Civil and Administrative Tribunal

New South Wales

Case Name:	Salib v The Owners – Strata Plan No 20851
Medium Neutral Citation:	[2023] NSWCATCD 48
Hearing Date(s):	22 March 2023
Date of Orders:	12 April 2023
Decision Date:	12 April 2023
Jurisdiction:	Consumer and Commercial Division
Before:	M Eftimiou, General Member
Decision:	The application is dismissed.
Catchwords:	Breach of owners corporation's obligation to repair and maintain common property - measure of damages for breach; mitigation
Legislation Cited:	Civil and Administrative Tribunal Act 2013 Strata Schemes Management Act 1996 Strata Schemes Management Act 2015
Cases Cited:	Siewa Pty Ltd v The Owners Strata Plan 35042 [2006]NSWSC 1157 The Owners Strata Plan 50276 v Thoo [2013]NSWCA 270 The Owners- Strata Plan No 80412 v Vickery (No 2) [2019]NSWCA 284 The Owners- Strata Plan No 36613 v Doherty [2021]NSWCATAP 285 Vickery v The Owners – Strata Plan No 80412 [2020] NSWCA 284. Hammond v Ozzy's Cheapest Cars Pty Ltd [2015]NSWCATAP Russell v The Trustees of Roman Catholic Church for the Archdiocese of Sydney [2008] NSWCA 217 Glenquarry Park Investments v Hegyesi [2019]

	NSWSC425
Category:	Principal judgment
Parties:	Hany Salib (applicant) The Owners- Strata Plan No 20851 (respondent)
Representation:	The applicant in person Mr Mueller (solicitor) for the respondent
File Number(s):	SC 22/41500
Publication Restriction:	Nil

REASONS FOR DECISION

1 By application filed with the Tribunal on 12 September 2022 the applicant sought orders to "stop the leaking and fix the resulted damages: compensation to be considered" The proceedings relate to a strata scheme in Bankstown NSW. The applicant is the owner of Lot 24 in Strata Plan 20851.The respondent is the Owners Corporation.

2 For the reasons that follow, the Tribunal has determined that the respondent has breached its duty to maintain and repair common property pursuant to of

> s 106(1) of the SSMA. However, the Tribunal declines to make a work order. The Tribunal finds pursuant to s 106(5) of the SSMA that the applicant is not entitled to an amount in damages totalling $53,770.00. The application is dismissed.

Hearing

3 The applicant appeared at the hearing. The respondent was represented by Mr Mueller solicitor.

4 The applicant sought to rely on the following documents: Exhibit A-The applicant's documents. The respondent sought to rely on the following document: Exhibit R – the respondent's documents.

5 There was an application by Mr Mueller, Solicitor made at the commencement of the hearing to represent the respondent. An earlier application for leave had been refused by the Tribunal on 15 March 2023. The application was made on the following basis:

(a) The amount of damages claimed by the applicant is well above $30.000.00.

(b) There is conflicting expert evidence in relation to the work order that is being sought. The submissions of a legal practitioner would assist the Tribunal.

(c) There is a novel aspect to the applicant's claim in that he is seeking $15,000.00 for his time in relation to the matter as a cost and seeking legal costs that were incurred prior to the proceedings having been commenced.

(d) Allowing a legal practitioner to represent the respondent will ensure that the proceedings are completed in a just, quick and cheap manner. There is no one on the strata committee who is legally qualified and who can represent the owners corporation. The respondent will suffer a prejudice due to the nature of the claim if not legally represented.

(e) The applicant would not be disadvantaged as the Tribunal has experience in assisting persons who are not legally represented.

6 The applicant opposed the respondent being legally represented for the following reasons:

(a) The Tribunal had previously refused legal representation on the basis that the claim was modest and less than $30,000.00 however, that was not the only basis for not granting leave.

(b) The applicant does not have legal qualifications, so the respondent would not be disadvantaged if not legally represented.

(c) The owners corporation have failed to carry out repairs.

(d) Any fees for legal representation will need to be paid by the owners corporation and that would not be fair.

7 The Tribunal considered the submissions of both parties and granted leave to the respondent to be legally represented. The Tribunal was satisfied that the claim far exceeded $30,000.00 and raised complex issues of fact and law. Oral Reasons were given at the hearing for the Tribunal's decision. The Tribunal gave the applicant an opportunity to seek an adjournment to allow him to seek legal advice and representation, if he felt he was being disadvantaged by the Tribunal's decision to grant leave to the respondent to be legally represented. The applicant declined the opportunity to request an adjournment and advised the Tribunal that he was ready to proceed to hearing.

Jurisdiction

8 These proceedings relate to premises in Bankstown which are the subject of a strata scheme. As a result, the SSMA applies, and the Tribunal has jurisdiction to hear and determine the proceedings.

9 Section 106(6) imposes a time limit of two years for a claim for damages by a lot owner for a breach of s 106(1), with time commencing to run from when the lot owner "*first becomes aware of that loss*". The applicant first became aware of water ingress in the property on 10 February 2021, with his tenant vacating the property on 13 January 2023. The applicant submitting that he was unable to lease his premises once the tenant had vacated. The premises and these proceedings were commenced in 12 September 2022 and so the application has been made within time.

The relevant law

10 The obligation to repair and maintain common property is set out s 106 of the SSMA as follows:

> (1) An owners corporation for a strata scheme must properly maintain and keep in a state of good and serviceable repair the common property and any personal property vested in the owners corporation.
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> (2) An owners corporation must renew or replace any fixtures or fittings comprised in the common property and any personal property vested in the owners corporation.
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> (3) This section does not apply to a particular item of property if the owners corporation determines by special resolution that-
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> (a) it is inappropriate to maintain, renew, replace or repair the property, and
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> (b) its decision will not affect the safety of any building, structure or common property in the strata scheme or detract from the appearance of any property in the strata scheme.
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> (4) If an owners corporation has taken action against an owner or other person in respect of damage to the common property, it may defer compliance with subsection (1) or (2) in relation to the damage to the property until the completion of the action if the failure to comply will not affect the safety of any building, structure or common property in the strata scheme.
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> (5) An owner of a lot in a strata scheme may recover from the owners corporation, as damages for breach of statutory duty, any reasonably

foreseeable loss suffered by the owner as a result of a contravention of this section by the owners corporation.

(6) An owner may not bring an action under this section for breach of a statutory duty more than 2 years after the owner first becomes aware of the loss.

(7) This section is subject to the provisions of any common property memorandum adopted by the by-laws for the strata scheme under this Division, any common property rights by-law or any by-law made under section 108.

(8) This section does not affect any duty or right of the owners corporation under any other law.

11 As the obligation imposed by the *Strata Schemes Management Act* 1996 (the 1996 Act), which applied prior to the SSMA, is in the same terms as the wording of s 106(1), what was said in *Siewa Pty Ltd v The Owners Strata Plan 35042* [2006] NSWSC 1157 at [3] is still relevant:

> 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.

12 That the Tribunal has jurisdiction to hear and determine such a claim was recently confirmed in the Court of Appeal decision in *Vickery v The Owners – Strata Plan No 80412* [2020] NSWCA 284.

Applicant's Evidence and Submissions

13 The applicant is the owner of lot 24 in Strata Plan 20851. This is a commercial lot.

(1) The applicant's lot has suffered water ingress due to a building roof defect leaving parts of the lot uninhabitable and the carpets ruined with mould.

(2) The owners corporation have failed to take any action over the past two years to remedy the common property roof.

(3) The applicant's tenant vacated the property on 13 January 2023 due to ongoing water ingress.

(4) The applicant has made numerous requests to the owners corporation and to the strata manager for repairs to be undertaken with little results.

(5) The applicant continues to suffer loss and damage due to the respondent's failure to repair and maintain the common property defects.

(6) The applicant seeks an order that the owners corporation rectify the defects pursuant to section 106(1) SSMA.

(7) The applicant seeks the following damages:

(a) Rent compensation already paid to the applicant's tenant $2260.37.

(b) One month free rent given to the applicant's tenant $3917.97.

(c) Loss of Rent from January 2023 until the repairs are carried out at $3917.97 per month.

(d) Compensation "of our time". At least 40 hours $15,400.00

(e) Carpet Replacement $8380.00

(f) Legal Fees $5645.58

(g) Scratching mould and painting $2500.00.

Respondent's submissions

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(a) The building is a two-storey brick and concrete commercial building which contains 29 commercial lots and car spaces.

(b) There are 13 commercial lots situated on the top floor of the building. One of the top floor lots is lot 24, the applicant's lot.

(c) The owners corporation is aware of water leaks to the top floor lots including the applicant's lot.

(d) The owners corporation has engaged roofing experts to identify the cause of those leaks and retained plumbers and other building contractors to carry out extensive remedial works to the roof of the main building to fix those leaks and to repair water damage to the lots (remedial works).

(e) Remedial works have been carried out in August 2020, October 2022, February 2021, March 2021, April 2021, December 2021, February 2022. The remedial works were largely successful and stopped or severely reduced roof leaks into all the top floor lots including the applicant's lot.

(f) Whilst the remedial works reduced the leakage of water from the main building's roof into lot 24 they did not eliminate those roof leaks into lot 24.

(g) The key difference between lot 24 and other top floor lots is that there is a number of air conditioning units for various lots in the main building that sit on a wooden platform above lot 24. It appears that the air conditioning contractors have from time to time caused damage to the roof when they have walked on the roof to service, maintain and repair those air condition units and that damage has resulted in further roof leaks affecting lot 24.

(h) The owners corporation has carried out the additional works to be done on the roof to prevent water leaking into lot 24 and to make good water damage caused to lot 24 caused by those leaks (rectification works).

(a) October 2021; DBS replaced broken tiles above lot 24 (invoice attached Exhibit R;10)

(b) October 2021 DBS again repaired broken roof tiles caused by air conditioning contractors walking on roof (invoice Exhibit R:11)

(c) February 2022 DBS installed sealant over several cracked roof tiles and fixed the flashing and inspected the whole roof and found no damaged roof tiles (DBS invoice Exhibit R:95)

(d) February 2022 DBS sealed leaking air conditioning pipes above lot 24 (DBS invoice Exhibit R;12)

(e) April 2022 ASP engaged to clean the ceiling lot 24, remove mould and paint the gyprock (Exhibit R;13)

(i) A building consultant was engaged by the owners corporation in May 2022. Mr Taylor of BWRA inspected the building on 3 August 2022 and provided a draft report on 28 September 2022. The final report was issued to the owners corporation on 4 October 2022. IN his report, Mr Taylor set out scope of work for the rectification of the defects.

(j) The strata committee reviewed the report and resolved that the recommendations made by Mr Taylor to relocate the air conditioning units on the roof to allow other repairs to be undertaken.

(k) On 27 October 2022 the strata manager sent an email to the building contractor, Carlton, requesting that the air conditioning units be relocated in accordance with Mr Taylor's recommendations.

(l) On 1 February 2023 the applicant wrote to the strata manager to complain about another water leak. Later that day, the strata manager sent a work order to a plumber requesting that the contractor attend and repair the roof leak. On 9 February 2023 the plumber reported that the roof leak had been repaired.

(m) Between October 2022 and February 2023 correspondence was exchanged between the strata manager, the builder Carlton and the structural engineer GHA Engineer , which advised against relocating the air conditioning units due to concerns about the structural integrity of the wall.

(n) Due to the structural engineers recommendations, the owners corporation has not been able to implement Mr Taylor's recommendations to relocate the air conditioning units. Further, the repairs to the roof recommended by Mr Taylor cannot be carried out until the air conditioning units have been moved.

(o) The owners corporation is liaising with the builder, the engineer and Mr Taylor to find a way forward to resolve the issue and remedy the defects in the roof.

(p) The owners corporation concedes water damage to the applicant's lot however, the damage is confined to a handful of water stained ceiling tiles, some isolated wet spots on rather old looked carpet and some bubbling paint and mould on the plasterboard ceiling in the bathroom

(q) The owners corporation disputes that the damage is major or significant or that it renders lot 24 unfit for occupation.

(r) Between 9 -13 April 2022 after torrential rainfall in Sydney members of the strata committee inspected the lot and observed no leaks from the roof or any mould or bad smells in the lot.

(s) The owners corporation disputes that the applicant's tenants vacated due to the water ingress issues.

Consideration

15 As the applicant is the party making claims in these proceedings, he bears the onus of proof. To be entitled to recover any amount from the respondent as damages under s 106(5) of the SSMA, the applicant needs to establish:

(i) That the Owners Corporation has failed to properly maintain and keep in a state of good and serviceable repair the common property

(ii) That he has suffered reasonably foreseeable loss as a result of the breach by the Owners Corporation.

(iii) The quantum of any loss and it is also necessary to consider whether there was a failure by the applicant to mitigate his loss

Breach

16 The Tribunal is satisfied that there is water ingress from the roof above the applicant's lot into the lot. The Tribunal is satisfied that the defects with the roof have at various times caused water ingress into the applicant's lot.

17 The Tribunal is satisfied that the owners corporation has been acting with reasonable diligence to have the defects identified and to carry out rectification works. The owners corporation is looking at viable alternatives to resolve the problem created by the air conditioning units on the roof.

18 The Appeal Panel in *The Owners –Strata Plan No 36613 v Doherty [2021]NSWCATAP 2*85 at paragraph [173] citing Brereton J in *Seiwa* at [4] states:

> "expressly referred to the duty as including keeping the premises 'in a proper order by acts of maintenance before it falls out of condition, in a state which enable it to serve the purpose for which it exists". This encompasses preventative maintenance and repair and financial provision for such preventative work. Reasonable steps are not a defence, nor are contributory negligence a consideration: *Owners SP345042 v Seiwa Australia PL [2007[NSWCA 272 at* [46[.
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> The statutory provision is not in itself case in the form of a duty on an owners corporation to take reasonable care. It does not embody a range of reasonable excuses for inaction."

19 And further at paragraph [175] the Appeal Panel stated;

> Alleged restriction of access to, or interference with or resistance to, remediation by a lot owner as a matter of law does not qualify the owners corporation's performance of its strict liability….. In accordance with SSMA as currently in force, as already canvassed, the OC can seek orders for access and non interference: SSM Ass 122 , 124. If faced with what it regarded as obstruction and interference it ought to seek orders for access and non interference , which is a concomitant of performance of its strict duties under SSMA s 106.
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> [176] It is clear that an owners corporation does not require approval by the owners in general meeting to carry out its strict duty under SSMA s 106, although it can gain dispensation from the strict statutory duty by a consent resolution under what is now SSMA s106(3).

20 The Appeal Panel decision of *Doherty* makes it clear that the liability of the Owners Corporation is a strict liability. The roof is in need of repair. The owners

corporation have yet to find a solution to the issue of water ingress. The duty under s106 is a strict duty and reasonable steps are not a defence to the owners corporations obligations.

21 The Tribunal finds that the owners corporation has breached its obligations under s 106 of the SSMA and has failed to properly maintain and keep in a state of good and serviceable repair the common property

22 Having established a breach of s106 of the SSMA the Tribunal must now consider whether the applicant is entitled to damages.

23 The applicant has given evidence that he provided to his tenant's a rental reduction during the tenancy due to water ingress. Further, the tenant submits that the tenant's vacated due to the water ingress and the applicant seeks loss of rent from January 2023 until the roof leak is repaired. The applicant alleges that the premises are uninhabitable.

24 The Tribunal is not satisfied on the material provided that the applicant's tenant moved out due to the premises not being habitable. The applicant seeks to rely on an email dated 30 August 2022 (Exhibit A 4.1) which states:

> "Just confirming our conversation of a couple of weeks ago, One Door Mental Health will vacate the current property by 13 January 2023"
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> The applicant has not satisfied the Tribunal on the evidence provided, that if the premises were uninhabitable as alleged by the applicant, the tenants would have moved out immediately, not given the landlord 5 months notice of their intention to vacate. Further, the issue with water ingress has been ongoing for over two years and the tenant has remained in the premises.

25 In addition the Tribunal has considered the photographs provided by the tenant Exhibit a1.1-1.4 which show staining in isolated areas of the ceiling with minor damage to ceiling tiles. In addition evidence has been provided by the strata manager that the strata committee inspected the property on 13 April 2022 after heavy rainfall and that were not able to detect any water ingress. (Statements of Mr Creek and Mr Irman (Exhibit R pages 97).

26 The only independent evidence of water damage is found in the report of Mr Taylor from Building and Waterproofing Australia dated 23 September 2022. Mr Taylor states at (Exhibit R page 46) that he gained access to lot 24 in the presence of the strata manager and the commercial tenant on 3 August 2022. He was directed to leaks at the centre and east elevations of the main office in Lot 24. There was water damage on the ceiling grid tiles and the floor below evidence by water stains. There was a bucket on the desk below the removed ceiling grid tile to collect water. (Photos 3, 4 and 8 in his report). The evidence provided show that the water leaks and damage are minor. The premises cannot be described as uninhabitable.

27 The Tribunal is not satisfied that the tenant has vacated the property due to the premises being uninhabitable or due to the minor damage and water leaks to the property as depicted in Mr Taylor's report. Further the Tribunal is not satisfied that the applicant has taken any steps to mitigate his loss. There is no evidence that after his tenant gave him notice in August 2022 that he has taken any steps to find a new tenant. There is no evidence that he is unable to secure a new tenant due to the roof leak and water issues. For the reasons set out above, the application for damages for rent from January 2023 until the repairs are completed is dismissed.

28 The Tribunal is not satisfied that the rent reduction and one months free rent given by the applicant to his tenant is as a result of the breach by the owners corporation of s 106 of the SSMA. The documents relied upon by the applicant at Exhibit A 19.1 and 19.3 do not show that the applicant's tenant was given a rent reduction or a rent abatement due to water ingress. No bank statements have been provided by the applicant. No business records have been provided or a letter from an account to establish this loss and the cause of the loss. An email from the applicant dated 28 March 2022 indicating that he is happy to give rent relief due to the leaking issue is not in the Tribunal's mind sufficient to establish that the rent relief was actually given. A payment made to an unknown bank account to an unknown person is not evidence of rent relief given by applicant to his tenant. A tax invoice does not record a rent abatement or any rent relief. The handwritten notes on the tax invoice are not evidence of any rent relief or abatement given to the tenant. The application by the

applicant for damages for rent reduction and rent relief given to his tenant is dismissed.

29 The application made by the applicant for his costs in his time in dealing with this dispute in the sum of $15,000.00 is dismissed. Section 60 of the Civil and Administrative Tribunal Act provides that each party to proceedings is to pay the party's own costs. The Tribunal may award costs in relation to proceedings before it only if it is satisfied that there are special circumstances warranting an award of costs. Rule 38 provides that despite section 60, the Tribunal may award costs in proceedings in the absence of special circumstances if the amount claimed or in dispute in the proceedings is more than $30,000.00.

30 The Appeal Panel in *Hammond v Ozzy's Cheapest Cars Pty Ltd* [2015] NSWCATAP 65 at paragraph 107-018 provides as follows:

> 107. "Under s 60(5)(b), "*costs*" includes the costs of, or incidental to, proceedings in the Tribunal and the costs of, or incidental to, the proceedings giving rise to the application or appeal, as well as the costs of or incidental to the application or appeal. Otherwise, "*costs*" is not defined in the Act. Given the general prohibition on the awarding of costs in s 60(1) and the absence of any definition, apart from the inclusive illustrations in s 60(5) which refer to "*costs*" without elaborating upon that term, we are of the view that the word "*costs*" in s 60 refers to the types of costs recoverable in legal proceedings and that the legal principles relating to what "*costs*" may be ordered to be paid by a Court apply in relation to the Tribunal, except to the extent that they are modified by the Act or other applicable legislation. As we understand it, there is no applicable statutory modification in this case. Accordingly, "*costs*" that the Tribunal can order to be paid under s 60(2) will not include compensation for time spent by a litigant who is not a lawyer in preparing and conducting his or her case: *Cachia v Hanes* (1994)179 CLR 403 at 409. In *Cachia*, the High Court explained the position as follows at 410-411:
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> This is hardly surprising. It has not been doubted since 1278, when the Statute of Gloucester ((30) 6 Edw.I c.1.) introduced the notion of costs to the common law, that costs are awarded by way of indemnity (or, more accurately, partial indemnity) for professional legal costs actually incurred in the conduct of litigation. They were never intended to be comprehensive compensation for any loss suffered by a litigant. As Coke observed of the Statute of Gloucester, the costs which might be awarded to a litigant extended to the legal costs of the suit, "but not to the costs and expences of his travell and losse of time" ((31) Coke, Second part of the Institutes of the Laws of England at 288. See also *Howes v. Barber* [1852] EngR 15; (1852) 18 QB 588 at 592 [1852] EngR 15; (118 ER 222 at 224); *Dowdell v. The Australian Royal Mail*

> *Co.* (1854) 3 El and Bl 902 at 906 [1854] EngR 604; (118 ER 1379 at 1381).).
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> 108. A similar approach is apparently taken in the Victorian Civil and Administrative Tribunal and the Queensland Civil and Administrative Tribunal in relation to what "*costs*" are recoverable, where the word "*costs*" is not given a specific definition in the legislation applicable in either of those Tribunals: *Ractliffe v VOCAT (Review and Regulation)* [2015] VCAT 205 at [35] and *Northpine (Aust) Pty Ltd v Queensland Building and Construction Commission* [2014] QCAT 579 at [9] and [18].

31 Accordingly costs that the Tribunal can order to be paid will not include compensation for time spent by a litigant who is not a lawyer in preparing and conducting his or her case *(Cachia v Hanes (1994) 179CLR 403.* The application for costs of $15,000.00 is dismissed.

32 The applicant for legal costs is dismissed. The applicant is not entitled to legal costs that arose before proceedings were commenced. They are not costs of the proceedings. (*Russell v The Trustees of Roman Catholic Church for the Archdiocese of Sydney* [2008] NSWCA 217 at paragraph 48)

33 The Tribunal dismisses the applicant's claim for damage to the carpet. The applicant has failed to provide any evidence that the carpet needed to be replaced due to water damage. The carpet is now more than 21 years old. The Tribunal is not satisfied that the damage to the carpet has been caused by water damage.

34 The applicant's claim pursuant to section106(5) is dismissed. The applicant has not satisfied the Tribunal that he has suffered any damage that has arisen out of a breach of the respondent's statutory duty pursuant to section 106(1) of the SSMA.

Work Order

35 The applicant seeks a work order to compel the owners corporation to carry out works. The applicant seeks to rely on a letter from Service fox dated 23 December 2022. The letter is not signed. There is little evidence of the skills and experience of the person who wrote the letter. The letter does not meet the requirements of the Expert Witness Code of Conduct. The author does not set out a detailed scope of work. This letter is to be considered in light of the expert evidence provided by the respondent and in particular the report provided by

BWR Australia (Exhibit R page 36-69) and GHA Engineering (Exhibit R page 93).

36 As set out in *Glenquarry Park Investments v Hegyesi [2019] NSWSC425* at paragraphs [104-113] that work orders cannot be general in nature and need to be specific as to what the owners corporation is required to actually do to rectify the issue.

37 The Tribunal finds that the work order requested by the applicant relying on the letter of Servicefox is too general and does not set out a scope of works. Having regard to the reports of BWR Australia and GHA Engineering who are trying to find a resolution to the issues in dispute the Tribunal declines to make a specific work order. There is insufficient evidence for the Tribunal to make a sufficient detailed work order under s 232 and 241 of the SSM Act. IT is not appropriate to make a general order that the owners corporation comply with its obligations under s 106 of the SSMAct. It is too vague and indeterminate having regard to the principles in Glenquarry's Case.

38 At the commencement of the hearing the Tribunal allowed the applicant to submit several photographs that he states were taken recently of the premises. The respondent has undertaken to inspect the premises and if there is any damage of ceiling tiles caused by water ingress will repair.

39 At the end of the proceedings, the applicant sought an adjournment on the basis of seeking legal representation and obtaining additional evidence to support his case. The request for an adjournment was refused for the following reasons. The applicant was offered an adjournment at the commencement of the proceedings which he declined. The respondent opposed the adjournment request that was made at the end of the hearing time. There was no reasonable explanation as to why the applicant had not submitted all of the evidence that he sought to rely upon prior to the hearing. The Tribunal was not satisfied that any evidence that the applicant now sought to rely upon was not reasonably available at the time that he was directed to file and serve documents. The application for an adjournment was refused.

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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

Amendments

16 August 2023 - Formatting amendments.