Civil and Administrative Tribunal

New South Wales

Case Name:	Selkirk v The Owners - Strata Plan No 2661
Medium Neutral Citation:	[2024] NSWCATAP 17
Hearing Date(s):	14 November 2023
Date of Orders:	6 February 2024
Decision Date:	6 February 2024
Jurisdiction:	Appeal Panel
Before:	S Westgarth, Deputy President G Burton SC, Senior Member
Decision:	1. As against the first respondent Owners SP 2661, (a) to the extent necessary leave to appeal is granted, and (b) the appeal is allowed. 2. Note that the second respondent was by consent order dated 26 October 2023 removed as a party to the appeal. 3. The proceedings are remitted for determination by the Tribunal consistent with the findings and reasons in this decision on the following matters and any related matters pressed on this appeal: the scope of work and terms of the work order to be complied with by the first respondent Owners SP 2661 in respect of the common property; the amount of the rent and other losses established by the applicant/appellant lot owner under s 106(5) of the Strata Schemes Management Act 2015 (NSW) for a period commencing on 5 December 2020. 4. Any application with supporting evidence (not already provided) and written submissions in respect of costs of this appeal and costs of the original proceedings is to be filed and served on or before the end of 14 days

after date of orders in this appeal. The submissions are to include whether the parties consent to or oppose the appeal panel determining costs on the papers and for that purpose making an order dispensing with a hearing on costs.

5. Any written submissions and supporting evidence (not already provided) in response is to be filed and served on or before the end of 28 days after date of orders in this appeal.

Catchwords: REAL PROPERTY – STRATA MANAGEMENT – strict duty of repair – onus of proof on scope and consequences of breach – causation and mitigation – measure and quantification of loss – Strata Schemes Management Act 2015 (NSW) ss 106, 122, 124, 232

Legislation Cited:
Civil and Administrative Tribunal Act 2013 (NSW)
Home Building Act 1989 (NSW)
Residential Tenancies Act 2010 (NSW)
Strata Schemes Management Act 2015 (NSW)

Cases Cited:
Barwick v Shetab [2017] NSWCATAP 127
Bellgrove v Eldridge (1954) 90 CLR 613, [1954] HCA 36
Carli v Owners SP 56120 [2018] NSWCATCD 55
Catapult Constructions PL v Denison [2018] NSWCATAP 158
Collins v Urban [2014] NSWCATAP 17
Downer EDI Rail PL v John Holland PL [2018] NSWSC 326
Glenquarry Park Investments PL v Hetyesi [2019] NSWSC 425
GPM Constructions PL v Baker [2018] NSWCATAP 119
Hyder Consulting (Australia) PL v Wilh Wilhemsen Agency PL [2001] NSWCA 313
Karakominakis v Big Country Developments PL [2000] NSWCA 313
McCue v Owners SP 3844 [2021] NSWCATCD 35
Marr v JCK Building Solutions PL [2018] NCATCD, unreported, 4 December 2018, HB 16/43946
Mastelltone v Owners SP 87110 [2021] NSWCATAP 188
Mummery v Irvings PL (1956) 96 CLR 99, [1956] HCA

	45 Nicita v Owners SP 64837 [2010] NSWSC 68 Owners SP 36613 v Doherty [2021] NSWCATAP 285 Owners SP 50276 v Thoo [2013] NSWCA 270 Owners SP 76674 v Di Blasio Constructions PL [2014] NSWSC 1067 Owners SP 78465 v MD Constructions PL [2016] NSWSC 162 Owners SP 80412 v Vickery [2021] NSWCATAP 98 Owners SP 80881 v Gregg [2022] NSWCATAP 172 Prendergast v Western Murray Irrigation Ltd [2014] NSWCATAP 69 Proprietors SP 6522 v Furney [1976] 1 NSWLR 412 Ridis v Owners SP 10308 (2005) 63 NSWLR 449, [2005] NSWCA 246 Riley v Owners SP 73817 [2012] NSWCA 410 Seiwa PL v Owners SP 345042 [2006] NSWSC 1157, [2007] NSWCA 272 Shum v Owners SP 30621 [2017] NSWCATCD 68 Smith v Owners SP 3004 [2022] NSWSC 1599 Stolfa v Hempton [2010] NSWCA 218 Tabcorp Holdings Ltd v Bowen Investments PL (2009) 236 CLR 272, [2009] HCA 8 TCN Channel 9 PL v Hayden Enterprises PL (1989) 16 NSWLR 130 Trevallyn-Jones v Owners SP 50358 [2009] NSWSC 694 Unity Insurance Brokers PL v Rocco Pezzano PL (1998) 192 CLR 603 Vickery v Owners SP 80412 [2020] NSWCA 284 Walker Corporation v Sydney Harbour Foreshore Authority (2009) 168 LGERA 1 Walker Group Constructions PL v Tzaneros Investments PL [2017] NSWCA 27 Warkworth Mining Ltd v Bulga Milbrodale Progress Association Inc [2014] NSWCA 105
Texts Cited:	None Cited
Category:	Principal judgment
Parties:	Ms Simone Selkirk (Appellant) The Owners - Strata Plan No 2661 (Respondent)

Representation:	Sachs Gerace Lawyers (Appellant) Mills Oakley Lawyers (Respondent)
File Number(s):	2023/00289207
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Citation:	N/A
Date of Decision:	15 August 2023
Before:	M Tyson, Senior Member
File Number(s):	SC 22/32390

DECISION

Outcome of appeal

1 We have decided that the appeal should be allowed against the first respondent owners corporation (OC) and, to the extent required, leave to appeal in respect of the appeal against the OC should be granted, in relation to the matters pressed on this appeal and that those matters should be remitted for re-determination on whatever evidence the parties are advised to bring but in accord with our reasons. This will not permit the appellant to re-agitate matters which were dismissed by the Tribunal in the original proceedings and were not pressed on this appeal.

2 As indicated below, by consent the second respondent was removed as a respondent to the appeal.

Background, procedural matters

3 The proceedings concern a nine-lot strata scheme in Darling Point in inner eastern Sydney, NSW. They were originally filed on 9 July 2021 in the NSW Supreme Court. On 29 June 2022 they were ordered to be transferred to the Tribunal.

4 The applicant (as the appellant was) originally claimed a variety of relief on a number of bases against the OC as first respondent and another lot owner as second respondent, who owned the lot (lot 8) immediately above the appellant's lot 5.

5 All the appellant's claims were heard over two days in February 2023 and were dismissed in a detailed primary decision on 15 August 2023. The appellant appealed, within time, the primary decision, by notice of appeal filed 11 September 2023. An amended notice of appeal was attached to the appellant's written submissions and contained the matters pressed before us on the appeal.

6 Leave for legal representation on the appeal was granted to all parties on 27 September 2023, as it apparently had been in the primary proceedings.

Matters pressed and not pressed on appeal

7 The appeal originally raised matters in the primary decision of the Tribunal concerning the second respondent's alleged breach of noise level requirements in respect of flooring and aspects, explored below, of the OC's alleged breach of its strict duty to repair common property under s 106 of the *Strata Schemes Management Act 2015* (NSW) (SSMA). Dismissal of the appellant's original claims concerning debt recovery fees and interest was not appealed.

8 The second respondent was removed as a respondent to the appeal by consent order on 26 October 2023, the second respondent having sold her lot and disclosed the proceedings on sale. This removed the flooring issue from the present appeal, leaving only the common property issue.

9 The common property issue concerned a claimed work order against the OC in respect of the common property in the bathroom in her lot 5 and the appellant's related claims concerning the scope of restoration of lot property (in particular, the form of tiling if that was lot property affected by the common property works rather than also being common property) and rent foregone until the remediation of the bathroom was completed.

10 We refused leave for the appellant to rely in the appeal on a report and quotation in December 2022 since on the evidence it was clearly available to the parties at the time of the primary proceedings, having been the subject of communication between them. In the notice of appeal dated 11 September 2023 the "new evidence" heading had been marked "not applicable".

11 At the hearing of the appeal the OC accepted that it was in breach of SSMA s 106(1) from 4 December 2020 in that the appellant's lot was "uninhabitable" being the language used in the *Residential Tenancies Act 2010* (NSW) s 52. The OC submitted that the more appropriate characterisation was that the lot could not (we add legally) be rented without a functioning bathroom. In substance this reached the same point of conclusion for these proceedings since the alleged breach of duty pursued at hearing was the OC's attempted remediation of the leaks in the bathroom which the appellant said required re-waterproofing and complete re-tiling to achieve like-for-like tiling since the original tiles could not be matched.

12 The OC's concession gave success to the appellant on her grounds of appeal concerning the Tribunal's alleged failure to take into account as a relevant consideration a similar concession in the Tribunal's findings. As we mention below, the OC did concede a breach of duty from at least that date but contested the effect of that breach and what consequences of that breach had been established.

13 The focus of the appeal at hearing was therefore on whether the primary decision erred on questions of law, mixed questions of law and fact or on findings of fact (the last two categories requiring leave to appeal) in the Tribunal's findings that: the appellant did not establish with appropriate evidence, including expert evidence, what was the source of water damage in her bathroom and therefore what was required for the scope of work by the OC to fulfil its strict duty to maintain and repair common property; the appellant caused her own loss; the appellant failed to mitigate her loss for substantially the same reasons as causing her own loss; the appellant failed to establish the scope of remediation of tiling that was required, and the appellant sought an inappropriate measure and amount of damages for alleged lost rent.

14 The alleged errors as pressed included taking into account irrelevant considerations such as the OC's attempts at compliance with its duty and the appellant's conduct including in pressing an insurance claim, disagreeing with the OC's suggested works and filing proceedings against the OC. They also raised that the OC under its strict duty to maintain and repair common property bore the onus of establishing by appropriate investigation and report the cause of common property falling out of repair and proper maintenance so as to identify what was required to fulfil the strict duty.

Principles governing appeals

15 Internal appeals may be made as of right on a question of law, and otherwise with leave of the Appeal Panel: s 80(2) of the *Civil and Administrative Tribunal Act* 2013 (NCAT Act).

16 In *Prendergast v Western Murray Irrigation Ltd* [2014] NSWCATAP 69 the Appeal Panel set out at [13] a non-exclusive list of questions of law:

(1) Whether there has been a failure to provide proper reasons;

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

(3) Whether a wrong principle of law had been applied;

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

(5) Whether the Tribunal failed to take into account relevant (i.e., mandatory) considerations;

(6) Whether the Tribunal took into account an irrelevant consideration;

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

(8) Whether the decision is so unreasonable that no reasonable decision-maker would make it.

17 The circumstances in which the Appeal Panel may grant leave to appeal from decisions made in the Consumer and Commercial Division are limited to those set out in para 12(1) of Schedule 4 to the NCAT Act. In such cases, the Appeal Panel must be satisfied that the appellant may have suffered a substantial miscarriage of justice on the basis that:

(a) the decision of the Tribunal under appeal was not fair and equitable; or

(b) the decision of the Tribunal under appeal was against the weight of evidence; or

(c) significant new evidence has arisen (being evidence that was not reasonably available at the time the proceedings under appeal were being dealt with).

18 In *Collins v Urban* [2014] NSWCATAP 17 (*Collins v Urban*), the Appeal Panel stated at [76] that a substantial miscarriage of justice for the purposes of para 12(1) in Schedule 4 may have been suffered where:

> … there was a "significant possibility" or a "chance which was fairly open" that a different and more favourable result would have been achieved for the appellant had the relevant circumstance in para (a) or (b) not occurred or if the fresh evidence under para (c) had been before the Tribunal at first instance.

19 Even if an appellant from a decision of the Consumer and Commercial Division has satisfied the requirements of para 12(1) of Schedule 4, the Appeal Panel must still consider whether it should exercise its discretion to grant leave to appeal under s 80(2)(b).

20 In *Collins v Urban*, the Appeal Panel stated at [84] that ordinarily it is appropriate to grant leave to appeal only in matters that involve:

> (a) issues of principle;
>
> (b) questions of public importance or matters of administration or policy which might have general application; or
>
> (c) an injustice which is reasonably clear, in the sense of going beyond merely what is arguable, or an error that is plain and readily apparent which is central to the Tribunal's decision and not merely peripheral, so that it would be unjust to allow the finding to stand;
>
> (d) a factual error that was unreasonably arrived at and clearly mistaken; or
>
> (e) the Tribunal having gone about the fact finding process in such an unorthodox manner or in such a way that it was likely to produce an unfair result so that it would be in the interests of justice for it to be reviewed.

Consideration and conclusion

21 At [242] of its primary reasons (PR) the Tribunal found that there was no evidentiary basis to make the order sought by the appellant, being claim 1(a) that the OC install in her bathroom a new waterproof membrane, villaboard linings and compressed cement sheeting.

22 The reasoning behind that finding was explained in the succeeding paragraphs as a failure by the appellant to establish a definitive source of the water leakage and the extent of damage and the scope of works required to

remediate it, it having been the subject of evidence in a quotation from a plumber that “membrane failure” was a cause of the water leakage.

23 This appears to us to constitute an error of law in misstating the scope of the OC’s obligation to fulfil its admitted strict duty to maintain and repair common property under SSMA s 106(1). It led to an application of the wrong principle in that respect to the evidence that justifies, to the extent required, a grant of leave to appeal the findings so based.

24 The OC’s concession on uninhabitability mentioned earlier was recognised by the Tribunal at PR [240] and [263] amongst other places. In the course of discussing the amount of rent there is an anomalous finding at [296] that “The Tribunal does not find that the applicant has established that her lot was unusable or uninhabitable after the water leak was discovered” to the extent in terms of time period that this was contrary to the concession and consequent common ground on uninhabitability from 5 December 2020 which was the period for which the appellant claimed relief for loss. For such a finding to have effect it would need to have been notified to the parties and submissions invited: *Warkworth Mining Ltd v Bulga Milbrodale Progress Association Inc* [2014] NSWCA 105 at [39]-[41]. We do not need to take consideration of the apparent anomaly further given the otherwise clear concession and common ground and our discussion of the rent issue below in which the anomaly arose.

25 The existence of the OC’s strict duty under SSMA s 106(1) was not in dispute. Once the OC conceded its breach of that duty from 5 December 2020, it was part of the scope of fulfilling that duty and rectifying that *admitted* breach for the OC, not the appellant, to establish the source of water entry and the extent of damage and the scope of works required to remediate it, particularly when an expert quotation said that “membrane failure” about which the appellant complained was one source. The same conclusion would apply if the admission was not made (as it properly was here) but, rather, it was established by the lot owner that there was a breach of duty by, for example, water entry.

26 To the extent that expert evidence was required for such purpose, it was within the OC’s scope of duty and obligation to remediate to provide it. This was

reinforced when the quotation referred to by the appellant in itself was a source of expert opinion sufficient to require a response that satisfied the requirements for weight to be given to an expert report.

27 The Tribunal's consequential finding at PR [247] et seq – that "because the scope of any rectification works has not been established, the Tribunal cannot then evaluate what are the likely ramifications of the rectification works for the bathroom in the applicant's lot" – suffered from a similar error. The inability to evaluate resulted from the OC's failure to establish its scope of duty and obligation to remediate, from which the ramifications for bathroom works would flow.

28 A further consequence of the OC's not fulfilling its obligation by establishing the scope of obligation to remediate was that any failure to provide sufficient information to enable formulation of a work order within the requirements of *Glenquarry Park Investments PL v Hetyesi* [2019] NSWSC 425 at [57]-[74] et seq, [100]-[114] fell at the feet of the OC. To the extent that such required expert evidence, we have already indicated that was the OC's responsibility, reinforced by the status of the quotation obtained by the appellant.

29 However, we interpolate that the Tribunal further erred in requiring the foregoing matters to be *necessarily* the subject of expert evidence, although frequently that will be necessary or preferable in the circumstances of the case: cf *Mastelltone v Owners SP 87110* [2021] NSWCATAP 188; *Carli v Owners SP 56120* [2018] NSWCATCD 55 at [104]. An available inference from the evidence can also arise that is akin to the approach to evidence expounded in *Mummery v Irvings PL* (1956) 96 CLR 99, [1956] HCA 45 at 116-117, 120-122.

30 Our conclusions are consistent with the nature of an owners corporation's strict obligations to maintain and repair the common property.

31 It is trite law, and was uncontroversial in these proceedings, that the OC owed and owes lot owners a *strict* duty to maintain and repair, including as required to renew or replace, common property under s 106(1) and (2) of the *Strata Schemes Management Act 2015* (NSW) (SSMA) as interpreted in well-established authority: *Seiwa PL v Owners SP 345042* [2006] NSWSC 1157 at [3]-[7], [21]-[23]; *Trevallyn-Jones v Owners SP 50358* [2009] NSWSC 694 at

[128] et seq, esp at [154]-[156]; *Riley v Owners SP 73817* [2012] NSWCA 410 at [75]-[76], referring to the same content of duty in the predecessor to SSMA s 106, being s 62 of the 1996 Act. There was no qualification on appeal to what was said in *Seiwa* at first instance in relation to the strict nature of the duty: *Owners SP 345042 v Seiwa Australia PL* [2007] NSWCA 272 - Hodgson JA at [5] referred to the strict nature of the duty in similar terms to Brereton J in *Seiwa*, as did Tobias JA at [54] with an acknowledgement of what is now s 106(3) that is not presently relevant. The same approach on the present provision was endorsed by reference to the earlier authority in *Smith v Owners SP 3004* [2022] NSWSC 1599 at [30]-[31].

32 The duty extends to remediation of defects in the construction of the common property, because repair means making something good even if it was not originally good: *Proprietors SP 6522 v Furney* [1976] 1 NSWLR 412 at 416.

33 Brereton J in *Seiwa* [2006] NSWSC 1157 at [4] expressly referred to the duty as including keeping the premises "in 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 is not a defence, nor is contributory negligence a consideration: *Owners SP 345042 v Seiwa Australia PL* [2007] NSWCA 272 at [46]. The statutory provision is not cast 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. The common property is out of the state of repair and maintenance in breach of duty until the repair or maintenance occurs: *Owners SP 80412 v Vickery* [2021] NSWCATAP 98 at [36], [63]; *Owners SP 36613 v Doherty* [2021] NSWCATAP 285 at [84], [93]-[94].

34 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 OC's performance of its strict duty: *Seiwa* [2006] NSWSC 1157 at [21]-[23]; *Carli v Owners SP 56120* [2018] NSWCATCD 55 at [101]-[103]. The OC can seek orders for access and non-interference: SSMA ss 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.

35 The OC does not require approval by the owners in general meeting of the OC to carry out its strict statutory duty under SSMA s 106: *Stolfa v Hempton* [2010] NSWCA 218 at [9]-[10].

36 Delays associated with the OC's insurers are an explanation but not an excuse: *Nicita v Owners SP 64837* [2010] NSWSC 68 at [11]. One would expect the same to apply to others involved in the process such as delays by contractors or regulatory authorities, subject to the limited exception in s 106(4) where the OC itself takes the initiative in bringing proceedings against a third party.

37 We do not accept, as the OC submitted, that the strict duty as established by authority is qualified to operate differentially depending on whether the common property in question is purely related to the appellant's lot or the appellant is the only person affected by the breach (at least since the water overflow to the lot below from the breach was stopped). To so differentiate would be to read into the application of SSMA s 106 a differentiation that is not there on the plain words and is inconsistent with the thrust of the authority just cited. It is not there for good reason. Such a differentiation would potentially be very difficult to administer and would potentially increase disputation. An owners corporation's judgment call on who was affected by fulfilment of its duty in respect of specific common property would have that consequence. No authority was cited in support of the submission.

38 The foregoing principles are not qualified by the decision in *Glenquarry Park Investments PL v Hegyesi* [2019] NSWSC 425 at [57]-[74] et seq, [100]-[114]. In *Glenquarry Park* there were jurisdictional deficiencies in formulation of the orders for remediation, because the formulation potentially imposed on the owners corporation in that case, without basis in the findings, a scope of works which went beyond the owners corporation's strict duty. It was not a dispensation from the strict duty. There was recognised a degree of flexibility in the form of compliance by the owners corporation with the strict duty, which, on the authorities canvassed extensively by Parker J (*Ridis v Owners SP 10308* (2005) 63 NSWLR 449, [2005] NSWCA 246, *Owners SP 50276 v Thoo* [2013]

NSWCA 270 and *Stolfa*) includes replacement if that is reasonably necessary because the item has come to the end of its serviceable operating life and can no longer be kept in a state of good and serviceable repair. The same must be true if the state of the item is so damaged or deteriorated that it cannot be repaired but must be replaced.

39 The requirements in *Glenquarry* find complementary support in the requirements for work orders under the *Home Building Act 1989* (NSW) (HBA). Under HBA s 48O(1)(c) an owner is required to specify action by the builder that is grounded in proof by the owner of, not only the defect, but also the manner of remediation and a work order must focus on the particular defect to be rectified and must be certain, practical and enforceable: *Catapult Constructions PL v Denison* [2018] NSWCATAP 158 at [46]-[61] and the authority there cited. The evidentiary onus is on the homeowner to set out the appropriate method of rectification: ibid, at [59]. In *Bellgrove v Eldridge* (1954) 90 CLR 613, [1954] HCA 36, the High Court said that the scope of remedial works must not be disproportionate to the defect. The High Court has also stated that there is a high bar for unreasonableness or disproportion once a breach is established: *Tabcorp Holdings Ltd v Bowen Investments PL* (2009) 236 CLR 272, [2009] HCA 8 at [13]-[20]; see also *Walker Group Constructions PL v Tzaneros Investments PL* [2017] NSWCA 27 at [186]; *Barwick v Shetab* [2017] NSWCATAP 127 at [87]-[88]. The analysis in the paragraphs in the *Tabcorp* decision, and the authority there reviewed, also makes it clear in these passages that reinstatement, provided it is not extravagantly disproportionate, is the appropriate measure of relief. Reinstatement means works with a certain standard of amenity and presentation which includes not being at risk of emergent problems returning or growing which in form and finish produces an outcome that matches other components in form and finish and makes the works of the originally-intended quality and integrity.

40 An expert report may be integral to formulation of the precise scope of work required to assist the owners corporation to fulfil its strict duty or as an incident of the relief granted to require the owners corporation to fulfil its strict duty: *Carli* at [53]; cp in a home building context *Marr v JCK Building Solutions PL* [2018] NCATCD, unreported, 4 December 2018, HB 16/43946 at [46]-[54],

where an element of the manner of remediation in certain circumstances may inherently require inspection, properly defined so as to be sufficiently specific, to establish the need for and required scope of remediation.

41 It is consistent with the strict nature of the OC's duty that, once a breach is admitted or established of that duty, it is incumbent on the owners corporation, to fulfil the duty, to establish the source or reason for the breach and the scope of the breach. If the owners corporation fails in fulfilling those aspects of its duty then part of the remedial order is necessarily to compel the required investigations (often expert) to establish those matters so that they can be undertaken as part of the order.

42 While a lot owner will be required, on commonsense principles of causation akin to those in negligence or nuisance, to establish damage to lot property or other loss under SSMA s 106(5) (further discussed on lost rental cited below), certain types of loss such as those claimed in this case will be self-evident from the breach of strict duty admitted or established by its consequences, in this case water entry that rendered premises admittedly uninhabitable and therefore unrentable from the inability to use the bathroom: cp *McCue v Owners SP 3844* [2021] NSWCATCD 35.

43 Our conclusions above mean that the Tribunal, contrary to PR [253], was required to consider the issues raised by the appellant's claim 1(b) that her bathroom ought to be reinstated to a "like-for-like" condition". Helpfully, the Tribunal went on to consider at PR [254] et seq that matter in the event that it was later found to be in error on the matters already considered.

44 The Tribunal at PR [255] correctly, in our view, stated that the OC's fulfilment of its strict obligation required it to repair or replace common property so that it substantially was similar in appearance, characteristics and quality compared with what was there before, to which could be added functionality and amenity to the extent those are not already encompassed within the Tribunal's words. It is inevitable that replacement in fulfilment of duty will bring an element of improvement and does not attract a discount: *Owners SP 36613 v Doherty* [2021] NSWCATAP 285 at [163], [165]-166], [181]; authority discussed in

Glenquarry already referred to; cp *Hyder Consulting (Australia) PL v Wilh Wilhemsen Agency PL* [2001] NSWCA 313 at [47], [54], [107].

45 However, with respect the Tribunal then misapplied the test to reject the appellant's claim entirely at PR [260] because there was not sufficient evidence to suggest that identical replacement could be achieved.

46 If identicality could not be achieved then substantial similarity in terms of quality and amenity could be achieved on the evidence cited by the Tribunal, and if that required replacement of a larger section of tiling to achieve substantial similarity, then such was a consequence of the OC's breach of duty. On the foregoing authority the OC was required to remediate the breach even if there was an element of improvement in the outcome.

47 One type of self-evident loss (unless otherwise demonstrated) from the breach of strict duty admitted or established by its consequences, in this case water entry that rendered the premises admittedly uninhabitable and therefore unrentable from the inability to use the bathroom, is loss of rent, particularly where there is a history of the lot being a rented property: *Owners SP 80881 v Gregg* [2022] NSWCATAP 172 at [39]; *Smith v Owners SP 3004* [2022] NSWSC 1599 at [34]-[37], approving *Shum v Owners SP 30621* [2017] NSWCATCD 68 at [60]-[61], see also at [64]; *Vickery v Owners SP 80412* [2020] NSWCA 284 esp at [160]-[166].

48 The Tribunal erred in law in finding at PR [267]-[269] that the OC's attempts to comply with its strict duty to keep the premises in repair excused it from paying for non-compliance during those attempts. As said earlier, reasonable efforts does not excuse or end the breach of duty or alleviate in itself the consequence of non-compliance with the strict duty.

49 The Tribunal further erred in law in stating the effect of what Ball J said about mitigation (not directly causation) in *Owners SP 76674 v Di Blasio Constructions PL* [2014] NSWSC 1067 at [42] in the context of breach of statutory warranties in the *Home Building Act 1989* (NSW).

50 In ordinary principles of contract law imported into construction contracts, an owner's claim for monetary compensation requires the owner to act reasonably

in relation to the claimed monetary loss in order for the claimed loss to be recoverable: cp HBA s 18BA(1), (5). This includes giving the builder or other relevant party a reasonable opportunity to remediate or complete, or to minimise damages by remediating what it can and will do: cp HBA s 18BA(1), (3)(b), (5). The owner may be justified in a reasonable loss of confidence in the willingness and ability of the builder or other party to undertake properly the remediation and completion. As Ball J in *Di Blasio* recognised, the evidential onus is on the builder to prove that the owner acted unreasonably: *Owners SP 76674 v Di Blasio Constructions PL* [2014] NSWSC 1067 at [42]-[48], adopted in *Owners SP 78465 v MD Constructions PL* [2016] NSWSC 162 at [26]-[30] and *GPM Constructions PL v Baker* [2018] NSWCATAP 119 at [38]. This is consistent with the orthodox principles at general law: *TCN Channel 9 PL v Hayden Enterprises PL* (1989) 16 NSWLR 130 at 158; principles summarised in *Downer EDI Rail PL v John Holland PL* [2018] NSWSC 326 at [585] and authority there cited.

51 If the owner has acted reasonably then, since the builder or other relevant party is a wrongdoer, it will not defeat the owner's claim that the builder or that party can suggest other and more beneficial alternative methods of remediation: *Unity Insurance Brokers PL v Rocco Pezzano PL* (1998) 192 CLR 603 at 654; *Karakominakis v Big Country Developments PL* [2000] NSWCA 313 at [187].

52 It follows that the builder and by application in the present case the OC bears the evidential onus to establish by sufficient evidence that the other party (in this case, the lot owner) acted so unreasonably as to cause her own loss or failed to mitigate her own loss.

53 In applying the test just discussed to the facts the Tribunal erred in a manner justifying a grant of leave. The reason given at PR [273] et seq for saying that the appellant caused her own loss or failed to act reasonably to mitigate her loss was her pressing “an alternative means for her to recover rent loss and for rectification works, namely, recovery and carrying-out of rectification works through the [OC’s] insurer” and to have the whole bathroom re-tiled.

54 As said earlier, the OC was entitled as well as obliged to fulfil its strict duty whatever the appellant lot owner advocated as an alternative or whatever the appellant did to attempt to resist the chosen course. The OC was empowered, as said earlier, under SSMA s 122 to obtain access orders to fulfil its strict duty as part of moving through any such resistance, with s 124 governing relief for any associated damage to the appellant's property whatever the appellant's assertions about right of indemnity, requests for indemnity for damage and references to rights under other provisions (ss 106(5) with 232) in respect of her alleged losses. Such resistance and advocacy does not, contrary to the primary findings, constitute a means of discharging the evidential onus on the OC to establish a break in causation or a failure by the lot owner to mitigate loss. As already said, if the motivation was in part re-tiling of the bathroom, again that was either within the scope of the OC's duty, or not, irrespective of the lot owner's motives or conduct.

55 We recognise the appellant's submission on this appeal that at the primary hearing causation was not in issue, only mitigation, and that adverse findings on causation raised similar procedural fairness issues to those where a finding contrary to a concession (discussed above) is made. We have determined the matter on substantive grounds in favour of the appellant because that submission on causation not being in issue was in contest.

56 Turning finally to the Tribunal's findings at PR [290] et seq about quantification of the appellant's claim for rent foregone, in our view the test set out earlier in these reasons justifies a grant of leave; in any event, even if it did not, the errors that we have identified above and the resultant need for re-consideration of those matters would also require re-consideration of quantum once those errors were rectified in new findings.

57 First, as said earlier the Tribunal's finding at PR [296] that the premises were not established to be unusable or uninhabitable is contrary to the express concession to the contrary from 5 December 2020. The Tribunal acknowledged correctly at [295] that "some loss of rent by the [appellant] was a type of damage that was foreseeable in the present circumstances", and the OC's written submissions on appeal correctly accept that proposition. The Tribunal

however went on to give as a measure of loss the likelihood of a rent reduction for loss of amenity in having to use a communal washing machine during the period when remediation works were carried out. The Tribunal said that there was no acceptable evidence to support the amount of the reduction (even for a period not affected by the appellant's conduct), only an assessment of market rent from 26 August 2021. However, as the OC's written submissions on appeal correctly acknowledge, this is irrelevant if, as conceded, the premises were uninhabitable for absence of a bathroom because the logical consequence (failing evidence to the contrary) was a complete rental loss.

58 Secondly, what the OC accepted (set out at PR [303]) as the measure of loss, which the Tribunal accepted but then at [304] said did not find application in the evidence, is not a sufficient measure of loss while the premises remained uninhabitable until remediated, although it could potentially be a measure after habitability was restored if the restoration was at a lower rental for a lower level of amenity. That last point was not the subject of this appeal.

59 Thirdly, while market rent may in circumstances not be sufficient to establish quantum as the Tribunal pointed out at PR [293] and as has just been discussed, that requires evidence to challenge the sufficiency of market rent alone and the OC in its written submissions accepted that, if the premises were untenantable, "then the measure of the appellant's damage is simply what the property would have realised in rental income over the period had there been no breach". The Tribunal also accepted that implicitly at [308] by its finding that, if contrary to its conclusion there should be a finding on quantum, a further market appraisal at $1,200 to $1,300pw from 26 August 2021 was sufficiently probative of rent foregone from that time "in the absence of any expert opinion to the contrary adduced by the [OC]".

The way ahead

60 Section 81 of the NCAT Act provides that, in determining an internal appeal, the Appeal Panel may make such orders as it considers appropriate in light of its decision on the appeal. The section sets out a list of available orders which is not exhaustive. That list includes: allowing the appeal; re-determining the matter on the existing evidence with or without any further evidence from the

parties; setting aside the primary decision and remitting the whole or any part of the case to the original jurisdiction of the Tribunal for reconsideration, either with or without further evidence and in accord with the Appeal Panel's directions.

61 A number of central matters of fact and law in the proceedings, particularly in respect of onus of proof, need fundamental reconsideration in light of our foregoing findings. Those findings reveal the need in that reconsideration for a significant rethink about the nature of the evidence that the parties wish to lead.

62 It would in our view be very likely procedurally unfair to the parties to determine those matters on the existing evidence without further right of appeal within the Tribunal. That position would be the case if we re-heard the matter on the evidence put before us, whether or not that was the entirety of the evidence before the Tribunal originally and whether or not it was supplemented by the further evidence we rejected for the purposes of hearing the appeal.

63 In the circumstances where quantification is at the end of a chain of matters that need reconsideration on our foregoing conclusions, it would not be appropriate to preclude reconsideration of the rental valuation as an entirety.

64 Further, it seems as if the parties need to debate a matter which was not the subject of comprehensive evidence and debate before us, namely, the effect of work apparently undertaken to the lot by the appellant after delivery of the primary decision on the scope and method of fulfilling the OC's strict duty.

65 It may be possible that, in the context of our conclusions and reasons, the parties may achieve a negotiated outcome without the risk and cost of further proceedings.

66 Our orders will accordingly reflect remitter for re-determination on whatever evidence the parties are advised to bring but in accord with our reasons on the matters pressed on this appeal. It will not permit the appellant to re-agitate matters which were dismissed by the Tribunal in the original proceedings and were not pressed on this appeal.

67 Our orders will also make provision for any application and submission concerning costs of the appeal and of the original proceedings in the light of

these reasons and conclusions. The proceedings should be listed for directions in the Consumer and Commercial Division to enable the parties to address the scope and timing of any further evidence and preparation for the limited re-hearing.

68 The primary member who constituted the Tribunal for the original proceedings commented at points and made some findings in relation to acceptance and credit of witnesses. There also will be, in effect, a fresh start on expanded evidence and potentially altered issues in the further hearing. In those circumstances it is appropriate that the proceedings be remitted to be heard by a Tribunal differently constituted: *Walker Corporation v Sydney Harbour Foreshore Authority* (2009) 168 LGERA 1 at [121] (5) and (7).

69 To the extent we have not dealt with any (if any) matters or submissions related to the foregoing and pressed on this appeal, we have considered it unnecessary to do so to reach the conclusions we have reached as reflected in our reasons and the orders. Those raised and pressed related matters will form part of the remitted matters to be re-heard and it may be prudent not further to comment on them than is necessary to determine this appeal.

Orders

70 We make the following orders:

(1) As against the first respondent Owners Strata Plan No 2661, (a) to the extent necessary leave to appeal is granted, and (b) the appeal is allowed.

(2) Note that the second respondent was by consent order dated 26 October 2023 removed as a party to the appeal.

(3) The proceedings are remitted for determination by the Tribunal consistent with the findings and reasons in this decision on the following matters and any related matters pressed on this appeal: the scope of work and terms of the work order to be complied with by the first respondent Owners SP 2661 in respect of the common property; the amount of the rent and other losses established by the applicant/appellant lot owner under s 106(5) of the *Strata Schemes Management Act 2015* (NSW) for a period commencing on 5 December 2020.

(4) Any application with supporting evidence (not already provided) and written submissions in respect of costs of this appeal and costs of the original proceedings is to be filed and served on or before the end of 14 days after date of orders in this appeal. The submissions are to include

whether the parties consent to or oppose the appeal panel determining costs on the papers and for that purpose making an order dispensing with a hearing on costs.

(5) Any written submissions and supporting evidence (not already provided) in response is to be filed and served on or before the end of 28 days after date of orders in this appeal.

****

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