Supreme Court

New South Wales

Case Name:	Smith v Owners – Strata Plan No. 3004
Medium Neutral Citation:	[2022] NSWSC 1599
Hearing Date(s):	2 June 2022
Date of Orders:	28 November 2022
Decision Date:	28 November 2022
Jurisdiction:	Common Law
Before:	Mitchelmore J
Decision:	Summons dismissed with costs
Catchwords:	LAND LAW – strata title – owners corporation – maintenance and repair of common property – breach of obligation to maintain and repair common property – whether lost rental income was reasonably foreseeable consequence of breach – whether lot owners failed to mitigate loss by not renting out unit on lot
Legislation Cited:	Local Court Act 2007 (NSW), s 39 Strata Schemes Management Act 1996 (NSW), s 62 Strata Schemes Management Act 2015 (NSW), ss 8, 106, 111 Strata Titles Act 1973 (NSW), s 68 Trade Practices Act 1974 (Cth), s 82
Cases Cited:	Australia City Properties Management Pty Ltd v The Owners – Strata Plan No 65111 [2021] NSWCA 162 B & L Linings Pty Ltd v Chief Commissioner of State Revenue (2008) 74 NSWLR 481; [2008] NSWCA 187 Doppstadt Australia Pty Ltd v Lovick & Son Developments Pty Ltd [2014] NSWCA 158 Galafassi v Kelly (2014) 87 NSWLR 119; [2014] NSWCA 190 Gales Holdings Pty Ltd v Tweed Shire Council (2013)

	85 NSWLR 514; [2013] NSWCA 382 Karacominakis v Big Country Developments Pty Ltd (2000) 10 BPR 18,235 Kizbeau Pty Ltd v W G & B Pty Ltd (1995) 184 CLR 281; [1995] HCA 4 Koufos v C Czarnikow Limited (The Heron II) [1969] 1 AC 350 Krolczyk v Winner t/as J Winner Building Services [2022] NSWCA 196 Lubrano v Proprietors Strata Plan No 4038 (1997) 6 BPR 13,308 Miller Steamship Co Pty Ltd v Overseas Tankship (UK) Ltd [1963] SR (NSW) 948 Overseas Tankships (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound No 1) [1961] AC 388 Owners – Strata Plan 32735 v Lesley-Swan [2012] NSWSC 383; (2012) 17 BPR 32,311 Ridis v Proprietors of Strata Plan 10308 (2005) 63 NSWLR 449; [2005] NSWCA 246 Rose v Tunstall [2018] NSWCA 241 Seiwa Pty Ltd v Owners Strata Plan 35042 [2006] NSWSC 1157; (2006) 12 BPR 23,673 Shum v Owners Corporation SP30621 [2017] NSWCATCD 68 Steamship Co Pty Ltd v Overseas Tankship (UK) Ltd (1963) SR (NSW) 948 SZTAL v Minister for Immigration & Border Protection (2017) 262 CLR 362; [2017] HCA 34 Taouk v Ho [2018] NSWSC 1854 The Owners Strata Plan 50276 v Thoo (2013) 17 BPR 33,789; [2013] NSWCA 270 The Owners – Strata Plan No 76674 v Di Blasio Constructions Pty Ltd [2014] NSWSC 1067 Trevallyn-Jones v Owners Strata Plan No 50358 [2009] NSWSC 694 Vickery v The Owners – Strata Plan No. 80412 (2020) 103 NSWLR 352; [2020] NSWCA 284
Texts Cited:	McGregor on Damages (21st ed, Thomson Reuters, 2021)
Category:	Principal judgment

Parties:	Ross Harold Smith (First Plaintiff) Jennifer Ann Smith (Second Plaintiff) The Owners – Strata Plan No. 3004 (Defendant)
Representation:	Counsel: Mr T Davie (Plaintiffs) Mr D Elliott (Defendant) Solicitors: Chapman Solicitors (Plaintiffs) Bannermans Lawyers (Defendant)
File Number(s):	2021/216568
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Local Court of NSW
Jurisdiction:	Civil
Citation:	N/A
Date of Decision:	2 July 2021
Before:	Farnan LCM
File Number(s):	2020/38760

JUDGMENT

1 **HER HONOUR:** The plaintiffs, Jennifer Ann Smith and Ross Harold Smith ("the Smiths"), own an investment unit in Mona Vale ("the Unit") as tenants in common. The defendant is the owners corporation for the block of 12 units of which the Unit is one, and is a body corporate constituted under s 8 of the *Strata Schemes Management Act 2015* (NSW) ("the *SSM Act*"). The proceedings arise from a dispute between the Smiths and the owners corporation in respect of the latter's breach of the duty in s 106(1) of the *SSM Act* to "properly maintain and keep in a state of good and serviceable repair the common property … vested in the owners corporation". The issue is the proper construction of s 106(5) of the *SSM Act*, which provides:

> "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."

2 The Smiths' claim in the Local Court against the owners corporation included a claim for loss of rent for the period from 24 September 2017 to 31 January 2021. Magistrate Farnan accepted that damages for loss of rent were reasonably foreseeable but limited the loss of rent that the Smiths could recover from the owners corporation to a period of three months.

3 The Smiths have appealed pursuant to s 39(1) of the *Local Court Act 2007* (NSW), which provides that a party to proceedings before the Local Court who is dissatisfied with a judgment or order of the Court may appeal to the Supreme Court, but only on a question of law. The Smiths contend that the loss of rent for which they claimed was, to use the language of s 106(5), "reasonably foreseeable loss suffered" by them as a result of the owners corporation's contravention of s 106(1). They contend that, in reaching a different conclusion, the Magistrate erroneously construed the words "reasonably foreseeable loss" as meaning whether or not it was actually unreasonable, as a matter of fact, for the owners corporation not to have foreseen the relevant loss.

4 For the reasons outlined below, the Summons should be dismissed. The Magistrate approached the assessment of damages for which s 106(5) of the *SSM Act* makes provision consistently with the approach for which the Smiths contend. On the basis of the factual findings the Magistrate made, her Honour also concluded that the Smiths failed to mitigate their loss, which operated to reduce the extent of the loss to which she considered the Smiths were entitled. Her Honour's conclusion on those issues did not involve a misconstruction of s 106(5) of the *SSM Act*.

Background to the decision of the Magistrate

5 There is no dispute about the background to the matter, which may be shortly stated. The Smiths purchased the Unit in 2003. They leased the Unit until August 2017 when, through no fault of either party, it became vacant. Before re-letting the Unit, Mr Smith decided to replace the carpet. When he pulled up the existing carpet in the living room, he noticed damage to the magnesite flooring, generally close to the sliding glass door that led on to the balcony.

6 The Magistrate explained that magnesite flooring is "a woodchip compound bound with magnesium chloro oxide, applied over concrete in many unit buildings during the 1960s and 1970s for levelling and acoustic purposes": [24]. It was common ground that the damage to the magnesite was caused by the ingress of water generally from the area underneath the sliding door to the balcony. Chloride leaching from the magnesite damaged the reinforcing steel in the concrete slab: [42].

7 Following this discovery, Mr Smith lifted and broke up a significant part of the magnesite floor topping in the living area of the Unit. Photos in evidence showed that by 5 October 2017 most of the magnesite flooring in the living area had been broken up and lifted. Mr Smith gave evidence in the Local Court that he did this out of curiosity and because it was "useless to leave it in place".

8 The Unit has not been tenanted since that time. Mr Smith's evidence was that he did not think it was safe: [29]. Her Honour found that there was no evidence to support that assertion.

9 On 26 July 2019, the Smiths applied to the NSW Civil and Administrative Tribunal ("the Tribunal") to obtain core samples of the common property slab. In separate proceedings, the Smiths also made a claim for loss of rent. According to the Magistrate, the owners corporation agreed to pay for all rectification works but not damages. As at the date of the Magistrate's decision, it was not clear whether rectification works had been carried out: [19].

10 In February 2020, due to uncertainty at that time about the Tribunal's powers to determine the proceedings, the proceedings were transferred to the Supreme Court and then remitted to the Local Court: see [16].

11 By their Amended Statement of Claim, the Smiths sought damages for loss of rent from 16 August 2017 to 31 January 2021 (accruing at a daily rate of $70.86) pursuant to s 106(5) of the *SSM Act*. At the hearing in the Local Court, however, Counsel for the Smiths conceded that damages should be awarded from 24 September 2017 in accordance with the evidence about when Mr Smith ripped up the carpet in the Unit. The Smiths alleged that at least seven items of common property were not kept in a state of good and serviceable repair, including a failed waterproof membrane to the balcony

which appeared to have caused the damage to the flooring. The Smiths alleged that the loss of rent constituted foreseeable loss that they had suffered as a result of the owners corporation's contravention of s 106(1).

12 By way of defence, the owners corporation pleaded that any loss that the Smiths incurred was the result of their unauthorised works to the lot and to the common property, or was the result of their failure to repair and maintain the balcony door causing damage to the common property. The owners corporation otherwise denied the allegations, and further contended that the Smiths had failed to mitigate their loss. The owners corporation particularised the failure to mitigate as follows:

> "(a) The Plaintiffs did not notify the Owners Corporation of the defective items until on or about 7 April 2018;
>
> (b) The Plaintiffs following the discovery of the defect failed to reinstate the carpet and to take steps to cause Lot 7 to be let on the rental market while the remedial issues were addressed;
>
> (c) The Plaintiffs without authorisation carried out work on and altered the common property by removing the magnesite floor topping in the lounge and dining area in or around 5 October 2017 and thereby causing the lot to become uninhabitable; and
>
> (d) The Plaintiffs by their unilateral actions caused Lot 7 to be uninhabitable and unable to be let on the rental market from 5 October 2017."

The decision of the Magistrate

13 The Magistrate heard evidence from two structural engineers on subjects which included whether the Unit was unsafe. Her Honour found that the Smiths had not discharged their onus of proving that there was anything about the Unit, in particular the balcony, that was unsafe: [59].

14 The Magistrate also heard evidence from two real estate agents about the market rent for the Unit and whether it was lettable. Ultimately, her Honour preferred the evidence of the expert retained by the owners corporation, Ms Whithear. As it happened, Ms Whithear had been the renting agent for the Unit when it was tenanted. She gave evidence that the Unit would be readily lettable, although she accepted that its unrenovated nature would affect its rental value. Ms Whithear also gave evidence that tenants would need to be told at the start of the tenancy that works were required. Provided tenants were given this notice, her evidence was that a month's rent would seem a fair

amount by way of compensation, "if it wasn't major work and it wasn't too noisy": [63].

15 Her Honour found that the damage to the magnesite flooring inside the balcony door, and consequent damage to the concrete slab in the living area, resulted from the failure of the owners corporation to maintain the common property: [78]. However, as noted above, her Honour was not satisfied that the damage rendered the Unit unsafe: [79]. As to the Unit being uninhabitable, her Honour found that this was the result of a combination of factors, stating at [82]:

> "Once Mr Smith had removed the vast majority of the magnesite flooring in the living room the unit was uninhabitable until the flooring was reinstated even to the 'dated' standard it was in before Mr Smith removed the carpet. However, as is argued for the defendant, this was done without notice to, or approval of, the defendant in breach of s 111 of the Act. The fact that, ultimately, the Owners Corporation agreed to replace all of the flooring is not to the point. The issue is whether I am satisfied on the balance that it was reasonably foreseeable when the damage was discovered that no tenant would be placed in the unit for however long it took for repairs to be done (now more than three years)."

16 Her Honour accepted that some period during which the Unit remained vacant while repairs were undertaken was reasonably foreseeable. Her Honour found that the estimated time that the repairs should have taken was two weeks, and referred to the evidence of Ms Whithear that compensation in the order of one month's rent would likely have been sufficient: [83].

17 Her Honour referred to Mr Smith's evidence in cross-examination that it did not make commercial sense to put flooring in, and a tenant in, only to then be up for relocation costs. Her Honour also noted the Smiths' contention that removal of the flooring was beneficial to the owners corporation because it would have had to be removed anyway. However, her Honour found that the immediate removal of the topping before any work was requested or agreed, and without permission of the owners corporation, "was the immediate cause of the unit being uninhabitable". If the floor had been removed as part of a schedule of works, "the whole of the works would have been completed in a short time frame" without rendering the Unit uninhabitable: [85]. Compensation would have to be paid to the tenants, but only for the period during which the work was done: [86]. Her Honour found that the Smiths knew this, "and chose not to take that course for their own commercial reasons".

18 Her Honour observed that although the Smiths regarded the Unit as uninhabitable, "their own property manager would have been happy to put a tenant in the unit subject to knowledge that there were repairs and investigations to take place". Apart from the Smiths' assertion, there was nothing in the evidence to prove on the balance of probabilities that it was reasonably foreseeable that they would not put tenants in the Unit: [88]. That reasonable foreseeability did not follow from the knowledge of the owners corporation, by April 2018, that the Smiths were seeking repairs to the Unit and that the Unit was not tenanted.

19 The Magistrate accepted that a plaintiff confronted with a defendant's breach of statutory duty will not be held to have acted unreasonably simply because the defendant can suggest other and more beneficial conduct, provided it was reasonable for the plaintiff to do what he did, citing *Karacominakis v Big Country Developments Pty Ltd* (2000) 10 BPR 18,235 ("*Karacominakis*") at [187]. However, her Honour considered that the Smiths' conduct had gone beyond that referred to in *Karacominakis*, stating at [92]:

> "As I have found above, it was not reasonable for the plaintiffs to themselves remove the common property magnesite flooring and then do nothing to make it good to allow the unit to be rented out. There was nothing that obviously made the unit potentially dangerous at that point. This was a commercial decision made by the plaintiffs, hoping to have works done while the unit was empty. There was significant delay in pursuing the matter while the unit remained empty. This is not a matter of contributory negligence. The obligation is still on the defendant to make good the defects. However the defendant is not liable in damages for consequences it could not reasonably have foreseen, and it could not reasonably have foreseen action by the plaintiffs that was itself unreasonable. It was not reasonable to make a 'commercial' choice not to put tenants in the property until the floor was repaired. There was no reasonable concern about danger."

20 Her Honour found that although it was reasonably foreseeable that the Smiths would lose some rent as a result of the owners corporation's failure to maintain the common property, it was not reasonably foreseeable that the Unit would remain vacant for the entire time the repairs remained outstanding: [98]. In her Honour's opinion, the Smiths had made a choice to remove the entire flooring of the Unit; that choice was not a consequence of the breach of the s 106 duty; and the owners corporation was not liable for the consequences of that choice: [101].

21 On the issue of whether the Smiths failed to mitigate their loss, her Honour considered that mitigation was argued in relation to foreseeability, and her Honour had dealt with it on that basis: [97].

22 In relation to quantum, although Ms Whithear's evidence was that one month's rent was reasonable compensation for tenants who had been warned of the necessity for repairs, her Honour considered that was a conservative estimate, given the necessity for several periods of disruption, for testing and then repairs: [100]. Ultimately, her Honour determined that the maximum reasonably foreseeable rent loss in the circumstances was three months' rent at $495 per week, making a total of $6377.40 (at $70.86 per day): [102]. Her Honour entered judgment for the Smiths in that amount plus interest: [104]. On 3 December 2021, her Honour ordered that the Smiths pay the owners corporation's costs as agreed or assessed.

The submissions in this Court

23 An appeal to this Court under s 39 of the *Local Court Act* must be predicated upon "an identified question of law" or "an erroneous answer in respect of a question of law": *B & L Linings Pty Ltd v Chief Commissioner of State Revenue* (2008) 74 NSWLR 481; [2008] NSWCA 187 at [75] per Allsop P, [150] per Basten JA. The Smiths bear the onus of demonstrating error: *Rose v Tunstall* [2018] NSWCA 241 at [20] per Payne JA, Basten JA and Simpson AJA agreeing; *Taouk v Ho* [2018] NSWSC 1854 at [9] per Johnson J.

24 The Smiths advanced two grounds on which the Magistrate is said to have erred. The principal focus was their first ground, that her Honour erred in construing the words "reasonably foreseeable loss" in s 106(5) of the *SSM Act* as meaning whether or not it was actually unreasonable as a matter of fact for the owners corporation not to have foreseen the relevant loss. Their second ground of appeal was that her Honour erred in finding there was nothing in the evidence to prove on the balance of probabilities that it was reasonably foreseeable that they would not put tenants in the Unit. To the extent that a question of law is raised by the latter ground, it appears to involve the same question of construction as Ground 1; it was not addressed separately in the written submissions filed on behalf of the Smiths or in oral submissions.

25 The Smiths contended that the Magistrate applied a notion of remoteness and did so incorrectly. “But for” the owners corporation’s failure to repair and maintain the common property, the Smiths claim they would not have suffered loss of rent. There being no issue of contributory negligence, the issue, in their submission, was whether the loss incurred was reasonably foreseeable in the sense applied in *Miller Steamship Co Pty Ltd v Overseas Tankship (UK) Ltd* [1963] SR (NSW) 948. The relevant causal link, in their submission, was not between the existence of the defect to the floor of the Unit and the loss of rent claimed, but between the failure to repair and maintain that defect and the loss of rent claimed. It was only if the risk of the damage in question was so small that “a reasonable man would in the whole circumstances feel justified in neglecting it” that the owners corporation would not be liable, citing *Koufos v C Czarnikow Limited* (*The Heron II*) [1969] 1 AC 350 at 385–386 per Lord Reid.

26 The Smiths conceded that it may have been *possible* for the Unit to be tenanted regardless of defects. However, it did not follow that the failure to repair and maintain the premises did not cause the relevant loss, applying the “but for” test. Even if it had been unwise or unreasonable for them to remove some of the loose magnesite topping, upon discovering the state it was in, their actions in doing so were wholly understandable: they were doing what the owners corporation would have to do in any event in order to rectify the defective work. It followed, in their submission, that the ensuing damage could not be described as a risk that would be dismissed as unreal or far-fetched. Similarly, even if the defects did not result in the Unit being unsafe or uninhabitable, that did not mean that the risk that it would not be let until the floor was repaired or maintained was “so small that [the owners corporation acting reasonably] would in the whole circumstances feel justified in neglecting it”.

27 The owners corporation submitted that the Magistrate correctly identified the issue, namely, whether it was reasonably foreseeable when the damage was discovered that the Unit would need to remain empty until the repairs were completed. It took issue with the Smiths’ submission that “but for” the impact of the breaches they could have let the Unit at $495 per week and would suffer loss of rent until such time as the defects had been remedied. In its

submission, the Unit was able to be tenanted notwithstanding the existence of the defects for the following reasons:

(1) The Unit had been tenanted for a substantial period of time and there was no suggestion that the tenant moved out due to the defects.

(2) The defects did not result in the Unit being unsafe or uninhabitable and there was nothing that obviously made it potentially dangerous.

(3) The immediate cause of the Unit being unlettable was Mr Smith's removal of the magnesite floor topping, in breach of s 111 of the *SSM Act*, which prohibits an owner of a lot in a strata scheme from carrying out work on the common property without authorisation as provided for under that section.

28 The owners corporation separately submitted, by way of a Notice of Contention, that the Magistrate erred in finding that the failure to mitigate was expressly relied on only as an aspect of foreseeability of damage (at [9], [97]). Mitigation was expressly pleaded and pressed as a defence to the Smiths' claim for damages. On her Honour's findings, the Smiths did not mitigate their loss by reletting the Unit until the repair works took place. The owners corporation submitted that the following facts found by her Honour supported that conclusion:

(1) Mr Smith's removal of the magnesite topping was the immediate cause of the Unit being uninhabitable, and it could otherwise have been let in the condition it was in October 2017.

(2) The Unit was not unsafe, nor was there a reasonable concern about danger.

Construction of s 106(5) of the SSM Act

29 It is axiomatic that s 106(5) of the *SSM Act* is to be construed having regard to its text, considered in context, having regard to its purpose and the mischief it is intended to remedy: *SZTAL v Minister for Immigration & Border Protection* (2017) 262 CLR 362; [2017] HCA 34 at [14]; *Australia City Properties Management Pty Ltd v The Owners – Strata Plan No 65111* [2021] NSWCA 162 at [330] per Bathurst CJ (Payne and McCallum JJA agreeing).

30 Section 106 of the *SSM Act* imposes two duties on an owners corporation. By s 106(1), an owners corporation has a duty to properly maintain, and keep in good and serviceable repair, common property and any personal property vested in it. By s 106(2), the owners corporation has a duty to renew or replace

any fixtures or fittings comprised in common property or personal property vested in it. The duties in ss 106(1) and (2) were formerly ss 62(1) and (2) of the *Strata Schemes Management Act 1996* (NSW) ("the 1996 Act"), the legislative predecessor to the *SSM Act*. The duty in s 62(1) and (2) was characterised as strict or absolute: *Seiwa Pty Ltd v Owners Strata Plan 35042* [2006] NSWSC 1157; (2006) 12 BPR 23,673 ("*Seiwa*") per Brereton J at [2], [21]; *Ridis v Proprietors of Strata Plan 10308* (2005) 63 NSWLR 449; [2005] NSWCA 246 at [5] per Hodgson JA. In *Seiwa*, Brereton J said of the duty in s 62(1) of the 1996 Act that "as soon as something in the common property is no longer operating effectively or at all, or has fallen into disrepair, there has been a breach of the s 62 duty": at [5].

31 The absolute nature of the duties imposed by s 106 of the *SSM Act* is protective of a lot owner's interest. In *Owners – Strata Plan 32735 v Lesley-Swan* [2012] NSWSC 383; (2012) 17 BPR 32,311 at [50], Hall J observed of s 62 of the 1996 Act that the provision ensures accountability for any maintenance and/or repair work carried out on common property. Section 106(5) can be seen to further that protective purpose by expressly conferring on a lot owner a right of recovery from the owners corporation, of "any reasonably foreseeable loss suffered by the owner as a result of a contravention of this section by the owners corporation".

32 Although s 62 of the 1996 Act contained the equivalent of s 106(1) and s 106(2), it did not contain an equivalent to s 106(5). Before the decision in *The Owners Strata Plan 50276 v Thoo* (2013) 17 BPR 33,789; [2013] NSWCA 270 ("*Thoo*"), a series of cases had held that damages were available for breach of the statutory obligation to repair and maintain: see, e.g., *Trevallyn-Jones v Owners Strata Plan No 50358* [2009] NSWSC 694 per Ward J. In awarding damages in *Seiwa*, Brereton J considered that the breach of the duty in s 62 of the 1996 Act in that case, and its consequences, were closely analogous to the tort of nuisance, from which his Honour derived guidance for the assessment of damages: at [27].

33 The Court of Appeal in *Thoo* held that s 62 of the 1996 Act did not give rise to a right to recover losses caused by a breach of the obligation to maintain

common property. In *Vickery v The Owners – Strata Plan 80412* (2020) 103 NSWLR 352; [2020] NSWCA 284 ("*Vickery*"), each member of the Court of Appeal described s 106(5) of the *SSM Act* as having been enacted to reverse the effect of the judgment in *Thoo*: see Basten JA at [11]; Leeming JA at [96]; White JA at [161].

34 In its terms, the right of recovery in s 106(5) of the *SSM Act* is dependent upon characterisation of the loss as "reasonably foreseeable" and "suffered by the owner as a result of a contravention of this section". The terminology is consistent with the approach to assessing damages in tort, consistently with the cases before *Thoo* which had approached damages on that basis. There is no suggestion in the text of s 106(5) that the enactment of a statutory right to damages which the Supreme Court had previously considered to be available was intended to depart from the basis on which damages had previously been assessed.

35 Support for the application of the tort assessment of damages may also be drawn from the description of the loss for which a claim may be made, in s 106(5), "*as* damages for breach of statutory duty" (emphasis added). In *Vickery*, Leeming JA considered that these words signalled the engagement of a general law cause of action in tort, having regard to the natural effect of the words and finding it difficult to see what those words did if they were "not regarded as identifying the character of the right as a private law cause of action": [96]. Basten JA took a different view, characterising s 106(5) as creating a statutory right of recovery in the circumstances in which it was engaged that was independent of principles arising under the general law and not reflecting a general law cause of action: at [19]. White JA did not rely specifically on the characterisation of the provision as conferring a statutory or general law cause of action, it not being essential to the issue that the Court was considering in *Vickery*.

36 Even if s 106(5) of the *SSM Act* is characterised as conferring a purely statutory right of action, it does not follow that the assessment of the damages which the provision confers was intended to be different to that in tort. The present parties were agreed that whether or not s 106 gives rise to a statutory

cause of action or an action under the general law, the cause of action is analogous to a claim in negligence or nuisance. Counsel for the Smiths, Mr Davie, relied on what he described as an analogous observation of the cause of action in relation to s 82 of the *Trade Practices Act 1974* (Cth) in *Kizbeau Pty Ltd v W G & B Pty Ltd* (1995) 184 CLR 281; [1995] HCA 4. Counsel for the owners corporation, Mr Elliott, endorsed that submission.

37 I note for completeness that while not binding on this Court, there are a number of cases in the Tribunal which, in considering damages under s 106(5) of the *SSM Act*, have applied the assessment approach for which both parties in this case contended: see, eg, *Shum v Owners Corporation SP30621* [2017] NSWCATCD 68 at [60]-[61]; *Owners - SP 80881 v Gregg* [2022] NSWCATAP 172 ("*Gregg*") at [39]-[41].

38 If, as Leeming JA concluded in *Vickery*, s 106(5) does no more than confer a private law cause of action for breach of statutory duty, it would be open to a defendant to prove, in answer to the claim for damages, that the plaintiff had failed to mitigate their loss. If, alternatively, s 106(5) were to involve a wholly statutory cause of action, the requirement for the loss to be "reasonably foreseeable … as a result of a contravention" accommodates the application of mitigation. Having regard to the legislative history to which I have referred above, there is nothing in the terms of s 106(5) that suggests any legislative intention to exclude its application.

39 In *The Owners – Strata Plan No 76674 v Di Blasio Constructions Pty Ltd* [2014] NSWSC 1067, which concerned a breach of statutory warranties under the *Home Building Act 1989* (NSW), Ball J stated that the principle "is that the plaintiff is not entitled to recover losses attributable to its own unreasonable conduct": at [42]. In *Karacominakis* at [187], Giles JA (Meagher JA and Stein JA agreeing) said of mitigation:

> "This is often misleadingly referred to as a duty to mitigate, although the plaintiff is not under a positive duty. The plaintiff does not have to show that he has fulfilled his so-called duty, and the onus is on the defendant to show that he has not and the extent to which he has not (*TCN Channel 9 Pty Ltd v Hayden Enterprises Pty Ltd* (1989) 16 NSWLR 130). Since the defendant is a wrongdoer, in determining whether the plaintiff has acted unreasonably a high standard of conduct will not be required, and the plaintiff will not be held to have acted unreasonably simply because the defendant can suggest other

> and more beneficial conduct if it was reasonable for the plaintiff to do what he did (*Banco de Portugal v Waterlow and Sons Ltd* (1932) AC 452; *Pilkington v Wood* (1953) Ch 770; *Sacher Investments Pty Ltd v Forma Stereo Consultants Pty Ltd* (1976) 1 NSWLR 5)."

40 The above principles have been cited with approval in subsequent cases, including *Doppstadt Australia Pty Ltd v Lovick & Son Developments Pty Ltd* [2014] NSWCA 158 at [211] per Gleeson JA, Ward and Emmett JJA agreeing; and recently in *Krolczyk v Winner t/as J Winner Building Services* [2022] NSWCA 196 at [185] per Griffiths AJA, White and Kirk JJA agreeing.

The Magistrate did not misconstrue s 106(5) of the SSM Act

41 In the present case, it was common ground between the parties, consistently with settled principle, that damages in negligence are available for loss or injury of a kind that is reasonably foreseeable as a possible result of the breach of duty, citing *Overseas Tankships (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound No 1)* [1961] AC 388 (see at 423, 426). As summarised in *McGregor on Damages* (21st ed, Thomson Reuters, 2021) at [8-065], "… the bar is only to recovery for unforeseeable types of damage: if the damage is of a type that is foreseeable, then recovery is still available even if the degree of damage is unforeseeable or if the precise manner in which the damage occurs is unforeseeable". Reasonable foreseeability also limits damages in nuisance, whether the conduct constituting the nuisance be intentional or negligent: *Gales Holdings Pty Ltd v Tweed Shire Council* (2013) 85 NSWLR 514; [2013] NSWCA 382 at [218] per Emmett JA (Leeming JA agreeing at [276]-[279], Sackville AJA at [284]).

42 Looking at the Magistrate's reasons in the context of Ground 1 of the Smiths' appeal, the Smiths emphasise her Honour's statement in [82] that the issue for her determination as whether she was satisfied "that it was reasonably foreseeable when the damage was discovered that no tenant would be placed in the unit for however long it took for repairs to be done (now more than three years)". The Magistrate formulated that issue in the negative later in her reasons, in observing at [92] that "the defendant is not liable in damages for consequences it could not reasonably have foreseen, and it could not reasonably have foreseen action by the plaintiffs that was itself unreasonable".

43 Read in isolation, neither of those statements accurately reflects the approach to assessing damages in cases such *Wagon Mound No 1*, the focus of which is the reasonable foreseeability of the *kind* of damage that eventuates – in this case, loss of rent. However, statements of that nature need to be read in context of her Honour's reasons as a whole. Her Honour *did* consider that loss of rent was a type of damage that *was* reasonably foreseeable in the present case. Indeed, her Honour made an order for damages for loss of rent. However, her Honour also had before her a claim by the owners corporation that the Smiths had failed to mitigate their loss.

44 I have set out at [12] above the manner in which the owners corporation pleaded that the Smiths had failed to mitigate their loss. The issue required her Honour to focus on the particular conduct of the Smiths – and Mr Smith in particular – upon discovery of the damage to the magnesite flooring near the balcony. It is clear from her Honour's reasons that mitigation was a focus, particularly as concerns the question of the appropriate award of damages. This can be seen from the full passage at [92] which I have extracted above at [19]. The sentence which I have extracted from [92] in [42] above is consistent with the principle of mitigation, as are the immediately following sentences where her Honour found that it was not reasonable for the Smiths to make a "commercial" choice not to put tenants in the property until the floor was repaired in circumstances where there was no reasonable concern about danger.

45 In relation to the issue of mitigation, the Smiths relied on the decision in *Lubrano v Proprietors Strata Plan No 4038* (1997) 6 BPR 13,308 ("*Lubrano*") in submitting that there was no room for the principle of mitigation to operate in this case. I disagree that *Lubrano* supports that submission. In that case, Young J was addressing whether the duty in the cognate provision to s 106 of the *SSM Act* and s 62 of the 1996 Act, namely, s 68 of the *Strata Titles Act 1973* (NSW), was a strict one. The defendant had submitted that characterising the duty as strict would have absurd results, giving as an example it being liable to the owner of premises at the top of the building who deliberately threw a metal ball on the roof, breaking the tiles so that rain could come in. Young J rejected the submission, observing that the strictness of the duty had been

decided in a series of earlier cases: at 13,310. However, it does not follow from a conclusion that the duty in s 106 applies irrespective of contributory negligence on the part of a lot owner that an owners corporation cannot raise mitigation when the duty is breached and damages are claimed. *Lubrano* does not say anything about that circumstance.

46 Having regard to the description of the loss for which s 106(5) makes provision, her Honour did not err in reducing the amount of damages to be awarded to the Smiths for loss of rent. The Smiths accept that it is not open to them to challenge the factual findings on which the Magistrate relied in reaching that result in an appeal under s 39 of the *Local Court Act*.

47 The factual findings are determinative in this case, which can be seen by reference to the contrary result in the Appeal Panel's decision in *Gregg*. Ground 2 before the Appeal Panel in that case concerned whether the Tribunal erred in finding that Mr Gregg had mitigated 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". In dismissing that ground, the Appeal Panel noted (at [53]-[54]) the first-instance Tribunal's finding that Mr Gregg's premises were uninhabitable and unsafe due to the ongoing building works and, thus, unleasable. Accordingly, the Appeal Panel held that Mr Gregg (at [57]) took all available steps available to him to mitigate his loss. In the present case, no such finding was made in favour of the Smiths. On the contrary, the Magistrate found that there was nothing dangerous which made the Unit unlettable and that the Smiths made a "commercial decision" to leave it empty while the remedial works to the floor were carried out.

48 In view of the conclusion I have reached, I do not need separately to address the owners corporation's Notice of Contention.

Conclusion

49 As the Smiths have failed to establish error, the Summons must be dismissed. There is no basis on which the ordinary rule as to costs should be displaced. The Smiths should pay the costs of the owners corporation.

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