions, is that the Decision was not fair and equitable, in that it was not fair for the appellant to be required to pay damages to the respondent for loss of rent, when "there was no actual rent being lost", and the respondent had not incurred any expenses in relation to the rental of his property.

Reply to Appeal

12 In summary, in relation to the first ground of appeal, the respondent submits that the ground does not invoke an error of law, that the Tribunal did not err in

making orders pursuant to s 106(5) of the SSMA and that the Tribunal had jurisdiction to do so.

13 In relation to the second ground of appeal, the respondent submits that this ground does not invoke an error of law and requires a grant of leave. The respondent also submits that the appellant seeks to rely on arguments and evidence which were not before the Tribunal.

14 In relation to the third ground of appeal, the respondent submits that the evidence that was before the Tribunal was considered and given appropriate weight.

15 To the extent that the appeal raises errors for which leave is required, the respondent opposes leave being granted.

Nature of an appeal

16 Section 80 of the Civil and Administrative Tribunal Act 2013 (NSW) (**NCAT Act**) sets out the basis upon which appeals from decisions of the Tribunal may be brought. That section states that an appeal may be made as of right on any question of law or with leave of the Appeal Panel on any other grounds (s 80(2)(b)).

A question of law

17 In Prendergast v Western Murray Irrigation Ltd [2014] NSWCATAP 69, without listing exhaustively possible questions of law, the Appeal Panel considered the requirements for establishing an error of law giving rise to an appeal as of right.

18 In Prendergast the Appeal Panel also stated at [12] that, in circumstances where an appellant is not legally represented, it is appropriate for the Tribunal to approach the issue by looking at the grounds of appeal generally, and to determine whether a question of law has in fact been raised (subject to any considerations of procedural fairness to the respondent that might arise).

Leave to appeal

19 Clause 12 of Sch 4 of the NCAT Act provides that, in an appeal from a decision of the Consumer and Commercial Division of the Tribunal, an Appeal Panel may grant leave to appeal only if satisfied that the appellant may have suffered a substantial miscarriage of justice because:

(1) the decision of the Tribunal under appeal was not fair and equitable; or

(2) the decision of the Tribunal under appeal was against the weight of evidence; or

(3) significant new evidence has arisen (being evidence that was not reasonably available at the time the proceedings under appeal were being dealt with).

20 The principles to be applied by an Appeal Panel in determining whether or not leave to appeal should be granted are well settled. In Collins v Urban [2014] NSWCATAP 17 the Appeal Panel conducted a review of the relevant cases at [65]-[79] and concluded at [84](2) that:

> Ordinarily it is appropriate to grant leave to appeal only in matters that involve:
>
> (a) issues of principle;
>
> (b) questions of public importance or matters of administration or policy which might have general application; or
>
> (c) an injustice which is reasonably clear, in the sense of going beyond merely what is arguable, or an error that is plain and readily apparent which is central to the Tribunal's decision and not merely peripheral, so that it would be unjust to allow the finding to stand;
>
> (d) a factual error that was unreasonably arrived at and clearly mistaken; or
>
> (e) the Tribunal having gone about the fact finding process in such an unorthodox manner or in such a way that it was likely to produce an unfair result so that it would be in the interests of justice for it to be reviewed.

21 Even if an appellant establishes that they may have suffered a substantial miscarriage of justice in the sense explained above, the Appeal Panel retains a discretion whether to grant leave under s 80(2) of the Act. An appellant must demonstrate something more than that the Tribunal was arguably wrong: Pholi v Wearne [2014] NSWCATAP 78 at [32].

First ground of appeal

Appellant's submissions

22 The first ground of appeal is that the Tribunal erred in law by making orders pursuant to s 106(5) of the SSMA when it had no jurisdiction to do so "as the loss suffered was not reasonably foreseeable".

23 The appellant submits that pursuant to ss 106(1), (5) and (6) of the SSMA damages can only be claimed for "'costs/losses' that have actually been incurred". It submits that:

> 6. Section 106(5) specifies that "damages" may be recovered in respect of any "loss suffered by the lot owner". This section confirms out that damages may be recovered for losses that have previously been incurred, rather than losses that may be incurred. This supports the position that loss may only be claimed by a lot owner in circumstances where actual damage has been suffered, rather than damage that may be suffered in the future.
>
> 7. This position is affirmed by section 105(6) that sets out that 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". This section implies that an owner has not suffered damage until they become aware of their loss.

24 The appellant submits that the Tribunal acknowledged that the respondent and his family resided in the premises until they moved out in March 2021 due to their sudden allegation that the unit was uninhabitable: Decision at [10], [42] and [44], and that the respondent was claiming loss of rent from immediately after he moved out: Decision at [36].

25 The appellant notes that in *Shum v Owners Corporation SP30621* [2017] NSWCATCD 68 at [60], the Tribunal found that the foreseeability of the loss is to be assessed at the date of the breach of statutory duty, namely from the time that the lot owner became aware of the defect until such time that defect is rectified: *Overseas Tankship UK Limited v Mort's Dock & Engineering Co Limited (The Wagon Mound [No 1])* [1961 AC 388. The appellant submits that this test is satisfied provided that the risk of damage occurring is not so slight as to be dismissed as a mere far-fetched or fanciful possibility: *Wyong Shire Council v Shirt* (1980) 146 CLR 40.

26 Thus the appellant submits that the alleged loss suffered by the respondent was “in no way ‘reasonably foreseeable’” as required pursuant to s 106(5) of the SSMA as the respondent:

- had never been entitled to the payment of rent for his property;
- did not incur any loss associated with the use of the property as a rental; and
- did not provide any evidence to substantiate his allegations of losses incurred, and the Tribunal does not have the power to award damages under s 106(5) of the SSMA for theoretical losses.

27 The appellant contrasts this with the position in *Shum* where the Tribunal found that the economic loss that had been suffered and incurred by the applicant in the form of lost rent was a "reasonably foreseeable loss". It submits that in *Shum*, there was also a failure of the owners corporation to repair and maintain

common property and to prevent water penetration to the lot owner's property. The water penetration occurred in an area which affected the habitability of the property.

28 The appellant emphasises that in the facts of the current appeal there was water ingress to parts of the common property affecting a courtyard, and the requirement to excavate a hole in the courtyard was to investigate the cause of the ingress.

29 Further, the appellant submits that in *Shum*, the property was used as a rental property, whereas the respondent and his family resided in his property until March 2021, in circumstances where there was no evidence to suggest that the property had ever been used as a rental property.

30 In any event, even if the Appeal Panel determines that the respondent's actions were reasonable, the appellant submits that the only losses that could be considered to be "reasonably foreseeable" losses suffered by the respondent would be losses suffered as a result of moving out of his house such as the costs of alternate accommodation, removalist or storage costs and other incidentals associated with moving out of his home.

31 The appellant submits that no evidence of such losses was provided, the only evidence being evidence from a real estate agent that the property would be "unleasable" due to a "large hole". The appellant submits that, "[p]utting aside the fact that such evidence is absurd", the evidence is irrelevant, as the respondent was not a landlord when he moved out of the premises and claimed a loss of rent.

32 It is submitted that the appellant, "being self-represented"[1] did not exercise its rights to cross-examine the agent, including as to whether the property could be let with part of the property being excluded from the leased premises.

33 Thus the appellant submits that the respondent's loss of rent is a "far-fetched or fanciful possibility", and relates to his inability to use his property for a

[1] The appellant, being a body corporate, could not be self-represented. The appellant was in fact represented at the Tribunal hearing by one of the members of the strata committee, Mr O'Regan. What the appellant means is that it was not legally represented at the Tribunal hearing.

commercial purpose, which is to obtain rent from it, as opposed to any actual loss he has suffered.

Respondent's submissions

34 The respondent submits that the only real question arising in relation to the first ground of appeal is whether or not the loss suffered by the respondent was reasonably foreseeable.

35 To summarise the detailed written submissions, the respondent submits:

(1) to the extent that the appellant appears to allege that the respondent did not suffer actual loss, the appellant has proceeded on a mistaken assumption that the respondent needed to have rented out his lot prior to bringing the application to the Tribunal. Such an approach places a "gloss" on the statutory words ("reasonably foreseeable") that does not exist;

(2) the respondent's lot is his to deal with as he pleases. That includes living in the lot and exercising, at any time, the right to generate income by renting out the lot. It cannot be said to be not reasonably foreseeable that a lot owner might, at any time, seek to rent out their lot to generate income;

(3) the respondent lived in the lot until March 2021. In March 2021, the respondent chose, as was his right, to move out of his lot and seek to rent it out;

(4) the appellant was on notice from 30 October 2020 that the respondent was considering renting out his lot, and the respondent did nothing to address what turned out to be a fatal impediment to obtaining a rental return, namely the gaping hole in the Respondent's courtyard, between October 2020 and the hearing in the Tribunal below;

(5) the respondent was entitled to seek damages for any reasonably foreseeable loss arising from the appellant's contravention of s 106(1) SSMA: *Vickery v The Owners - Strata Plan No 80412* [2020] NSWCA 284; 103 NSWLR 352 at [98] (Leeming JA). Damages are available as of right and can take the form of compensating economic loss, including lost rent: *Vickery* at [99] (Leeming JA), [161] (White JA);

(6) the respondent mentioned the idea of moving out at the annual general meeting of the appellant of 1 September 2020;

(7) the appellant was informed "on at least three occasions spanning a number of months" that the respondent was contemplating renting out his lot;

(8) the loss of rent as a result of the "crater" in the respondent's courtyard was not "far-fetched or fanciful": *Wyong Shire Council v Shirt* (1980) 146 CLR 40 per Mason J at 47.

36 In summary, the respondent submits that, but for the appellant's breach of duty, he could have rented out his lot, and that he was deprived of this opportunity entirely due to the respondent's breach.

Consideration

37 The starting point is s 106 of the SSMA which provides:

> **106 Duty of owners corporation to maintain and repair property**
>
> (1) An owners corporation for a strata scheme must properly maintain and keep in a state of good and serviceable repair the common property and any personal property vested in the owners corporation.
>
> (2) An owners corporation must renew or replace any fixtures or fittings comprised in the common property and any personal property vested in the owners corporation.
>
> (3) 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.

38 To the extent that the appellant is submitting that the Tribunal had no power to award damages, that submission must be rejected. And to the extent that the appellant submits that the losses suffered have not been incurred that submission too should be rejected. Both these submissions are misconceived

as the Tribunal had power to award damages for breaches of a statutory duty: SSMA, s 106(5); *Vickery* and losses were in fact incurred, namely lost rent.

39 It is put by the appellant that lost rent was not reasonably foreseeable. However, in *Wyong Shire Council v Shirt* (1980) 146 CLR 40 Mason J stated:

> 13. A risk of injury which is quite unlikely to occur, such as that which happened in Bolton v. Stone (1951) AC 850 , may nevertheless be plainly foreseeable. Consequently, when we speak of a risk of injury as being "foreseeable" we are not making any statement as to the probability or improbability of its occurrence, save that we are implicitly asserting that the risk is not one that is far-fetched or fanciful. Although it is true to say that in many cases the greater the degree of probability of the occurrence of the risk the more readily it will be perceived to be a risk, it certainly does not follow that a risk which is unlikely to occur is not foreseeable.
>
> 14. In deciding whether there has been a breach of the duty of care the tribunal of fact must first ask itself whether a reasonable man in the defendant's position would have foreseen that his conduct involved a risk of injury to the plaintiff or to a class of persons including the plaintiff. If the answer be in the affirmative, it is then for the tribunal of fact to determine what a reasonable man would do by way of response to the risk. The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have. It is only when these matters are balanced out that the tribunal of fact can confidently assert what is the standard of response to be ascribed to the reasonable man placed in the defendant's position.
>
> 15. The considerations to which I have referred indicate that a risk of injury which is remote in the sense that it is extremely unlikely to occur may nevertheless constitute a foreseeable risk. A risk which is not far-fetched or fanciful is real and therefore foreseeable. …

40 The question therefore is whether the appellant could have foreseen that its conduct, that is its breach in failing to maintain and repair the premises, involved a risk of injury or risk to the respondent.

41 The Tribunal found that the respondent had been in “constant contact” with the appellant to have the building works carried out, thus making it clear that the respondent was likely to suffer monetary loss due to the delay in carrying out works (Decision at [42]). Evidence of that contact can be seen in:

- a statement made by the respondent at the annual general meeting of the appellant held on 1 September 2020;
- an email sent by the respondent to the appellant dated 20 October 2020 and all of the lot owners stated 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";

- a statement made by the respondent with members of the respondent's strata committee on 15 November 2020 that his partner would be moving out in early 2021 "*with or without him";*
- an email sent by the respondent to the appellant dated 21 December 2020 states: "*The behaviours and actions of the Executive Committee has caused myself and my family excessive undue stress. … 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 Given these matters, we consider that the Tribunal did not err in concluding at [43] that it was reasonably foreseeable to appellant that if the works were not completed, the respondent and his family would move out of the premises and there would be a loss of rental income that would flow.

Second ground of appeal

Appellant's submissions

43 The second ground of appeal is that the Tribunal erred in finding that the respondent had mitigated his loss. In circumstances where the damages claimed are to be for loss of rent, the appellant submits that the question arises whether the respondent took all reasonable steps required to mitigate his loss, including whether he was willing to accept a lower amount for rent for his property and whether he pursued all legal remedies available to him.

44 The appellant relies on *Shih v The Owners – Strata Plan No 87879* [2018] NSWCATAD 74 which considered a loss of rent claim against an owners corporation for its failure to maintain and repair common property. The appellant submits that the Tribunal accepted the failure of the lot owner to accept a reduced weekly rental for their property constituted a failure of the lot owner to take reasonable steps to mitigate their loss.

45 The appellant also notes that in *Shih* the Tribunal found the lot owner did not provide any expert evidence in the form of an expert building report to confirm that the property was affected by any structural or safety issues.[2]

[2] An appeal to the Appeal Panel was dismissed: Shih v The Owners – Strata Plan No 87879 [2019] NSWCATAP 263.

46 The appellant submits that the respondent has not provided any evidence to support his assertions that his lot is uninhabitable by way of any structural or safety issues.

47 The appellant then refers to the evidence of Mark Casemore of NSW Insurance Valuations Pty Ltd t/as Clisdells dated 14 March 2022 (**Clisdells' Report**). We will consider that evidence below if we decide to allow it.

48 The appellant then submits that:

(1) as there was no evidence provided by the respondent of any actual loss suffered, such as the costs of alternative accommodation, there could not possibly be any mitigation;

(2) in order to mitigate his loss the respondent would have to explain:

(a) why he did not arrange to have the hole sealed off temporarily;

(b) why he did not lock the door to the courtyard; or

(c) why the townhouse could not be enjoyed by his family or another tenant with the use of only one of the two courtyards;

(3) the Tribunal failed to take this into consideration;

(4) the Tribunal's findings at [49] that the respondent had "complained formally and at length" to the appellant and warned the appellant that he would need to move out if the repairs were not carried out cannot be considered as the taking of "all reasonable steps" to mitigate loss;

(5) the respondent could have:

(a) sealed off the hole in the backyard;

(b) locked the door to the courtyard; or

(c) rented the property to someone else at a reduced rent.

Respondent's submissions

49 The respondent says that the appellant's approach is misconceived as:

(1) the appellant relies on its own wrongdoing as a defence by submitting that the respondent failed to mitigate his loss because he did not seek an order that the appellant repair the hole in his courtyard;

(2) the respondent clearly took steps to urge the appellant to comply with its statutory duty in the period where he was incurring loss as:

(a) the respondent applied for mediation in April 2021 with NSW Fair Trading to seek to have the appellant undertake the necessary works: Decision at [44];

(b) the respondent also proposed, in May 2021, a resolution that the appellant resolve to appoint a contractor to carry out the remediation work: Decision at [48].

(3) the appellant's submission that the respondent should have brought an application under s 106(1) SSMA to compel the repair work be done is misconceived as the duty to maintain and repair common property under s 106(1) is a strict one: *Seiwa Australian Pty Ltd v Owners Strata Plan 25042* [2006] NSWSC 1157 at [3]-[5] (Brereton J); *The Owners Strata Plan No 80412 v Vickery* [2021] NSWCATAP 98 at [36]; *Ridis v Strata Plan 10308* [2005] NSWCA 246; 63 NSWLR 449 at [5] (Hodgson JA), [49]-[58] (Tobias JA)

50 The respondent's submissions then go on to address a number of issues, which in summary are:

(1) the appellant's submission that the respondent did not provide expert evidence that his lot was uninhabitable because of safety or structure issues was misconceived given:

(a) it is a matter of common sense that a large hole left uncovered represents a safety risk; and

(b) the Tribunal's unchallenged findings at [12] that:

> 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.

(2) the respondent did in fact provide evidence on the issue of safety: see the evidence of Ms Delaney (a real estate agent), referred to in the Decision at [36], in which she said:

> 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.

(3) in any event, the ultimate issue was the rentability of the lot, and, as Ms Delaney's unchallenged evidence established, the rental value of the lot with a crater in the courtyard is $0: Decision at [36]. Therefore, the suggestion that the respondent could have reduced the asking rent for his lot is, in light of that evidence, unsustainable.

51 The respondent submits that the Decision discloses ample attempts by the respondent to mitigate his loss, which steps satisfy the test enunciated in *Westinghouse Electric & Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673 at 689 that:

> The rationale underlying mitigation is to encourage plaintiffs to be self-reliant and to discourage waste. While it is sometimes referred to as a duty on the plaintiff to mitigate, this is strictly speaking inaccurate as a plaintiff's failure to mitigate does not expose the plaintiff to any legal action, it merely reduces the damages payable to the plaintiff for those losses which the plaintiff could have

> avoided. The standard expected of the plaintiff "is not a high one, since the defendant is a wrongdoer". Thus, the plaintiff must act reasonably and take reasonable steps to reduce the loss suffered once the plaintiff is aware of the breach. Reasonableness does not require that a plaintiff must adopt the most effective mitigating course of conduct at an excessive cost.

52 Finally, the respondent then addresses the Clisdells Report sought to be relied on at the appeal. The respondent submits that the appellant should not be permitted to rely on the report as:

(1) the report was not before the Tribunal below; a party is bound by the case it elected to run in the proceedings below and cannot re-run its case by adding fresh issues on appeal: *Coulton v Holcombe* at 7-9 (Gibbs CJ, Wilson, Brennan and Dawson JJ);

(2) there is no good reason why this evidence was not obtained in time for the hearing below, and it is clear that it could have been;

(3) the appellant was in receipt of the respondent's evidence on loss for over a month before filing a defence;

(4) even if the report is admitted:

(a) it would not aid the argument that the respondent failed to mitigate his loss, as the Tribunal found that the respondent's lot was uninhabitable: Decision at [79]. Therefore, questions of accepting a lower rent are meaningless;

(b) its reasoning is unpersuasive.

Consideration

53 The Tribunal found that the premises were uninhabitable due to the ongoing building works.

54 In making that finding, there was evidence before the Tribunal that was expressly referred to, being the report of Ms Delaney dated 21 September 2021)[3]. Ms Delaney said that "the property is currently unleasable with the large hole that currently sits in the courtyard of the property", and that "[o]ur advice is that the property is not sage and therefore not rentable as it currently stands".

55 There was also other evidence before the Tribunal, not challenged, but not referred to in the Decision, which would have allowed the Tribunal to reach this conclusion. That is the evidence of James Phlibossian (who referred to the "risk to the tenants"), Jasmine Quirk (who referred to the "disarray and safety of

[3] Incorrectly referred to at [36] as an affidavit.

the courtyard", and to the premises being "unliveable and unsafe"); Eric Guiotto (who referred to the "current dangerous condition"); Ursula Delaney (who referred to the premises being "unleasable") and Brylee Matthews (who said that "due to the current state of the courtyard we would not be able to lease the property out due to the safety of the tenants").

56 While this evidence was not expressly referred to by the Tribunal, as Allsop P in *Mitchell v Cullingral Pty Ltd* [2012] NSWCA 389 stated at [2]:

> [A] judge may, in dealing with large bodies of evidence, be forced to economise in expressions and approach in order to be coherent in resolving the overall controversy. The need for coherent and tolerably workable reasons sometimes requires a truncation of reference and expression. Judgement writing should not become a process that is oppressive and produces unnecessary prolixity. Not every piece of evidence must be referred to. That said, central controversies put up for resolution by the parties must be dealt with. The competing evidence directed or relevant to such controversies must be analysed or resolved …
>
> (Emphasis added)

57 We consider that the Tribunal, in finding that the property was uninhabitable, was implicitly referring to the safety of the property in the context of the building works. Given that the property was uninhabitable, in the sense of being unsafe, we consider that the respondent took all available steps available to him to mitigate his loss and we agree with the conclusions of the Tribunal.

Third and fifth grounds of appeal

58 These grounds can be dealt with together, as they both require leave.

59 The third ground of appeal is that the Tribunal erred in law as the Decision was made against the weight of the evidence. The appellant submits that the Tribunal relied on the respondent's evidence and failed to give appropriate weight to the appellant's evidence.

60 The appellant claims that the Tribunal erred by apportioning "excessive weight" to the respondent's evidence. The appellant submits that:

(1) "[i]f the property was uninhabitable, why [did] Mr Gregg and his family continued [sic – continue] to reside in the property for a further 1 year and 4 months until they vacated";

(2) the location of the courtyard did not affect the amenity of the property; and

(3) more weight should have been given to the following facts and evidence:

(a) that the respondent, together with his partner and 3 children, were able to reside at the property for a period of 1 year and 4 months despite without any harm or accident befalling their 3 children;

(b) the respondent did not provide evidence to suggest that the internal area of lot 5 was affected by any of the issues referred to in s 52 of the *Residential Tenancies Act 2010* (NSW); and

(c) in all of the rental appraisals, in particular the Rental Appraisal of Ursula Delaney dated 18 August 2021, the sole reason provided by the property managers as to why the property could not be let out was due to the state of the courtyard with the hole. No reference has been made in regards to an internal defect of the lot which affects its habitability.

61 As noted above, the fifth ground of appeal is that the Decision was not fair and equitable, in that it was not fair for the appellant to be required to pay damages to the respondent for loss of rent, when "there was no actual rent being lost", and the respondent had not incurred any expenses in relation to the rental of his property.

62 We accept the respondent's submissions that the third and fifth grounds of appeal are simply restatements of the first and second grounds of appeal, and raise errors other than an error of law.

63 We are not satisfied that either ground involves an issue of principle, a question of public importance, an injustice which is reasonably clear or that the Tribunal has gone about its fact finding process in such an unorthodox manner that it is likely to have produced an unfair result.

Fourth ground of appeal

Appellant's submissions

64 The appellant submits that:

(1) in the interests of natural justice, it is unfair for one party to be legally represented, and one party to be self-represented;

(2) the disadvantages of "self-representation" are that the appellant is less able to:

(a) assess the merits of their case objectively, or to enforce their rights;

(b) adduce relevant evidence and provide cogent argument;

(c) comply with accepted procedure without direction; and

(d) force opposing counsel to act contrary to their own clients best interests;

(3) knowing that the appellant was not represented and that the respondent was represented by a law firm specialising in strata law, the Tribunal should have been aware that the owners corporation was at a strong disadvantage in the proceedings;

(4) the Tribunal could have:

(a) revoked leave granted to Mr Gregg for legal representation;

(b) advised the appellant to obtain legal advice and reconvene at a future point in time; and/or

(c) scrutinised the evidence more carefully and provided guidance and assistance to the owners corporation which she failed to do.

Respondent's submissions

65 The respondent submits:

(1) the appellant was not precluded from seeking legal advice. The Tribunal specifically asked about the appellant's decision not to seek legal representation; and no objection was taken in the proceeding below by the appellant to presenting its case without legal representation;

(2) the appellant was shown due procedural fairness by the Tribunal in presenting its case; see:

(a) T lines 753-754 where the Tribunal afforded the appellant the opportunity to cross-examine the respondent. (We note at lines 174 to 195 the Tribunal discussed with Mr O'Regan, who appeared for the appellant, whether he wished to cross examine the respondent's witnesses and to let her know whether he wished to ask questions. Mr O'Regan responded "That's understood. Thank you");

(b) T lines 2006-2008; where the Tribunal ensured that the parties had equal time to make submissions, appellant's Appeal Bundle page 141);

(c) T lines 2250-2251; where the Tribunal ensured that the appellant was not deprived of the opportunity to put all of its submissions to the Tribunal;

(3) the Tribunal stated in its costs decision of 25 February 2022 (**Costs Decision**):

> … the respondents had been served with a notice of hearing and were aware that leave had been granted to the applicant to be legally represented and if the applicant was successful in the claim that he be entitled may to his legal costs. …

> The respondent did not seek legal advice even having regard to the nature and complexity of the legal proceedings and the amount of damages claimed by the applicant."

(4) the appellant made a conscious decision not to seek legal advice or representation. The consequences of this were obvious, and made clear to the appellant;

(5) the Tribunal took pains to ensure that the appellant was shown procedural fairness in its state as a non-legally represented litigant. The Tribunal was not bound to provide legal advice to the appellant, and it would have been unfair to the respondent had it done so: *Beisner v Bratt* [2004] NSWCA 22 at [4] (Hodgson JA, Ipp JA agreeing); *Malouf v Malouf* [2006] NSWCA 83 at [94] (Mason P, McColl and Bryson JJA agreeing);

(6) no unfairness or lack of equitable treatment is made out;

(7) the time to raise as an issue the appellant's lack of legal representation, has come and gone. The opportunity was present at the time of the hearing below to raise the issues of prejudice which are now claimed to have arisen as a result of being unrepresented and to seek an adjournment to obtain legal representation: *Coulton v Holcombe* [1986] HCA 33 at [7].

Consideration

66 We commence our consideration of this ground of appeal by setting out the relevant legal principles.

67 In *Bobolas v Waverley Council* [2016] NSWCA 139 the Court of Appeal stated:

> 246. There is no “special” duty of care owed to unrepresented litigants. Rather, to the extent there is an obligation, sometimes described as a “duty”, but not a “duty of care” it is framed in terms of the right to a fair trial.
>
> 247. Courts have an overriding duty to ensure that a trial is fair, which entails ensuring that the trial is conducted fairly and in accordance with law. In the context of an unrepresented litigant, the duty requires that a person does not suffer a disadvantage from exercising the recognised right of a litigant to be self-represented. However, the court’s duty is not solely to the unrepresented litigant. Rather, the obligation is to ensure a fair trial for all parties. While a trial judge has an obligation to take appropriate steps to ensure that the unrepresented litigant has sufficient information about the practice and procedure of the court, so far as is reasonably practicable for the purpose of ensuring a fair trial, the application of that principle will vary depending upon the circumstances of the case. In particular, the duty of a trial judge does not extend to advising the accused as to how his or her rights should be exercised, nor to giving judicial advice to, or conducting the case on behalf of, the unrepresented litigant. The judge must remain at all times the impartial adjudicator of the matter, measured against the touchstone of fairness.’

68 In *ZDB v The University of Newcastle* [2017] NSWCATAP 70 at [107] the Appeal Panel observed that principles concerning the assistance a Court, or

tribunal, is required to give a self-represented litigant were considered by the Court of Appeal in *Pollock v Hicks* [2015] NSWCA 122 at [91] and stated:

> "… In Bauskis v Liew [2013] NSWCA 297 at [67]-[70] (Gleeson JA; Beazley P and Barrett JA agreeing), the following propositions which emerge from those authorities were identified.
>
> > First, the Court's obligation in the case of a self-represented litigant is to give sufficient information as to the practice and procedure of the Court to ensure that there is a fair trial to both parties. The application of this principle will vary depending upon the circumstances of the case: see *Jae Kyung Lee v Bob Chae-Sang Cha* [2008] NSWCA 13 per Basten JA at [48]; *Abram v Bank of New Zealand* (1996) ATPR 41-507, 43,341, 43,347; *Microsoft Corporation v Ezy Loans Pty Ltd* [2004] FCA 1135; (2004) 63 IPR 54; Pezos v Police [2005] SASC 500; (2005) 94 SASR 154.
> >
> > Secondly, the Court's duty is not solely to the unrepresented litigant. The obligation is to ensure a fair trial for all parties. This is why the duty is usually stated in terms that require that the impartial function of the judge is preserved, whilst also requiring the judge to intervene where necessary to ensure the trial is fair and just: see *Tomasevic v Travaglini* [2007] VSC 337; (2007) 17 VR 100 at [95]; *Barghouthi v Transfield Pty Ltd* [2002] FCA 666; (2002) 122 FCR 19 at 23; *NAGA v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 944 at [11]; *Nagy v Ryan* [2003] SASC 37 at [52]-[53].
> >
> > Thirdly, the duty of a trial judge to assist an unrepresented litigant does not extend to advising the litigant as to how his or her rights should be exercised. That is, it is not the function of the court to give judicial advice to, or conduct the case on behalf of, the unrepresented litigant: see *Bhagwanani v Martin* [1999] SASC 406; (1999) 2004 LSJS 449; *Clark v State of New South Wales (No 2)* [2006] NSWSC 914.
> >
> > Fourthly, the trial judge must remain at all times the impartial adjudicator of the matter, measured against the touchstone of fairness. In this regard, an unrepresented party is as much subject to the rules as any other litigant: *Rajski v Scitec Corporation Pty Ltd* (Court of Appeal, 16 June 1986, unreported) per Samuels JA at 14."
>
> (emphasis added)

69 It is self-evident that the Tribunal regularly conducts matters where either one or both parties are not legally represented. Indeed, in some Lists of the Consumer and Commercial Division of the Tribunal, it is extremely rare for a party to be legal represented (for instance the Residential Tenancies List). Nevertheless, the Tribunal in all its Divisions often has to conduct hearings where one party is legally represented and the other is not (for instance, this regularly occurs in the Occupational Division).

70 In our view, the Member constituting the Tribunal on this occasion conducted the hearing entirely appropriately. We do not consider, in circumstances where the Tribunal had previously granted both parties the right to be legally represented (Tribunal directions, 10 September 2021), and the appellant decided not to obtain the benefit of legal representation and advice, that the Tribunal erred in failing to revoke that leave, especially when there was no application to do so.

71 Nor do we consider that the Tribunal erred in not advising the appellant to adjourn the proceedings, not advising the appellant to obtain legal advice and reconvening later. As is well-recognised, the guiding principle for the NCAT Act, and the procedural rules of the Tribunal, in their application to proceedings in the Tribunal, is to facilitate the just, quick and cheap resolution of the real issues in the proceedings (NCAT Act, s 36(1)).

72 Finally, as the respondent correctly submits, the Tribunal was not bound to provide legal advice to the appellant, and it would have been unfair to the respondent had it done so: *Beisner v Bratt; Malouf v Malouf.*

Additional new evidence

73 We have left to last our consideration of whether additional evidence which was not before the Tribunal should be allowed to be relied on in the appeal.

74 The relevant rule is cl 12(1)(c) of Sch 4 of the NCAT Act which requires the Tribunal to consider if "significant new evidence has arisen (being evidence that was not reasonably available at the time the proceedings under appeal were dealt with)".

75 The meaning and effect of this clause was considered by the Appeal Panel in Al-Daouk v Mr Pine Pty Ltd t/as Furnco Bankstown [2015] NSWCATAP 111which stated:

> 24. … something more than a party's incapacity to procure evidence is necessary to satisfy the requirements of cl 12(1)(c).
>
> 25. Further, to grant leave simply on the basis of whether a party had been unsuccessful in their attempt to obtain evidence would allow any party who has a personal excuse for not providing evidence otherwise reasonably available an opportunity to seek leave to appeal any decision of the Tribunal. Such an outcome would not promote finalisation of the real issues in dispute in a just, quick and cheap manner, as an opposing party would be liable to face a

> successful appeal and a rehearing merely because of the personal circumstances of the person who failed to procure necessary evidence.
>
> 26. In our opinion the intent of cl 12 of Sch 4 of the NCAT Act is to impose additional limitations on a party's entitlement to seek leave to appeal under s 80(2) of the NCAT Act from a decision of the Consumer and Commercial Division.

76 The Appeal Panel concluded at [27] that the issue is whether, objectively, the evidence has arisen since the hearing and was "not reasonably available" at the time of the hearing.

77 As in Al-Daouk, there is no feature of the evidence sought to be relied on to suggest it could not have been obtained at an earlier time and therefore was not, in that sense, reasonably available.

78 We do not allow any new evidence on the appeal.

Conclusion

79 We conclude with two observations.

80 The first is that, as the Appeal Panel recently noted in *Mao v Li* [2022] NSWCATAP 101 at [41], an appeal to the Appeal Panel does not simply provide a losing party in the Tribunal below with the opportunity to run their case again: *Ryan v BKB Motor Vehicle Repairs Pty Ltd* [2017] NSWCATAP 39 at [10]. And, as the Tribunal's Guideline 1, Internal Appeals (which can be found on the Tribunal's website) relevantly states, "an appeal is not an opportunity to have a second go at a hearing".

81 It appears to the Appeal Panel that the appellant is simply attempting to conduct its case all over again.

82 The second observation is that the Appeal Panel stated in *Bartel v Ryan* [2018] NSWCATAP 231 at [25] that the High Court of Australia said in *Coulton v Holcombe* [1986] HCA 33 at [9] that it is elementary that a party is bound by the conduct of their case. Except in the most exceptional circumstances, it would be contrary to all principle to allow a party, after a case had been decided against them, to raise a new argument which, whether deliberately or by inadvertence, the party failed to put during the hearing when they had an opportunity to do so: see too *Palm Homes Pty Ltd v Kav's Constructions Pty Ltd* [2015] NSWCATAP 113 at [27].

83 The point is that, as the respondent asserts, with some justification, that the appellant is now raising arguments on appeal which were never put to the Tribunal.

Costs

Costs of the appeal

84 Rule 38A of the Civil and Administrative Tribunal Rules 2014 provides:

> 38A Costs in internal appeals
>
> (1) This rule applies to an internal appeal lodged on or after 1 January 2016 if the provisions that applied to the determination of costs in the proceedings of the Tribunal at first instance (the "first instance costs provisions") differed from those set out in section 60 of the Act because of the operation of -
>
> (a) enabling legislation, or
>
> (b) the Division Schedule for the Division of the Tribunal concerned, or
>
> (c) the procedural rules.
>
> (2) Despite section 60 of the Act, the Appeal Panel for an internal appeal to which this rule applies must apply the first instance costs provisions when deciding whether to award costs in relation to the internal appeal.

85 The “the first instance costs provisions” appear in r 38, namely:

> 38 Costs in Consumer and Commercial Division of the Tribunal
>
> (1) This rule applies to proceedings for the exercise of functions of the Tribunal that are allocated to the Consumer and Commercial Division of the Tribunal.
>
> (2) Despite section 60 of the Act, the Tribunal may award costs in proceedings to which this rule applies even in the absence of special circumstances warranting such an award if:
>
> (a) the amount claimed or in dispute in the proceedings is more than $10,000 but not more than $30,000 and the Tribunal has made an order under clause 10 (2) of Schedule 4 to the Act in relation to the proceedings, or
>
> (b) the amount claimed or in dispute in the proceedings is more than $30,000.

86 In other words, as the amount claimed or in dispute before the Tribunal was more than $30,000 costs “followed the event”. This rule must also be applied to the appeal.

87 As the appellant has been unsuccessful, we propose to order it to pay the respondent’s costs as agreed or as assessed. If either party seeks some other order, they may file submissions within 14 days, and the other party may reply within a further 14 days. We propose to consider those submissions on the

papers and without a hearing. If either party opposes that course, they should address that issue in their submissions.

88 Submissions are to be no more than five pages in length.

Costs of the Tribunal hearing

89 On 25 February 2022 the Tribunal published its Costs Decision. The Tribunal ordered the appellant to pay the respondent's costs on the ordinary basis until 26 November 2021 and on an indemnity basis thereafter.

90 As the appeal has been unsuccessful, there is no reason to reconsider the costs of the Tribunal hearing.

Orders

91 The Appeal Panel orders:

(1) To the extent that the appeal raises a question of law, the appeal is dismissed.

(2) To the extent that the appeal raises any other error, leave to appeal is refused.

(3) Each party is to file any submissions on costs within 14 days.

(4) The other party may respond within a further 14 days.

****

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