Civil and Administrative Tribunal

New South Wales

Case Name:	Wang v The Owners – Strata Plan No. 88789
Medium Neutral Citation:	[2022] NSWCATCD 157
Hearing Date(s):	19 April 2022
Date of Orders:	07 September 2022
Decision Date:	7 September 2022
Jurisdiction:	Consumer and Commercial Division
Before:	P French, Senior Member
Decision:	(1) The Owners – Strata Plan No. 88789 must pay Yu Wang $3,604.00 immediately. (2) The application is otherwise dismissed.
Catchwords:	LAND LAW – Strata title – common property – maintenance of common property – breach – damages – whether damages claim is out of time – whether compliance with duty to maintain the common property in good and serviceable repair has been deferred
Legislation Cited:	Strata Schemes Management Act 2015 (NSW) – s 106
Cases Cited:	Briginshaw v Briginshaw [1938] 60 CLR 336 Hadley v Baxendale [1854] EWHC J70 Siewa Pty Ltd v The Owners – Strata Plan 35042 [2006] NSWSC 1157 Tezel v The Owners – Strata Plan No 74232 [2022] NSWCATAP 149 The Owners - Strata Plan No 33368 v Gittins [2022] NSWCATAP 130 Wardley Australia Ltd [1991] FCAFC 314 (1991) 30 FCR 245
Category:	Principal judgment

Parties:	Yu Wang (Applicant) The Owners – Strata Plan No. 88789 (Respondent)
Representation:	Applicant (self-represented) Counsel: A Power (Respondent) Solicitor: J S Mueller & Co (Respondent)
File Number(s):	SC 21/45413
Publication Restriction:	Nil

REASONS FOR DECISION

Introduction

1 This is an application by Yu Wang (**the Lot Owner**) for an order pursuant to s 106(5) of the *Strata Schemes Management Act* 2015 (**SSM Act**) that would require The Owners – Strata Plan No. 88789 (**the Owners Corporation**) to pay her damages $12,593.00 for lost rental and $1,911.00 for other loss she contends she has suffered as a result of the Owners Corporation's breach of its statutory duty to maintain and keep the common property of the Strata Plan in a state of good and serviceable repair. This application was made to the Tribunal on 3 November 2021 (**the application**).

2 For the reasons set out following, the Tribunal has determined that the Lot Owner is entitled to an order for damages in the amount of $3,604.00 for loss of rent and damage to the interior of her Lot caused by flooding in February 2022. The balance of the claim has been dismissed. The claim for lost rent dating to September 2018 has been made outside the period permitted by s 106(6). The claim for lost rent and other damage dating to 2020 is in respect of a period where the Owners Corporation's compliance with s 106(1) was deferred pursuant to s 106(4) because it was pursuing action against the builder (Icon) in the District Court. The Lot Owner has an arguable claim for damages for mould treatment in or after February 2022 but has filed no evidence of any such loss.

Procedural history

3 The application was first listed before the Tribunal, differently constituted, by telephone for Directions on 21 December 2021 in accordance with NCAT's COVID-19 Revised Hearing Procedure as it was then in force. The Lot Owner attended that listing of the application in person. There was no appearance by the Owners Corporation. Consequently, the matter was adjourned to a Special Fixture Hearing and directions were given to the parties for the filing and exchange of the documentary evidence that they intended to rely on at that hearing.

Evidence and hearing

4 There was some delay in the Owners Corporation's compliance with the Tribunal's directions for the filing and service of its evidence which was originally the subject of objection by the Lot Owner. However, by the time of the hearing both parties had complied with these directions, and the Lot Owner had made two further submissions of documents which were not subject to objection by the Owners Corporation. I therefore determined to admit the whole of the documentary evidence filed by both parties into evidence. The Lot Owner filed documents on 23 November 2021, 18 February 2022, 21 March 2022 and 11 April 2022. These were marked Exhibits A1 to A4 respectively. The Owners Corporation filed documents on 9 March 2022 in four large ring binders amounting to several thousand pages. It was marked Exhibit R1.

5 The Special Fixture Hearing was conducted by AVL in a VMR in accordance with NCAT's COVID-19 Revised Hearing Procedure as it was in force at that time. The Lot Owner appeared at the hearing in person accompanied by her son as a support person. Ms A Power of counsel appeared on behalf of the Owners Corporation instructed by J S Mueller & Co, solicitors. In the presentation of her case the applicant gave evidence in her own cause under affirmation. She was not subject to cross-examination. The respondent's witness, Ms Sarah Jedda, Strata Manager, was made available to give evidence, but was not required by the Lot Owner. The hearing proceeded based on oral argument and submissions.

Material facts

6 The applicant is the owner of Lot 76 (**Unit 4201**) in Strata Plan 88789. She has not personally occupied the lot for any material time for the dispute. She uses the Lot to rent to tenants under a residential tenancy agreement, deriving income from this activity, which also funds a mortgage she has over the property. She has appointed a Managing Agent to manage the property as a rental property.

7 The respondent is the Owners Corporation for that Strata Plan.

8 Strata Plan 88789 (**the Strata Plan**) incorporates 131 residential Lots in 6 buildings of either 5 or 6 levels with 2 levels of basement car park. The Strata Plan is situated in Greenwich in Sydney. It was registered on 8 February 2014.

9 The developer of the Strata Plan was Waterbrook at Greenwich Pty Ltd (**Waterbrook**). At the material times for this dispute Waterbrook was deregistered (18 February 2019). The builder of the Strata Plan was Icon Construction Australia (NSW) Pty Ltd (**Icon**). A construction certificate authorising the construction of the buildings was issued in early 2011. Construction work was completed in January or early February 2014.

10 At all material times for this dispute the Owners Corporation had appointed a Strata Manager which is Dynamic Property Services PTY Ltd (**Dynamic**) to manage its affairs.

11 In or about early 2015 the Owners Corporation engaged a building consultant, Landlay Consulting Group (**Landlay**) to prepare an independent building defect report. This report was produced on 26 February 2015 (**the 2015 Landlay report**). It is clear from the scope of that report that it was commissioned by the Owners Corporation in anticipation of the commencement of proceedings against Waterbrook and Icon. However, no such action was instituted at that time.

12 Lot 4201 is referred to on page 119 of the 2015 Landlay Report. No building defects were noted at that time.

13 On 22 February 2018 the Owners Corporation instructed J S Mueller & Co to advise it in relation to the institution of proceedings against Waterbrook and

Icon. By letters dated 11 September 2018 J S Mueller & Co issued letters of demand to Waterbrook and Icon demanding that they rectify the defects identified in the Landlay report.

14 By letter dated 25 September 2018 an entity acting for Waterbrook denied liability for any defects and advised that strike-off action against it was in process. By letter dated 25 September 2018 Icon replied to the letter of demand stating that it had and continued to rectify defects in the building work and remained prepared rectify any outstanding defects. The letter expressed criticism of the Landlay report on the basis that it was then 3.5 years 'out of date'. Icon provided with its letter a schedule of building defects that had been logged up to that date and their present status ('open'/'closed'). I can find no reference to Lot 4201 in that list of defects. That is surprising because the Lot Owner has submitted email communications between her Property Manager, Anna Berberian and Strata Scheme's Building Manager, Phillip Thornburrow, dating to 14 February 2018 in which Mr Thornburrow states that the water ingress into Unit 4201 had been included on a list of building defects that had been referred to Icon for rectification.

15 In response to these letters the Owners Corporation instructed Landlay to update its 2015 report by conducting further inspections of the buildings. The updated report was available in draft on 25 January 2019. The final version, dated 28 January 2020, is in evidence at Tab 15 of Exhibit R1. At page 147 the following defects are noted in relation to Lot 4201:

> Living Room
>
> The Author sighted evidence of water penetration to either side of the carpet adjacent to the sliding door in the form of water staining. To determine the extent of the damage, the Author peeled back the carpet and observed water staining to the smooth edge of the carpet.
>
> To verify the source and activity of water penetration, the Author conducted a spray test to the sliding door frame. The Author notes prior to the spray test, the Author cleaned the track of the sliding door and adjoining weepholes from debris. I was revealed water is bypassing the sliding door frame and attributing (sic) to the observed water penetration.
>
> Given the active water leakage the Author recommends the removal of the subject sliding door to facilitate the installation of sill flashing in accordance to AS4654.2 and manufacturer's specifications.

16 On 30 May 2019 the Owners Corporation held an information session for Lot Owners to discuss, among other things, the legal advice it had received from J S Mueller & Co, the findings of the Landlay 2019 draft report, and the possibility of instituting legal proceedings against Waterstreet and Icon before the elapse of the home building statutory warranty periods.

17 Following that meeting, on 25 June 2019 and again on 5 July 2019, Dynamic sent a letter to all Lot Owners requesting them to notify it before 12 July 2019 of any additional or new defects that were not identified in the Landlay 2015 report. A questionnaire was enclosed for this purpose. The Managing Agent of a tenancy in Unit 4202 which is next door to Unit 4201 notified Dynamic of significant problems with the waterproofing of that Unit at that time. It does not appear that the Lot Owner or her Managing Agent responded to Dynamic's enquiries.

18 In July 2019 J S Mueller & Co provided further legal advice to the Owners Corporation in a context where Waterstreet had been deregistered by that time. On 31 July 2019 a General Meeting of the Owners Corporation authorised the institution of legal proceedings against Icon before 18 February 2020.

19 On 14 February 2020 the Owners Corporation commenced legal proceedings against Icon in the District Court of NSW (**the District Court proceedings**). A copy of the sealed Statement of Claim is in evidence at Tab 17 of Exhibit R1. It is a claim under the *Home Building Act* 1989(NSW) which pleads breach by the builder of the statutory warranties in relation to residential building work contained in s 18B of that Act. The particulars of the alleged breach include in paragraph 17 of the Statement of Claim "defects that are particularised in the expert reports of Landlay Consulting Group dated 28 January 2020 …". The proceeding was listed for directions on 7 April 2020 when the Court made directions for the filing and exchange of evidence with a final compliance date of 18 September 2020.

20 On or about July 2020 the Owners Corporation put Icon on notice that it had deferred its compliance with its obligations in relation to the maintenance and repair of the common property pending the outcome of the District Court proceedings, excepting with respect to the most serious of the defects, which

would be rectified, and the costs sought as compensation from Icon (**the priority rectification works**). The waterproofing defects in Lot 4201 were not among the priority rectification works.

21 In the process of preparing its evidence for filing in the District Court proceedings, the Owners Corporation engaged Landlay to reinspect the buildings again. Landlay produced a third Report dated 10 July 2020 based on these further inspections. There is no reference to Lot 4201 in this report. However, that report (and each of the earlier iterations) detail defects in the waterproofing of 4202 and the Unit above 4201 and substantial work required to remediate these defects.

22 In or about July 2020 the Owners Corporation engaged a quantity surveyor (**MBM**) to estimate the cost of rectifying the building defects identified by Landlay. On 28 September 2020 MBM advised the Owners Corporations it estimated the cost at $1,228M.

23 In view of this information the Owners Corporation sought Icon's consent, which it gave, to transfer the proceedings to the NSW, because the amount in dispute exceeded the monetary limit on the District Court's jurisdiction.

24 However, before this transfer could be effected Icon went into voluntary administration. The Owners Corporation was advised of this by letter from Icon's administrator dated 4 November 2021. On 16 February 2021, at a creditor's meeting convened by Icon's administrator, it was resolved that Icon would put into liquation.

25 MBM produced an expert witness report which set out its costings for the purpose of the District Court proceedings. Lot 4201 is referred to page 70 of that report. No specific sum is allocated for the rectification of defects but work to the living room is stated as being included in general allocation "R2" which concerns work in various lots. "R2" is explained on page 29 of the report as "water penetration through the windows/vent openings". The scope of works for rectification of this defect is set out at pages 29 to 35 at a total cost of $212,254.05. That reference may be an error, because Lot 4201 does not appear in the list of lots subject to this work on page 29. However, there is a reference to Lot 4201 in general allocation "R1" which commences on page 21

of the MBM report. “R1” is explained as “water penetration emanating through the balcony doors”. The scope of works for the rectification of this defect in various lots is set out at pages 21 to 28 at a total cost of $180,221.00.

26 At an Annual General Meeting of the Owners Corporation held on 9 June 2021 a Special Levy of $2,000,000.00 plus GST was approved to be payable from 1 July 2021 for the purposes of funding the rectification of the building defects identified in the Landlay report as costed by MBM.

27 On 13 July 2021 the District Court granted leave for the Owners Corporation to discontinue its proceedings against Icon.

28 In or about December 2022 the Owners Corporation engaged Strata Remedial Engineers Pty Ltd (**Strata Remedial**) to prepare a tender package for the waterproofing and other rectification works required to the buildings in the Strata Plan. The tender package was completed on 9 February 2022. On that date Strata Remedial expected to receive tenders in early March 2022, to engage the successful tender during March-April 2022, and for the rectification works to commence in May-June 2022.

The Lot Owners claim:

29 The Lot Owner’s claim for damages is constituted as follows:

Item No	Description	Amount
1	Loss of rent for period 10 to 29 September 2019	$1,790.00
2	Loss of rent for period 16 February 2020 to 2 June 2020	$8,308.00
3	Loss of rent (tenant rent reduction) for period 14 January 2022 to 23 March 2022	$530.00
4	Loss of rent for period 24 March 2022 to 19 April 2022	$1,963.00

5	Compensation for the cost of water extraction, drying, carpet and underlay removal, disposal, and replacement February 2022	$946.00
6	Compensation for the cost of removal of smooth edge and underlay	$165.00
7	Compensation for the cost of mould treatment of the unit	$800.00
	Total:	$14,502.00

30 For reasons that are explained below it is not necessary to traverse the Lot Owners evidence of loss in relation to items 1 and 2.

31 Items 2 and 3 are evidenced by the rent record maintained by the Lot Owner's Managing Agent which establishes that her tenants were provided with a rent reduction between 14 January 2022 and 23 March 2022 in the total amount of $530.00 due to the impact of water ingress and mould. They are also evidenced by a letter the tenants sent to the Lot Owner's Property Manager indicating that they were ending their rental agreement due to the condition of the property after it was flooded in February 2022, and by an opinion contained in an email from the Property Manager to the Lot Owner advising that she considered the property uninhabitable (unrentable) in its present condition. The Lot Owner also relies upon several photographs which depict carpet seriously damaged by water and mould. Item 5 is evidenced by an account statement issued to the Lot Owner by her Managing Agent which indicates that this cost was incurred and paid on her behalf. Item 6 is evidenced by a tax invoice from a carpet supplier. There is no evidence to support item 7.

Contentions of the parties

32 The Lot Owner contends that the Owners Corporation has been since early 2018 and continues to be in breach of the statutory duty reposed in it by s 106(1) of the SSM Act to maintain the common property of and about her lot in good and serviceable repair. Specifically, she complains that there is a failure

of the common property waterproofing which results in recurring serious water ingress into her Lot which has been destructive of the carpet and underlay and which has caused mould. She contends that she has suffered damage because of this breach in the form of lost rental income because her tenants have sought a rent reduction and/or have moved out due to the condition of the premises and because the premises cannot now be re-let due to its water damaged condition. She also contends that she has suffered damage in having to replace the carpet and underlay installed in her Lot on two occasions.

33 The Owners Corporation contends that the application must be dismissed, at least insofar as it concerns a claim for rent loss, because it has been made outside the two-year period within which s 106(6) requires such a claim to be made. It also contends that the claim is not otherwise maintainable because it had deferred its compliance with the duty reposed in it by s 106(1) pursuant to s 106(4) by instituting proceedings against the builder in relation to building defects in the District Court. Alternatively, or additionally, the Owners Corporation contends that the Lot Owner has not proved, on her evidence, any failure by it to comply with s 106(1) with respect to the subject matter of her complaints, nor has she satisfactorily proved her loss.

Jurisdiction

34 Subject to whether there is a limitation period barring the application, which is discussed below, there is no issue that the Tribunal has jurisdiction to deal with this application according to the provisions of the SSM Act.

Applicable law

35 Section 106 of the SSM Act relevantly provides:

> 106 Duty of Owners Corporation to maintain and repair property
>
> (1) An owners corporation for a strata scheme must properly maintain and keep in a state of good and serviceable repair the common property …
>
> …
>
> (4) If an owners corporation has taken action against an owner or other person in respect of damage to the common property, it may defer compliance with subsection (1) … in relation to the damage to the property until the completion of the action if the failure to comply will not affect the safety of any building, structure or common property in the strata scheme.

> (5) An owner of a lot in a strata scheme may recover from the owners corporation, as damages for breach of statutory duty, any reasonably foreseeable loss suffered by the owner as a result of a contravention of this section by the owners corporation.
>
> (6) An owner may not bring an action under this section for a breach of statutory duty more than two years after the owner first becomes aware of the loss.

36 In *Seiwa Pty Ltd v Owners Strata Plan 35042* [2006] NSWSC 1157, Brereton J said with respect to an equivalent predecessor provision to s 106(1) (references omitted):

> 3. ... Section 62(1) imposes on an owners corporation a duty to maintain, and keep in a state of good and serviceable repair, the common property. That duty is not one to use reasonable care to maintain and keep in good repair the common property, nor one to use best endeavours to do so, nor one to take reasonable steps to do so, but a strict duty to maintain and keep in repair.
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> 4 The duty to maintain involves an obligation to keep the thing in proper order by acts of maintenance before it falls out of condition, in a state which enables it to serve the purpose for which it exists. Thus the body corporate is obliged not only to attend to cases where there is a malfunction, but also to take preventative measures to ensure that there not be a malfunction. The duty extends to require remediation of defects in the original construction of the common property and it extends to oblige the owners corporation to do things which could not be for the benefit of the proprietors as a whole or even a majority of them.
>
> …

37 In *The Owners-Strata Plan No 33368 v Gittins* [2022] NSWCATAP 130 the Appeal Panel summarised the relevant principles pertaining to the duty to repair (relevantly) as follows at [57] to [59] (references omitted):

> The scope of the duty of an owners corporation to maintain and keep in a state of good repair common property has been the subject of extensive judicial consideration …
>
> The pertinent principles … are:
>
> (1) The owners corporation has a strict duty under s 106 (1) of the SSM Act to maintain and keep in a state of good and serviceable repair the common property. That duty is not merely to take reasonable steps or use best endeavours.
>
> (2) The duty under s 106 (1) of the SSM Act includes keeping common property in order by acts of maintenance before it falls out of condition. The duty includes taking preventative measures to ensure there is not a malfunction. The duty also includes remediation of defects in the original construction of the common property.
>
> (3) 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 106 (1) duty.

(4) Breach of the duty under s 106 (1) of the SSM Act gives each Lot owner a statutory cause of action.

(5) Repairs to common property (including renewal or replacement of common property) that does not involve alteration or addition for the purpose of improving or enhancing the common property does not require a special resolution of the owners corporation under s 108 of the SSM Act. 13

(6) Renewal or replacement of common property under s 106 (2) of the SSM Act is only engaged when the item of common property is no longer operating effectively, or at all, or has fallen into a state of disrepair.

(7) Renewal or replacement of common property under s 106 (2) of the SSM Act is limited by a concept of reasonable necessity.

38 For the purposes of s 106(5) of the SSM Act damage and loss will be reasonably foreseeable if it is not too remote from the breach of s 106(1). That is, it must ordinarily or naturally flow from that breach: cf *Hadley v Baxendale* [1854] EWHC J70.

39 The Lot Owner bears the onus of establishing the Owners Corporation's breach of s 106(1) and any damage and loss she has suffered because of that breach to the civil standard, which is the balance of probabilities. This requires her to establish the affirmative of her allegations to the reasonable satisfaction of the Tribunal bearing in mind that reasonable satisfaction is not produced by inexact proofs: *Briginshaw v Briginshaw* [1938] 60 CLR 336 per Dixon J at p 362.

Consideration

40 To determine the outcome of this application the Tribunal must pose and answer the following questions:

(a) Has the application been made within the period permitted by s 106(6) of the SSM Act?

(b) Has the Owners Corporation deferred compliance with s 106(1) in accordance with s 106(4)?

(c) With respect to the Lot Owner's complaints, is the Owners Corporation in breach of its duty to maintain the common property in good and serviceable state of repair?

(d) If the answer to (c) is "yes" what damages, if any, has the Lot Owner suffered because of that breach?

The limitation issue:

41 The Owners Corporation contends that the Tribunal does not have jurisdiction to deal with the application because the Lot Owner first became aware of her

loss at least insofar as it relates to rent in September 2019 which was more than two years before she made her application on 3 November 2021. In this respect, as set out above, the first element of the applicant's claim concerns rent loss for the period 10 to 29 September 2018.

42 The hearing of this application took place before publication of the Appeal Panel's decision in *Tezel v The Owners – Strata Plan No 74232* []2022] NSWCATAP 149 on 10 May 2022 (**Tezel**). Prior to *Tezel* there had been some apparent divergence of Tribunal authority as to how the words in s 106(6) "first becomes aware of the loss" were to be interpreted and applied in ascertaining the limitation period imposed by that section. The Appeal Panel in *Tezel,* applying the Full Federal Court's decision in *State of Western Australia v Wardley Australia Ltd* [1991] FCAFC 314 (1991) 30 FCR 245, determined that issue in the following way at [40] to [45]:

> 40 … in the present appeal the appellant's loss is economic loss and the cause of action requires loss as a result of a breach of the strict liability duty in SSMA s 106(1) and/or (2). That strict liability duty is ongoing until the relevant strict liability obligation of repair or maintenance is fulfilled, although it may for a period be interrupted (or delayed in its commencement) under SSMA s 106(4). As already said, the relevant loss is actual loss that is reasonably foreseeable rather than future loss.
>
> 41 With actual economic loss as a result of this ongoing breach of strict statutory obligation, the crystallisation of the complete actual loss occurs and the cause of action is constituted only when the ongoing breach ceases. However, at any point there is a breach of the ongoing duty for which the loss arising from that breach is distinct *so as to constitute the two elements required to bring an action under SSMA s 106(5)* [emphasis in original]. …
>
> 42 SSMA s 106(6) operates on the completely-constituted claim under s 106(5), which means that the owner's first awareness must be of "the loss" that constitutes an element of *that* claim [emphasis in original], not any other loss even if it is of the same character or is of a continuing nature with the relevant loss for the claim.
>
> …

43 Applying the principle in *Tezel* to the facts of this case, the Lot Owner is unable to pursue a claim for lost rent for the period 10 to 29 September 2019 because she must be taken to have become aware of that loss on or about 29 September 2019 when it occurred. Although the building defect that resulted in the damage suffered by the Lot Owner (the lost rent) may have continued after 19 September 2019 the damage did not. The applicant lost rent for a finite period ending on 29 September 2019. For the purposes of s 106(6), time runs

from that date, which was more than 2 years before she made her application. This element of the claim is therefore time barred by the 2-year limitation period on the making of making of a claim for damages for breach of statutory duty imposed by s 106(6) of the SSM Act. It must therefore be dismissed on the basis that the Tribunal does not have jurisdiction to deal with it.

44 However, the Lot Owner is not prevented from pursuing a claim for damages for loss of rent that occurred after September 2019 and within the 2-year period before the application. That loss is distinct from any loss suffered in September 2019 even if it is of the same type. The applicant could not be aware of that loss until the time of its occurrence. This means that the claims for loss of rent (items 2, 3 and 4 above) have been made within the period permitted by s 106(6) and the Tribunal has jurisdiction to determine them.

The deferred compliance issue:

45 The evidence establishes that the Owners Corporation commenced action against Icon in the District Court on 14 February 2020 and that it discontinued that action on 13 July 2021. Those proceedings concerned the building defects identified in the Landlay Reports. Although there is some lack of clarity as to whether this included building defects in Lot 4201, I conclude that the better view is that it did because the MBM report (the Owners Corporation's expert in the District Court proceedings) specifically included such works in its costings.

46 Additionally, it is the Lot Owner's contention that most of the water ingress into her unit comes through common walls with Lot 4202. It is clear from the Landlay reports that there is a serious failure of water proofing in that Lot and the MBM Report costs substantial specific remedial works to that Lot. Also, in various correspondence between the Lot Owner and representatives of Dynamic over time it is asserted by Dynamic that water ingress into Unit 4201 cannot be addressed until water proofing failures in the "unit above" have been rectified. Although I am not certain what that lot/unit no. is, I am certain on the evidence that remedial works to that unit were found necessary by Landlay and were the subject of the District Court proceedings. I am thus satisfied that the building defects about which the Lot Owner complains were the subject of the District Court proceedings.

47 In or about July 2020 the Owners Corporation, or its Strata Committee, (it is not clear which) resolved to defer its compliance with its statutory duty to maintain and keep the common property in a state of good and serviceable repair pending the outcome of the legal action it had instituted against Icon. Section 106(4) of the SSM Act conferred discretion on it to do so, but this discretion had to be exercised reasonably. Specifically, s 106(4) did not permit compliance to be deferred if the defects in common property affected the safety of any building structure or common property.

48 As a matter of general principle, I am satisfied that it was a reasonable exercise of discretion in the circumstances for the Owners Corporation to defer its compliance with s 106(1) while its action against Icon in the District Court was on foot. The Owners Corporation could not know until Icon's creditor's meeting held on 16 February 2021 that this action was doomed to fail because of Icon's liquidation. The cost of the remedial works, later estimated as exceeding $1,200,000.00 by MBM, was very substantial and would have been a serious impost on the Owners Corporation (it ultimately required a $2,000,000.00 special levy to be raised). It was reasonable to try to avoid incurring that cost.

49 The Owners Corporation did not defer compliance with respect to all building defects while its action against Icon was on foot. It proceeded with rectification works identified as urgent in the Landlay Reports. The priority of those works relative to the totality of the building defects requiring rectification was thus determined on an objective basis with expert advice. Landlay did not consider the remedial works necessary to prevent water ingress into Unit 4201 urgent. The discretion conferred by s 106(4) was also exercised reasonably by the Owners Corporation for this reason.

50 In various emails that passed between the Lot Owner, her Managing Agent and Dynamic during the period 16 February to 2 June 2020 there are references to water ingress into Unit 4201 and "mould". Mould is potentially a building safety issue. However, the difficulty for the Lot Owner is that she merely asserts the presence of mould. That assertion is supported by some photographs showing what appears to be light mould on the under surface of carpet. But she has

submitted no evidence of a suitably qualified expert to establish the extent of the mould and its impact on the habitability of Unit 4201 at that time. I thus cannot be satisfied to the civil standard that Unit 4201 was unsafe during this period due to mould, which made it unreasonable for the Owners Corporation to defer compliance with respect to the building defects that were the root cause of the mould.

51 For the foregoing reasons, the Lot Owner's claim for lost rent for the period 16 February 2020 to 2 June 2020 must be dismissed because the Owners Corporation was entitled during this period to defer its compliance with s 106(1), while its proceedings against Icon in the District Court were on foot.

The breach of statutory duty issue

52 The period of deferral of the Owners Corporations duty to comply with s 106(1) certainly ended on 13 July 2021 when proceedings against Icon were discontinued, and arguably ended earlier than that when it was put on notice that Icon had entered voluntary administration. However, it is not necessary for me to decide that issue here. It is sufficient to conclude that the duty was re-enlivened on and from 13 July 2021 such that items 3 to 7 of the Lot Owner's claims, which relate to the period 14 January 2022 to 19 April 2022 are maintainable.

53 As *Siewa* and *Gittins* make clear, the duty reposed in an Owners Corporation by s 106(1) is a strict one. It applies to defects in the original construction of the common property of the Strata Scheme. It is not a duty that can be complied with by the taking of "reasonable steps" or by using "best endeavours". Consistent with this principle, the duty cannot be complied with by prioritising certain works over others. As soon as something in the common property ceases to function properly or at all, there is a breach of the duty.

54 The Owners Corporation submits that the Lot Owner has failed to prove that the source of water ingress into Unit 4201 is caused by a defect in the common property which attracts the operation of s 106(1). It is true that the Lot Owner has not filed any expert evidence to this effect. Nevertheless, I consider this submission disingenuous.

55 At no stage in the progression of this dispute has the Owners Corporation, though its Strata Manager, or otherwise, denied that the water ingress into Unit 4201 results from a failure of waterproofing in the common property. In various communications with the Lot Owner, the Strata Manager refers to the cause of the water ingress as being a failure of waterproofing in the adjacent unit and the unit above 4201 which must be fixed before any remedial work can be carried out to common property and damaged lot property in Unit 4201. Over the whole course of the dispute up to the hearing the Owners Corporation's position has been that the remedial works required to Unit 4201 were of less priority than other works identified as necessary by Landlay, not that it denied liability to undertake these remedial works. Although it is the applicant that bears the onus of proof, it is understandable that she conducted her case on the basis that liability (leaving aside the s 106(4) and (6) issues) was not in dispute. The Landlay and MBM reports include remedial works to Unit 4201 and the adjacent unit and unit above. If the Owners Corporation did not accept that Unit 4201 required remedial works to the common property waterproofing, I am satisfied that this work would not have been included in the Landlay and MBM reports.

56 For the foregoing reasons, I am satisfied that the Owners Corporation was and remains as at the date of the hearing in breach of its statutory duty to maintain the waterproofing of the common property on and adjacent to Unit 4201 in good and serviceable repair.

Damage

57 I have set out the evidence the Lot Owner relies upon to prove her damage at paragraph 31 above. Other than in relation item 7, which is not supported by any evidence, I consider the Lot Owner's proofs quite robust.

58 I am satisfied that the defective common property waterproofing on and adjacent to Unit 4201 resulted in the flooding of the apartment during heavy rain in February 2022. It is clearly the case that the Lot Owner was obliged to offer her tenants a rent reduction due to the condition of the apartment after the February 2022 flooding event, and it is clearly the case that those tenants gave up their tenancy in March due to the persistence of the water damage and

mould. I also accept the opinion of the Lot Owner's Property Manager that the apartment cannot reasonably be offered for rent while it remains in water damaged condition. The photographs of the condition of the carpets and floor are compelling in this respect. The Lot Owner was clearly obliged to incur the cost of water extraction and drying of the carpet to attempt to salvage it, and when that failed to incur the costs of removing and replacing the carpet, underlay, and smooth edge. All this damage was a reasonably foreseeable consequence of the Owners Corporation's breach of its statutory duty to maintain the waterproofing in a good and serviceable state of repair.

59 I will therefore order the Owners Corporation to pay the Lot Owner damages of $3,604.00 which is the total of each head of damage she claims in relation to the February 2022 flooding event and its aftermath, other than the cost of mould treatment, which she has failed to prove.

Orders

60 For the foregoing reasons I make the following order:

(1) The Owners – Strata Plan No. 88789 must pay Yu Wang $3,604.00 immediately.

(2) The application is otherwise dismissed.

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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