Civil and Administrative Tribunal

New South Wales

Case Name:	The Owners - Strata Plan No 19410 v King atf the Cascade Trust
Medium Neutral Citation:	[2022] NSWCATAP 326
Hearing Date(s):	26 May 2022
Date of Orders:	20 October 2022
Decision Date:	20 October 2022
Jurisdiction:	Appeal Panel
Before:	K Rosser, Principal Member P H Molony, Senior Member
Decision:	(1) Leave to appeal refused. (2) Appeal dismissed. (3) If the parties are able to agree on costs, they should file proposed consent order within 21 days of the date of the orders in these reasons for decision. (4) 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 2000 words, and any evidence in support by way of affidavit, within 21 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:	APPEAL – no question of law – leave to appeal – decision not against the weight of evidence – leave refused – appeal dismissed. LAND LAW - Strata title – 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 for damages for loss of rent – whether one concurrent cause a cause of loss
Legislation Cited:	Civil and Administrative Tribunal Act 2013 Civil and Administrative Tribunal Rules 2014 Strata Schemes Management Act 2015
Cases Cited:	CEO of Customs v AMI Toyota Ltd (2000) 102 FCR 578 Collins v Urban [2014] NSWCATAP 17 Craig v South Australia (1995) 184 CLR 163 Oikos Constructions Pty Ltd t/as Lars Fletcher Constructions [2020] NSWCA 358 Pholi v Wearne [2014] NSWCATAP 78 Prendergast v Western Murray Irrigation Ltd [2014] NSWCATAP 69 RBV Builders Pty Ltd v Chedra [2021] NSWCATAP 56 Ryan v BKB Motor Vehicle Repairs Pty Ltd [2017] NSWCATAP 39 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 - Expert Evidence
Category:	Principal judgment
Parties:	The Owners - Strata Plan No 19410 (Appellant) Robert King and Victoria King as trustees for the Cascade Trust (Respondent)
Representation:	Counsel: T Harris-Roxas (Appellant) J Mack (Respondents) Solicitors: Colin Biggers & Paisley (Appellant)

	Harris Freidman Lawyers (Respondents)
File Number(s):	2022-0053094
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Citation:	N/A
Date of Decision:	24 January 2022
Before:	G Blake AM SC, Principal Member
File Number(s):	SC 20/46971

REASONS FOR DECISION

Introduction

1 The Owners of Strata Plan 194190, a body corporate, (the appellant) has appealed against a decision made in the Consumer and Commercial Division (CCD) of the Tribunal on 24 January 2022 under the under the *Strata Schemes Management Act 2015* (NSW) (SSM Act) that it undertake specified repairs to prevent water ingress to the 2nd bedroom of lot 43 on the strata plan, and pay the lot holders, Robert King and Victoria King as trustees for the Cascade Trust (the respondents), damages for loss of rent. The appeal was filed within the time for making an appeal on 21 February 2022.

2 The proceedings before the CCD related to complaints about mould growth within lot 43, allegedly because of dampness and water ingress due to the appellant's failure to maintain and keep in good repair the common property. Parts of lot 43 are situated below the terrace and interior of lot 40.

3 Mould had resulted in tenants vacating lot 43 on 7 November 2020.

4 The orders made by the Tribunal on 24 January 2022 provided:

> "(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.

5 The Tribunal provided written reasons for decision. At paragraph [22] the Tribunal noted that:

> 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.

6 Only order 3, the money order, is challenged on appeal.

7 For the reasons set out below we have decided to dismiss the appeal.

The proceedings in the CCD

8 On 11 November 2020, Isobel King commenced proceedings SC 20/46971 against the appellant by filing a strata schemes application, with attachments, in which she sought an order under s 232 of the SSM Act settling a dispute with the appellant.

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 the parties to be legally represented. Time for those directions to be complied with was extended on 16 February 2022.

10 At paragraph [7] of its reasons the Tribunal explained that:

> "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."

11 At a directions hearing conducted on 16 March 2021 the Tribunal made a series of directions and notations. Those relevant for the purposes of this appeal are:

> "1. By Determination of member, on 24 March 2021 the hearing was adjourned to a date to be fixed by the Registrar.
>
> 2. By 31 March 2021, the Respondent is to obtain from Landlay Consulting Group (LCG) its recommendations as to a subcontractor to perform the agreed scope of remedial works.
>
> 3. By 5 April 2021, the Applicant is to inform the Respondent when it, and those engaged by it to carry out the agreed scope of remedial works, can have access to the Applicant's premises for the purposes of carrying out the agreed scope of remedial works.
>
> 4. By 7 April 2021, the Respondent is to make a determination as to the subcontractor to be appointed by it to carry out the agreed scope of remedial works and provide instructions to LCG to engage that subcontractor to carry out the agreed scope of remedial works.
>
> 5. By 23 April 2021, the Respondent to ensure that LCG has engaged the subcontractor to carry out the agreed scope of remedial works.
>
> 6. The Tribunal notes that the agreed scope of remedial works is expected to be completed by 11 June 2021.
>
> 7. The Respondent shall provide to the Applicant and the Tribunal, either in person or by post, a copy of all documents (see note below) relating to the Applicant's claim for past and future loss of rent, on which the Respondent intends to rely at the hearing, by 9 July 2021.
>
> 8. The Applicant shall provide to the Respondent and the Tribunal, either in person or by post, a copy of all documents (see note below) in reply to the

documents referred to in order 7, on which the Applicant intends to rely at the hearing, by 23 July 2021.

…

The Tribunal notes that:

1. The proceedings concern a claim by the Applicant for relief pursuant to section 232 of the Strata Schemes Management Act for remediation of water ingress into the Applicant's unit and loss of past and future rent.

2. On 12 March 2021, the Respondent engaged new solicitors.

3. On 16 March 2021, a scope of remedial works was received from 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.

4. By consent, the hearing of these proceedings on 24 March 2021 was adjourned so that the proposed remedial works can be carried out."

12 The scope of remedial works from Landlay Consulting Group was prepared by Daniel Green and is referred to throughout the Tribunal's decision as "the Green Report." From now on, we shall refer to it as the Green Report. The parties agree that, unfortunately, the remediation proposed in the Green Report proved impractical. This was so because it required the fitting of false ceilings to lot 43, which would result in the ceiling beings below minimum height, and below upper window and door frames and architraves.

13 The application was next listed for hearing on 9 August 2021. On 3 August 2021 the Tribunal considered an application for adjournment from the respondents (the applicants below) and made the following orders which are self-explanatory:

> "The Tribunal notes that the applicant seeks an adjournment of the hearing listed on 9 August 2021 and the listing of a directions hearing on the same date on the basis that the [applicant] " wishes to discuss a potential amended scope of remedial works with the respondent and the parties will not be in a position to agree any such amended scope and complete the works before 9 August 2021 nor can the applicant presently finalise or quantify the claim for loss of rent".
>
> The Tribunal further notes that in accordance with orders made on 24 March 2021, the respondent was supposed to have finalised an agreed scope of work by 11 June 2021.
>
> The applicant has provided no evidence or submissions in support of the adjournment application, including evidence going to why such an application

> is made seven days before the hearing in circumstances where work was to have been completed almost two months ago. The failure to provide evidence and submissions in support of the adjournment application is also unexplained.
>
> The application for an adjournment of the hearing will be heard and determined at the hearing on 9 August 2021. The following orders are made to facilitate consideration of the application.
>
> 1. The applicant is to file and serve affidavit evidence and submissions in support of the application by 4 August 2021.
>
> 2. The respondent is to file and serve affidavit evidence in response to the application by 6 August 2021.
>
> 3. The parties are on notice that:
>
> (a) The consent of the respondent to the application does not mean that the application will be granted;
>
> (b) The parties must be prepared for the hearing to proceed as listed in the event that the adjournment application is refused.
>
> 4. The parties are strongly encouraged to have settlement discussions without delay with a view to entering into signed terms of agreement."

14 The hearing listed for 9 August 2021 ultimately did not proceed and was adjourned due to the unavailability of a Member. The application was then listed for hearing on 19 January 2022.

15 Before that hearing, the parties obtained what has been referred to as a joint report from Daniel Green of Landlay Consulting Group and David Hall of David Hall Building Appraisals which is dated 18 October 2021 (the joint report). While Mr Green had provided an earlier expert report (which was tendered by the appellant to the Tribunal below), Mr Hall, who was retained by the respondents, had not previously reported on the problems affecting lot 43. The respondents had previously obtained an expert report from Ibrahim Ech dated 24 February 2021 (the Ech report).

16 The application was heard by Senior Member Blake on 18 January 2022. No evidence was called, and no witnesses or experts were cross examined. The parties made oral submissions in addition to the written submissions they had filed. The Tribunal then reserved its decision.

Applicable legal principles

17 Section 80(2)(b) of the *Civil and Administrative Tribunal Act 2013* (NSW) (the NCAT Act) states:

> "Any internal appeal may be made:

> (a) in the case of an interlocutory decision of the Tribunal at first instance—with the leave of the Appeal Panel, and
>
> (b) in the case of any other kind of decision (including an ancillary decision) of the Tribunal at first instance—as of right on any question of law, or with the leave of the Appeal Panel, on any other grounds."

18 Clause 12 of Schedule 4 to the NCAT Act states with respect to decisions made in the CCD that:

> An Appeal Panel may grant leave under section 80 (2) (b) of this Act for an internal appeal against a Division decision only if the Appeal Panel is satisfied the appellant may have suffered a substantial miscarriage of justice because:
>
> (a) the decision of the Tribunal under appeal was not fair and equitable, or
>
> (b) the decision of the Tribunal under appeal was against the weight of evidence, or
>
> (c) significant new evidence has arisen (being evidence that was not reasonably available at the time the proceedings under appeal were being dealt with).

19 In the present appeal the appellant, in amended grounds of appeal, relies on two grounds of appeal said to give rise to questions of law, and seeks leave to appeal with respect to three grounds founded on claims that the decision was not fair and equitable or was against the weight of the evidence.

20 There is no issue that the Tribunal had jurisdiction to hear the application. Similarly, it is agreed that the Tribunal could make an order that the appellant pay the respondent damages for loss of rent arising from a failure properly maintain and keep in a state of good and serviceable repair the common property as required by s 106(1) of the SSMA: see s 232 to SSMA and the decision of the Court of Appeal in *Vickery v The Owners Strata Plan 80412* (2020) 103 NSWLR 352; [2020] NSWCA 284.

21 A question of law may include, not only an error in ascertaining the legal principle or in applying it to the facts of the case, but also taking into account an irrelevant consideration or not having regard to a relevant consideration. This includes not making a finding on an element or central issue that is required to be made out to claim an entitlement to relief: see *CEO of Customs v AMI Toyota Ltd* (2000) 102 FCR 578 (Full Fed Ct), [2000] FCA 1343 at [45], applying the statement of principle in *Craig v South Australia* (1995) 184 CLR 163 at 179.

22 In *Prendergast v Western Murray Irrigation Ltd* [2014] NSWCATAP 69 at [13], the Appeal Panel said that the following are specifically included:

(1) whether the Tribunal provided adequate reasons, which explain the Tribunal's findings of fact and how the Tribunal's conclusion is based on those findings of fact and relevant legal principle;

(2) whether the Tribunal identified the wrong issue or asked the wrong question;

(3) whether it applied a wrong principle of law;

(4) whether there was a failure to afford procedural fairness;

(5) whether the Tribunal failed to take into account a relevant (that is, a mandatory) consideration;

(6) whether it took into account an irrelevant consideration;

(7) whether there was no evidence to support a finding of fact; and

(8) whether the decision was legally unreasonable.

23 The categories of errors of law that give rise to an appeal as of right, discussed in *Prendergast* are not all inclusive.

24 With respect to leave to appeal, in *Collins v Urban* [2014] NSWCATAP 17, after an extensive review from [65] onwards, the Appeal Panel stated at [76]– [79] and [84(2)]:

> "74 Accordingly, it should be accepted that a substantial miscarriage of justice may have been suffered because of any of the circumstances referred to in clause 12(1)(a), (b) or (c) where there was a "*significant possibility*" or a "*chance which was fairly open*" that a different and more favourable result would have been achieved for the appellant had the relevant circumstance in paragraph (a) or (b) not occurred or if the fresh evidence under paragraph (c) had been before the Tribunal at first instance.
>
> 75 As to the particular grounds in clause 12(1)(a) and (b), without seeking to be exhaustive in any way, the authorities establish that:
>
> > 1 If there has been a denial of procedural fairness the decision under appeal can be said to have been "not fair and equitable" - Hutchings v CTTT [2008] NSWSC 717 at [35], Atkinson v Crowley [2011] NSWCA 194 at [12].
> >
> > 2 The decision under appeal can be said to be "against the weight of evidence" (which is an expression also used to describe a ground upon which a jury verdict can be set aside) where the evidence in its totality preponderates so strongly against the conclusion found by the tribunal at first instance that it can be said that the conclusion was not one that a reasonable tribunal member could reach - Calin v The Greater Union Organisation Pty Ltd (1991) 173 CLR 33 at 41-42, Mainteck Services Pty Limited v Stein Heurtey SA [2013] NSWSC 266 at [153].

…

78 If in either of those circumstances the appellant may have been deprived of a "*significant possibility*" or a "*chance which was fairly open*" that a different and more favourable result would have been achieved then the Appeal Panel may be satisfied that the appellant may have suffered a substantial miscarriage of justice because the decision was not fair and equitable or because the decision was against the weight of the evidence.

79 In order to show that a party has been deprived of a "*significant possibility*" or a "*chance which was fairly open*" of achieving a different and more favourable result because of one of the circumstances referred to in clause 12(1)(a), (b) or (c), it will be generally be necessary for the party to explain what its case would have been and show that it was fairly arguable. If the party fails to do this then, even if there has been a denial of procedural fairness, the Appeal Panel may conclude that it is not satisfied that any substantial miscarriage of justice may have occurred - see the general discussion in *Kyriakou v Long* [2013] NSWSC 1890 at [32] and following concerning the corresponding provisions of the [statutory predecessor to CATA (s 68 of the Consumer Trader and Tenancy Tribunal Act)] and especially at [46] and [55].

…

84 The general principles derived from these cases can be summarised as follows: …

> (2) 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."

25 In *Ryan v BKB Motor Vehicle Repairs Pty Ltd* [2017] NSWCATAP 39 an Appeal Panel stated at [10]:

> "An appeal does not provide a losing party with the opportunity to run their case again except in the narrow circumstances which we have described. Mr Ryan has not satisfied us that those circumstances apply to his case and we refuse permission for him to appeal."

26 Even if the appellant establishes that he or she may have suffered a substantial miscarriage of justice within clause 12 of Sch 4 to the CATA, the Appeal Panel has a discretion whether or not to grant leave under s 80(2) of that Act (see *Pholi v Wearne* [2014] NSWCATAP 78 at [32]) The matters summarised in *Collins v Urban*, above, at [84(2)] will come into play in the Panel's consideration of whether or not to exercise that discretion.

Grounds of Appeal

27 The first error of law relied on by the appellant is ground 3 in the amended notice of appeal filed 6 April 2022. The appellant asserts that the Tribunal made an error of law by applying the wrong legal principle when finding that the respondent had suffered consequential loss (loss of rent) because of mould in the 2nd bedroom. The respondent asserts that the Tribunal correctly applied the law.

28 The second error of law relied on by the appellant is ground 4 in the amended notice of appeal is that the Tribunal failed to accept the uncontested "findings of the Joint Report in relation to the cause of the mould" in circumstances where it was bound to do so (the binding joint report ground). In reply, the respondent asserts that it was open to the Tribunal to consider other expert evidence before (including Mr green's earlier expert report) and to weigh and consider that evidence when reaching its decision. The respondent submits that this ground of appeal does not disclose an error of law and requires leave to appeal.

29 The leave grounds relied on by the appellant are:

(1) Ground 1 –

> "That the Tribunal's finding that the Appellant was responsible for mould in the second bedroom was against the weight of evidence."

(2) Ground 2 –

> "That the Tribunal's finding that mould in the second bedroom caused loss was against the weight of evidence."

(3) Ground 5 – the Tribunal "made an error of fact" when it found that Mr Green in the joint report had not withdrawn the opinion, given in his earlier expert report, with respect to the mould in the second bedroom arising from water penetration through the wall.

30 Grounds 1, 2, 4 and 5 each relate to the expert evidence, the status of the joint report and whether it was binding on the parties with respect to issues of causation. Ground 3 raises a separate and distinct question of law with respect to causation of consequential loss.

31 The parties filed an agreed appeal bundle which contained all relevant documents and materials.

The expert reports

32 Whether the Tribunal was bound to find that the joint report concluded that the mould at lot 43 did not result from any breach by the appellant of its duty to maintain and repair the common property under s 106 the SSMA lies at the heart of grounds 1, 2, 4 and 4. The appellant has always maintained that the mould is not causally related to any failure or defect in the maintenance and repair of the common property.

33 In its reasons for decision the Tribunal reviewed the expert reports before it and quoted extensively from them.

34 The Ech Report was tendered by the respondent and noted mould "in the Lounge/Dining (ceiling and sliding door), Kitchen (ceiling corner), Corridor (ceiling), Main Bedroom (window) and Bedroom 2 (window and outer wall)." With respect to the cause of the mould Mr Ech relevantly wrote:

> "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 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."

35 The Green Report noted was tendered by the appellant and reported mould at various locations throughout lot 43. Moisture meter reading were taken, and a flood test of the unit 40 deck conducted. At 4.2 the report advised:

> "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 (sic) 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. …
>
> 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."

36 The Green report went on to recommend the following works:

> • "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."

37 As previously noted, the proposal to fit false ceiling ran into practical difficulties which the Joint Report agreed required a different method of rectification.

38 The Joint Report was jointly tendered by the parties. It was written by Mr Green and Mr Hall. As already noted, Mr Hall had not previously provided a report in the matter, with the result that the there is no original report from him and no evidence as to what his own, initial view of the mould and its causes were. In the normal course of events, one would have expected the joint report in this case to have been prepared by Mr Green with Mr Ech.

39 There was no order for a conclave or preparation of a joint expert report made by the Tribunal. *NCAT Procedural Direction 3 - Expert Evidence* provides:

> **"Experts' conclaves, conferences and evidence**

> "23. An expert witness must abide by any direction of the Tribunal:
>
> (a) to attend a conclave or conference with any other expert witness;
>
> (b) to endeavour to reach agreement on any matters in issue;
>
> (c) to prepare a joint report, specifying matters agreed and matters not agreed and reasons for any disagreement;
>
> (d) to base any joint report on specified facts or assumptions of fact; and
>
> (e) to give evidence concurrently with other experts.
>
> 24. An expert witness must exercise his or her independent, professional judgment in relation to such a conclave or conference and joint report, and must not act on any instruction or request to withhold or avoid agreement."

40 It is important to note that cl. 22 of *NCAT Procedural Direction 3 - Expert Evidence* also provides:

> "If an expert witness changes his or her opinion on a material matter after providing a report, the expert witness must immediately provide a supplementary report to that effect containing any relevant information referred to in paragraph 19."

41 The preparation of the Joint Report appears to have been agreed between the parties but was not embodied in a Tribunal order or direction. No letter of instructions to the experts for the preparation of the joint report was among the evidence before the Tribunal, nor was it referred to in the affidavit material. The only evidence before the Tribunal as to instructions given to the experts for preparation of the joint report is in the report itself:

> "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].
>
> Where there is disagreement then reasons are to be provided for those disagreements."
>
> [Our emphasis.]

42 Even though their brief was to "discuss and agree on the rectification required for the mould" the experts provided an agreed "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."

43 The joint report goes on to discuss the causes of mould and proposed rectification in the kitchen bathroom and laundry. It does not directly address the 2nd bedroom. As to the external wall the joint report concluded:

> "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."

Is the expert report binding with respect to the issue of causation – ground 4?

44 In the absence of evidence of an agreement between the parties that the Joint Report would be binding on the parties, we do not accept that the joint report bound the parties on the issue of causation as asserted in ground 4. What evidence there is, the experts' own description of their brief in the Joint Report,

point to their brief being to discuss and agree on the rectification required for the mould, not its causes. There was no indication in any of the materials before the Tribunal that the parties agreed to be bound by the Joint Report. The appellant did not point us to any authority which establishes that the joint report is binding on the parties, let alone with respect to an issue (causation) which was not the subject their brief.

45 Similarly, even if there had been orders made in accordance *NCAT Procedural Direction 3 - Expert Evidence* that the experts confer and produce a joint report in accordance with cl 22(c) of the Procedural Direction, there is nothing in the Procedural Direction that provides that the report is binding. In *RBV Builders Pty Ltd v Chedra* [2021] NSWCATAP 56 the Appeal Panel explained, at [144]:

> … If experts are acting impartially, as required by the Practice Guidelines, discussions between the experts should result in the clarification of points of difference and will often involve a substantial narrowing of the issues in dispute and the shortening of the hearing. A party which seeks to challenge the conclusions of a joint expert report thereby undermines the objective of the obtaining of the joint report and can fairly be said to be responsible for some lengthening of the hearing in consequence.

46 While it common for the Tribunal to give significant weight to joint expert reports, the reports must otherwise comply with *NCAT Procedural Direction 3 - Expert Evidence* and be responsive to "matter in issue" referred to them for report.

47 Ground 4 must therefore fail, as the report was not binding with respect to the cause of the mould which was not a matter referred to the experts. The Tribunal was not, as a matter of law, bound to have regard to only the Joint Report when considering the issue of causation. No question of law arises.

Was the Tribunal's conclusion with respect to the cause of the mould in the 2nd bedroom against the weight of evidence – ground 1?

48 This ground requires leave to appeal.

49 Having reviewed the various reports before it the Tribunal noted, among other things, that the parties were at issue about the cause of the mould in the 2nd bedroom of lot 43. The appellant had submitted, (see para [56(d)] of the decision) that:

(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.

50 At para [58] of the decision the Tribunal summarised the appellant's submissions thus:

> 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.

The respondents, on the other hand, submitted that the Green Report, the Ech report and the Joint Report each supported the conclusion that the ivy growth was a cause of the mould in the 2nd bedroom of lot 43.

51 The Tribunal concluded:

> 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 [to] 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.

52 The Tribunal went on to find that mould in the remainder of the property was due to condensation which was not caused by a failure by the appellant to properly maintain and keep in a state of good and serviceable repair the common property.

53 We think that the conclusions reached by the Tribunal with respect to the cause of mould in the 2nd bedroom of lot 43 were clearly open to it in the evidence. The Joint Report can be read harmoniously with the other reports before the Tribunal, by considering what it does say, rather than what it does not say. The report purported to give an ""overview of the causes of condensation mould within ***a*** building", and then went on to address specific rooms in the unit, but not the 2nd bedroom. The overview addressed causes of mould within "a building," rather than the specific causes of mould. Issues with respect to nominated rooms of lot 43 which were discussed following that overview. In those circumstances, the Tribunal was logically able to reach the conclusions it did with respect Mr Green not withdrawing his earlier opinion with respect to the 2nd bedroom, especially in the light of the recommendation in the Joint Report for the removal of ivy from the external walls which had been central to his earlier findings. The fact that Mr Green did not amend the Green Report as required by Practice Direction 3 reinforces this.

54 The Ech Report was consistent with the Green report in that it said that the dampness in the external facing wall of the 2nd bedroom which "appeared to be caused by the plants on the outer wall or other water intrusion point" would have to be addressed.

55 The decision that mould in the 2nd bedroom resulted from a failure by the appellant to properly maintain the common property and to keep in a state of good and serviceable repair was one that clearly open to the Tribunal on the evidence before it. The weight of the evidence was not against it.

56 Accordingly leave to appeal on ground 1 is refused.

Was the Tribunal's conclusion that Mr Green had not withdrawn his opinion in the Green Report with respect to the cause of mould in the 2nd bedroom against the weight of evidence – ground 5?

57 This ground requires leave to appeal.

58 Central to this ground is the submission that because the Joint Report did not directly address the cause of mould in the 2nd bedroom, then the experts intended the overview with respect to causes of mould in a building to apply to it. The appellant submitted that in the circumstances the Tribunal should have inferred that Mr Green had withdrawn the opinion he gave for the cause of mould in the 2nd bedroom in the Green Report, in favour of the overview in the Joint Report.

59 We reject this submission for the reasons given in para [50] above. We can see no cause for drawing the inference urged by the appellant when all the reports can be read harmoniously. This is more so in circumstances in which the issue of causation was not part of the experts' brief, and when that part of the Joint Report which the appellant relies on with respect to causation addresses an agreed "overview of the causes of condensation mould within a building", rather than the causes of the mould in issue.

60 The conclusion that Mr Green had not withdrawn the Green Report was not against the weight of evidence. It was clearly one that the Tribunal could reach. Leave to appeal with respect to ground 5 is refused.

Did the Tribunal apply the wrong law in deciding that the respondent had suffered loss due to the appellant's breach of statutory duty under s 106(1) of the SSMA – ground 4?

61 The Tribunal set out its understanding of what is necessary to prove causation in a claim for damages under s 106(1) of the SSMA, by extracting, at [34] the following quote from the decision of an Appeal Panel in *The Owners Strata Plan No 30621 v Shum* [2018] NSWCATAP 15 at [132]-[134]:

> "[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.'"

62 The Tribunal went on to find that the appellant's breach of statutory duty in relation to the outer wall of lot 43 "was a material cause of the presence of mould in the outer wall of the 2nd bedroom of lot 43" (see para [63] and [81] of the decision). The Tribunal then found at [82]:

> "82. I am satisfied on the basis of the unchallenged evidence of Ms Bettencourt and the outgoing condition report that the presence of mould in 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."

63 In making those finding the Tribunal rejected the appellant's submission that any rental loss suffered by the respondents due to the presence of mould "is causally unrelated to any breach by the appellant of its statutory duty to maintain and repair common property".

64 On appeal the appellant submitted that it was not sufficient that the mould in the 2nd bedroom be a cause of the respondents' loss of rent together with mould elsewhere in the lot, which the Tribunal had found was not due to any breach of duty by the appellant. Rather, the appellant submitted that, while the Tribunal correctly asked whether the appellant's breach of statutory duty was a cause of the respondent's loss, that principle only applies "where the causes are concurrent in the sense that they are 'equally operative causes in that if either had ceased the damage would have ceased'" (relying on the decision of Devlin J in *Heskell v Continental Express Ltd* [1950] 1 ALL ER 1033 at 1047 and *Oikos Constructions Pty Ltd t/as Lars Fletcher Constructions* [2020] NSWCA 358 per White AJ at [142]). The appellant submitted that if the mould in the 2nd bedroom had been rectified that respondent would probably have incurred the rental loss in any event due to the presence of mould elsewhere in the lot, which did not arise from the appellant's failure to properly maintain the common property and keep it in a state of good and serviceable repair. The appellant therefore said that the Tribunal applied the wrong law in finding that its breach of the statutory duty under s 106(1) of the SSMA resulted in the respondents' loss of rent.

65 As the respondents pointed out in their submissions this was not an argument that was put to the Tribunal below. In its opening submissions to the Tribunal the appellant said, with respect to causation, that the question was, "Is the mould at the Premises causally related to some failure of the common property?" As already noted, the appellant defended the claim on the basis that none of the mould was the result of a breach of its duty to with respect to the common property. The Tribunal reached a contrary conclusion with respect to the mould in the 2nd bedroom and found that the breach of duty by the

appellant was a material cause of that mould, and a "material factor in lot 43 being uninhabitable due to the presence of mould."

66 Before the Tribunal the appellant did not advance the proposition of law it now seeks to agitate before us. To allow the appellant to now raise that issue on appeal when it was clearly had the opportunity to do so at first instance, including in the course of oral argument, would be both unjust and unfair to the respondents. We decline to do so.

67 We also note there was no evidence adduced by the appellant before the Tribunal, and no submissions made addressing how the Tribunal could conclude, on the evidence before it, that if the mould and dampness affecting the external wall to the 2nd bedroom were remedied, lot 43 would remain uninhabitable, with accordant loss to the respondents. Even if we had considered ground 4, it would not meet the exception to the general principle described in *Heskell v Continental Express Ltd.*

68 Ground 4 therefore fails.

Was the Tribunal's finding that finding that mould in the 2nd bedroom caused loss against the weight of evidence – ground 2.

69 This ground of appeal requires leave.

70 The appellant's submissions with respect to grounds 1 and 2 were the same. The substance of those submissions was an argument that the Tribunal had misconstrued the Green Report and the Ech Report and had failed to give sufficient weight to the Joint Report. For the reasons set out in paras [47] to [53] above, we are not persuaded that the Members conclusions based on the expert reports were against the weight of evidence.

71 Importantly, the appellant's submissions did not address the evidence of Ms Bettencourt, or that contained in the outgoing condition report, which the Tribunal accepted as demonstrating that the mould in the 2nd bedroom was a material factor in lot 43 being uninhabitable. As that evidence was unchallenged, we are unable to see why that conclusion was against the weight of evidence.

72 Leave to appeal on this ground is refused.

Costs

73 Given the amount of damages assessed, our preliminary view is that this is an appeal in which the Tribunal may award costs in the absence of special circumstances under r38 and r38A of the *Civil and Administrative Tribunal Rules 2014* (NSW). The appellant has been unsuccessful in its appeal.

74 If the parties are able to agree on costs, they should file proposed consent orders within 21 days of the date of the orders in these reasons for decision.

75 If the parties are not in agreement as to the costs of the proceedings, then:

(1) 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 2000 words, and any evidence in support by way of affidavit, within 21 days of the date of the orders in these reasons for decision;

(2) 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;

(3) 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

76 The Appeal Panel makes the following orders:

(1) Leave to appeal refused.

(2) Appeal dismissed.

(3) If the parties are able to agree on costs, they should file proposed consent order within 21 days of the date of the orders in these reasons for decision.

(4) 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 2000 words, and any evidence in support by way of affidavit, within 21 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