Civil and Administrative Tribunal

New South Wales

Case Name:	Wang v The Owners – Strata Plan No. 92448
Medium Neutral Citation:	[2022] NSWCATCD 156
Hearing Date(s):	12 July 2022
Date of Orders:	09 September 2022
Decision Date:	9 September 2022
Jurisdiction:	Consumer and Commercial Division
Before:	P French, Senior Member
Decision:	(1) The Owners – Strata Plan No. 92448 must pay Matilda Chang $12,531.43 immediately.
Catchwords:	LAND LAW – Strata title – common property – maintenance of common property – breach – damages
Legislation Cited:	Strata Schemes Management Act 2015 (NSW) – s 106
Cases Cited:	Briginshaw v Briginshaw [1938] 60 CLR 336 De Soleil v Palmhide P/L [2010] NSWCATT 464 Finn v Finato [2004] NSWCTTT 179 Hadley v Baxendale [1854] EWHC J70 Siewa Pty Ltd v The Owners – Strata Plan 35042 [2006] NSWSC 1157 The Owners - Strata Plan No 33368 v Gittins [2022] NSWCATAP 130
Category:	Principal judgment
Parties:	Matilda Chang (Applicant) The Owners – Strata Plan No. 92448 (Respondent)
Representation:	Applicant (self-represented) T Peeka, Strata Manager (Respondent)
File Number(s):	SC 22/06759

Publication Restriction: Nil

REASONS FOR DECISION

Introduction

1 This is an application by Matilda Chang (**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. 92448 (**the Owners Corporation**) to pay her damages in the sum of $12,900.00 for lost rental 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 15 February 2021 (**the application**).

2 For the reasons set out following, the Tribunal has determined that the Lot Owner is entitled to the order that will compensate her for lost rent for a period of 204 days between 21 July 2021 and 9 February 2022 in the amount of $12,531.43. The Owners Corporation's only defence to the application is that repairs to the common property were delayed by factors beyond its control, including by its insurer and the effect of COVID-19 Public Health Orders. That defence is no answer to the claim.

Procedural history

3 The application was first listed before the Tribunal, differently constituted, by telephone for Directions on 8 March 2022 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. At that point, the named respondent to the application was Tarakesh Peeka, who is the Owners Corporation's Strata Manager. He attended the Directions hearing in person. In accordance with the Tribunal's usual practice where both parties are present at the first listing of an application the Tribunal attempted to assist the parties to resolve the dispute cooperatively by conciliation. Those efforts were not successful. The application was amended to remove Mr Peeka as the respondent party and to substitute for him The Owners – Strata Plan 92448. The Lot Owner was directed to serve the Owners Corporation with a copy of her application and evidence, and the application was adjourned for a further Directions hearing.

4 The application next came before the Tribunal for directions on 4 April 2022. The Lot Owner and Mr Peeka attended that listing of the application. Further efforts at conciliation were unsuccessful. Consequently, the application was adjourned for a Special Fixture Hearing. Further directions were given to the parties for the filing and service of the documentary evidence that they intended to rely on for the final hearing.

Evidence and hearing

5 Both parties have complied with the Tribunal's directions for the filing and exchange of their documentary evidence. The Lot Owner filed documents on 25 February 2022, 18 March 2022, and 29 April 2022. These bundles were marked Exhibits A1 to A3 respectively. The Owners Corporation filed a bundle of documents on 24 June 2022. This was marked Exhibit R1.

6 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. Mr Peeka attended the hearing on behalf of the Owners Corporation. In the presentation of their respective cases, both gave evidence under oath. The parties had the opportunity to present their respective cases, to ask each other questions, and to make final submissions to the Tribunal.

Material facts

7 The applicant is the owner of Lot 10 in Strata Plan 92448 which is a residential lot in an apartment block. The applicant does not personally occupy her Lot. It is an investment property that she derives income from by leasing it to tenants under a residential tenancy agreement. At all material times for this dispute the Lot Owner had appointed a Managing Agent (an entity trading as Better Life Property Group) to manage the Lot as a rental property.

8 The respondent is the Owners Corporation of Strata Plan 92448, which is in Homebush. At all material times for this dispute, the Owners Corporation had appointed as its Strata Manager, an entity trading a Strathfield Partners. Mr Peeka is a licensed Strata Manager in the employ of Strathfield Partners. His portfolio includes Strata Plan 92448. The Owners Corporation has a policy of insurance in relation to the common property of the Strata Plan with Coverforce

Pty Ltd, which is underwritten by Strata Unit Underwriters. The insurer's loss adjuster is an entity trading as Crawford and Company.

9 The following facts are not in dispute:

(a) Lot 10 is a two bedroom apartment with one bathroom and a single car park.

(b) Lot 10 was leased to a tenant under a residential tenancy agreement up until 21 July 2021 (**the tenant**). The rent payable under that agreement was $430.00 per week.

(c) The Lot Owner has included in her evidence an appraisal provided to her by her Managing Agent dated 9 March 2022. The Managing agent states her opinion that the market rental that is achievable for the premises is "in the vicinity of $430.00 per week".

(d) In November 2020 the tenant reported to the Lot Owner's Managing Agent that there was water ingress under the floor of the hallway of the apartment and a foul odour emanating from the floor. The Managing Agent reported this to the Owners Corporation's Strata Manager.

(e) The Strata Manager engaged a specialist builder to carry out an inspection and provide a report. This report was completed on 17 December 2020. The builder found an extensive failure to the waterproofing on the common property in Lot 9, which is immediately adjacent to Lot 10, which had resulted in water penetration through the common wall and under the hallway floor of Lot 10.

(f) It appears that this inspection was invasive. In any event, on or about December 2020 the laminate floorboards of the hallway of Lot 10 were torn up. Photographs of their condition are in evidence. They are seriously water damaged and mouldy. There is also mould to the underfloor and lower sections of the hallway walls.

(g) The Owners Corporation made a claim on its insurance policy in relation to the failed waterproofing and consequential damage to lot property in Lots 9 and 10. It is sufficient for present purposes to state that it took some time for that claim to be assessed and it was not approved until on or about July 2021. In or about early July 2021 a builder was engaged by the insurer to carry out the necessary remedial works to Lot 9's waterproofing.

(h) Between the period November 2020 to July 2021 the tenant made repeated complaints to the Lot Owner's Managing Agent about the condition of the hallway floor and the amenity of the apartment more generally due to water ingress and mould. The Managing Agent and Lot Owner made repeated representations to the Strata Manager about the condition of Lot 10 requesting

urgent action to rectify the damage to the Lot caused by the defective waterproofing in Lot 9.

(i) On 21 July 2021 the tenant terminated the residential tenancy agreement and returned possession of the premises to the Lot Owner (landlord) because they considered the Lot to be uninhabitable because of its condition. The Lot Owner's Managing Agent advised the Lot Owner that it would not be possible to relet the property in that condition.

(j) In August 2021 the Lot Owner made a claim to the Owners Corporation for lost rental income which was referred by the Owners Corporation to its insurer. The Insurer declined the claim because there was no residential tenancy agreement subsisting at that time.

(k) After July 2021 there were further extensive delays in remedial works to Lot 9 being carried out. The Owners Corporation contends that these delays were caused by COVID-19 Public Health Orders which were then in force which, it contends, prevented trades from attending the site. The Lot Owner disputes this on the basis that Lots 9 and 10 were vacant and the Public Health Orders did not prevent work being carried out in vacant premises.

(l) In September 2021 the insurer, via its loss adjuster, required further testing of the waterproofing in Lot 9 as a pre-condition to commencing the remedial work to the lot property in Lot 10. There was considerable 'to and fro' about this between September and November 2021 which involved further inspections and reports by a builder. Between November 2021 and February 2021, there was then considerable 'to and fro' between the Strata Manager and the insurer's loss adjuster about the scope of works necessary to remedy Lot 10's floor.

(m) The insurer gave the final approvals for the replacement of Lot 10's floor at some time in late January 2022. A contractor attended to measure for the new floor on 30 January 2022, and this work was completed between 7 and 9 February 2022.

The Lot Owner's claim

10 The Lot Owner claims damages of $12,900.00, which is loss of rent for the period 21 July 2021 to 9 February 2022, being the period between when her former tenants moved out and when it was possible to offer the premises for lease again after the hallway floor was replaced. As evidence of her loss, she relies upon the residential tenancy agreement that subsisted between her and her former tenant which provided that the rent was $430.00 per week, and her Managing Agent's appraisal of the market rent for the premises dated 9 March 2022.

Contentions of the parties

11 The Lot Owner contends that the Owners Corporation was from November 2020 up to 9 February 2022 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 was a failure of the common property waterproofing which resulted in serious water ingress into her Lot which was destructive of the hallway floor. She contends that she has suffered damage because of this breach in the form of lost rental income because her tenant moved out on 21 July 2021 due to the condition of the apartment and the apartment could after that date due to its condition up to 9 January 2022 when the floor was replaced.

12 The Owners Corporation does not dispute that the common property waterproofing on and about Lot 9 was in a state of disrepair on and from November 2020. It does not dispute that this resulted in damage to the hallway floor of Lot 10. Its defence to the application is that the substantial delay to the carrying out of remedial works were the result of its insurer's conduct of its claim and the impact of the availability of tradespersons to carry out the work that resulted from COVID-19 related Public Health Orders. It also appears to be contended that the damage to the hallway floor did not render Lot 10 uninhabitable.

Jurisdiction

13 There is no issue that the Tribunal has jurisdiction to deal with this application according to the provisions of the SSM Act.

Applicable law

14 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.

15 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.
>
> 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.

16 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.

(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.

17 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.

18 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

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

(a) At the material time for the dispute, was the Owners Corporation in breach of its duty to maintain the common property in good and serviceable state of repair?

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

20 As *Siewa* and *Gittins* make clear, the duty reposed in an Owners Corporation by s 106(1) is a strict one. 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, an Owners Corporation cannot avoid breach of s 106(1) because of

the conduct of another (its' insurer's delay) or because of some supervening event (such as any COVID-19 related lockdown). As soon as something in the common property ceases to function properly or at all, there is a breach of the duty. In this case there is no issue that the common property waterproofing in relation to Lots 9 and 10 was defective (in a state of disrepair) from on or about November 2020, and that the waterproofing and consequential damage insofar as it affected Lot 10 was not finally rectified until 9 February 2022.

Damage

21 I have set out the evidence the Lot Owner relies upon to prove her damage at paragraph 10 above. I consider the Lot Owner's proofs quite robust. There can be no issue that the Lot Owner was leasing her Lot to a tenant under a residential tenancy agreement for rent of $430.00 per week up to 21 July 2021. I am also satisfied that the tenant vacated the property because of the persistent failure of the Owners Corporation to rectify the source of water ingress and mould into the hallway, and because of the state of demolition of that floor. I accept the evidence given by the Lot Owner that her Property Manager advised her the premises could not be relet when its floor remained in a state of demolition and when the apartment remained susceptible to further water ingress and mould. I find that in the unlikely event that a tenant was prepared to move into the property in that condition, the Lot Owner (landlord) would be exposing herself to claims from the tenant concerning the state of disrepair, and potentially, for consequential losses arising from that state of disrepair.

22 The Owners Corporation (or at least its insurer) appears to put the habitability of the premises in issue; that is, it appears to be contended that the damage to Lot 10 did not render it uninhabitable and that it could have been let to a tenant after 21 July 2021. The test for habitability of rented premises is whether premises can be dwelt in by a tenant with reasonably comfort and safety: *Finn V Finato* [2004] NSWCTTT 179. Premises will not be found uninhabitable lightly: *De Soleil v Palmhide P/L* [2010] NSWCATT 464. In this case I am satisfied that the test for habitability was not met between 21 July 2021 and 9 February 2022. As I have found, the floor of the hallway was in a state of

demolition, and Lot 10 was subject to recurring water ingress and mould during this period. Mould is dangerous to human health.

23 It follows from this that the rent that the Lot Owner lost between 21 July 2021 and 9 February 2022 was a reasonably foreseeable consequence of the Owners Corporation's breach of its statutory duty to maintain the common property of the Strata Plan in a good and reasonable state of repair. I am satisfied that but for the state of disrepair of the common property the Lot Owner would have continued to receive rent at the rate of $430.00 per week between 21 July 2021 and 9 February 2022. That is a period of 204 days in respect of which the rent payable would have been $12,531.43. I have been unable to determine how the Lot Owner has arrived at the figure $12,900.00, but the difference is not significant. I will therefore order the Owners Corporation to compensate the Lot Owner for the loss that has been proved immediately.

Orders

24 For the foregoing reasons I make the following order:

(1) The Owners – Strata Plan No. 92448 must pay Matilda Chang $12,531.43 immediately.

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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