

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

OWNERS COPORATIONS LIST

VCAT REFERENCE NO. OC1500/2017

CATCHWORDS

Owners corporation; entry of water to a lot; source of water; whether owners corporation breached duty to repair and maintain under section 46 of the *Owners Corporations Act 2006*; whether owners corporation liable under section 16 *Water Act 1989*; whether owners corporation on notice of danger of flow; whether owners corporation took reasonable steps to prevent the flow of water; damages for breach of statutory duty; loss to date of hearing and continuing

APPLICANT	Trent Guy
RESPONDENT	Owners Corporation 416326
WHERE HELD	Melbourne
BEFORE	R. Buchanan, Member
HEARING TYPE	Hearing
DATE OF HEARING	26 and 27 July 2018
DATE OF ORDER AND REASONS	20 December 2018
CITATION	Guy v Owners Corporation 416326 (Owners Corporations) [2018] VCAT 20

ORDER

- 1 The respondent must pay for \$54,843.20 to the applicant.
- 2 Liberty is reserved to the applicant to apply for an order for damages caused by loss of rent from 28 July 2018.
- 3 Liberty is reserved to the parties to apply on the question of costs.

R. Buchanan
Member



APPEARANCES:

For Applicant	Mr D. Harrison, of counsel
For Respondent	Ms N. Wilde, solicitor

REASONS

(The Tribunal has been assisted by written submissions, which were filed by the parties after the hearing.)

Introduction

- 1 This is a case about leaking water in a St Kilda apartment development. The applicant is the owner of one of the apartments. He claims that the owners corporation for the subdivision (the owners corporation is the respondent to this proceeding) failed to maintain and repair the owners corporation's common property. The result, the applicant claims, was that water entered and damaged his apartment.

Background

- 2 The buildings in the subdivision were constructed in about 1999. The subdivision contains 52 apartments. The applicant bought his apartment, lot 4, in 2001, first living there and from 2010, renting the apartment out.
- 3 During the hearing, the owners corporation (the OC) characterised the buildings as having been "badly built". Over the years, water caused a number of problems to the OC, so much so that, in its report to the OC's 2011 AGM, the committee of the OC observed that "the waterproofing and drainage problem is the nemesis for 62 Wellington".
- 4 The applicant's unit was not immune to those problems. The unit, which faces north, had a tiled patio on its north side. In 2008 the patio's pavers and screed were replaced in full, to rectify what the works contractor described in his quotation as "water ingress from the north facing patio area of the dwelling".
- 5 In 2013 water leaked into the applicant's lot, causing damage.
- 6 On 16 May 2016, the applicant's agent contacted the manager of the OC to advise that water had entered the applicant's unit from heavy rain in the previous week.
- 7 The applicant's tenants complained to the applicant about damp and mould. The applicant discounted the rent. On 15 October 2016 the tenants vacated the premises, on the ground that the unit was "unfit for human habitation". Since that date, the applicant's unit has remained unlet.

This proceeding

- 8 On 11 July 2017, the applicant issued the present proceeding. He claims that the entry of water into his lot in 2016 was a result of the failure of the building's façade cladding and that the cladding has not yet been repaired.
- 9 [The OC admits that the cladding, which is made of rendered blue board, is part of the OC's common property and the responsibility of the OC.]

- 10 The failure of the cladding, the applicant said, occurred because the OC had failed to maintain the common property, namely the cladding. The applicant alleged that the OC's failure to maintain and subsequently repair the cladding was a breach of the duty to maintain and repair the common property imposed on the OC by section 46 of the *Owners Corporations Act 2006*. The applicant claimed damages for the loss which he had suffered by reason of that alleged breach of the OC's duty.
- 11 Further, the applicant said, the OC was liable to pay damages to the applicant under section 16 of the *Water Act 1989*. He also sought an order that the OC repair and maintain the common property.
- 12 In its defence, the OC denied that it had failed to maintain or repair the common property and said that any water entry into the applicant's lot had come from the applicant's patio, not from a failure of the cladding.
- 13 As to the applicant's claim under section 16 of the *Water Act 1989*, the OC said that liability under that section required a failure on the part of the OC to act to prevent water flowing from the façade into the applicant's apartment. The OC said that there had been no such failure.
- 14 Accordingly, the case raised two issues:
 - What was the source of the water; and
 - If the source of the water was the façade, had the OC failed to act to prevent water flowing from the façade into the applicant's lot?

What was the source of the water?

- 15 There were two possible sources for the water which entered the applicant's apartment – the façade or the applicant's patio.

Façade history

- 16 The evidence made it clear that, by 2016, the building façade had had a long and troubled history.
- 17 On 8 February 2008 Tymaline Building Services reported to the OC on its inspection of the applicant's lot and lot 17. Its focus was on patio tiling, but Tymaline also advised the OC that, "We suspect additional leaks are occurring via joins in the blue board panels to walls. Many joins are visibly deteriorating and are opening up".
- 18 On 11 May 2008 the OC's committee met to discuss problems with, among other things, cracking in the building's façade cladding.
- 19 On 22 October 2008 T.D. & C. Pty Ltd reported to the OC, describing cracked cladding apparent around the building and recommending that the OC "repair all external cracked cladding (which leads to water entry such as in Units 17 and 18)".
- 20 The TD&C report attached a quotation for repairs to the applicant's lot from Alldry Damp Control, dated 20 October 2008. That quotation noted

- that, "The external structure is constructed with blue board that is cracking vertically on a number of joints".
- 21 On 16 June 2009 the OCs committee considered and approved in principle a quotation from a contractor, Higgins Coatings Pty Ltd, for painting and cladding repairs.
- 22 On 29 August 2011 Buildcheck Engineering and Building Consultants provide a report to the OC. The report recorded that:
- The objective of Buildcheck's report was provide a scope of works to repair cracks to the façade.
 - The cracks were in the southern and western walls the building.
 - Buildcheck recommended grinding out a recess at the joints of the blue board sheets in the façade, to allow the installation of tape, then re-rendering and recoating the blue board.
- 23 In its report to the OC's 2012 AGM, the committee attached the 29 August 2011 Buildcheck report and commented that:
- There has been an increase in repairs in relation to the water seepage to ground floor apartments.
- The repairs required are not major however the original problem must be resolved sooner than (sic) later as the damage at this stage is seen as common property as such costs come out of the body corporate fund.
- 24 In 2013 water leaked into the bedroom of the applicant's apartment, through the northern wall. The OC replaced the carpet in the room.
- 25 On 27 January 2016, some months before the August 2016 water event which is the subject of the applicant's claim, Buildcheck reported to the OC about apartment 12, but also commented on the entire building. It said:
- Water was entering the bedroom of unit 12, apparently through "cracking of the façade cladding and/or inadequate window flashings and/or a leaking balcony to Unit 47 above".
 - "The façade and windows to the entire building also have evidence of cracking and inadequate window flashings".
 - Cracking was evident to the external wall of apartment 12 as well as to the walls of the two apartments immediately above it.
 - There was cracking evident in the external walls of other apartments.
 - Buildcheck recommended that the OC re-mesh, texture coat and membrane the entire building.

Patio history

- 26 From the evidence, it was plain that, in addition to problems with the cladding, the subdivision had been bedevilled by leaks caused by poor tiling

installed by the builder. In the case of the applicant's patio, Alldry Damp Control, which carried out rectification works to the patio, said in its quotation of 20 October 2008 that water was coming into the applicant's apartment from the applicant's patio. The quotation commented that, "It appears that the slab below the screed has no waterproof membrane and the screed has been built up higher than the junctions in the dwelling structure".

- 27 Rectification works were carried out by Alldry Damp Control. Those works consisted of removing the pavers and screed, then installing a new screed, a waterproof membrane and tiles. Mark D'Aluisio, the principal of Alldry Damp Control, gave evidence that the membrane would normally last for 20 years.

Opinions

Building professionals

- 28 After the water flow into the applicant's apartment in August 2016, a number of building professionals inspected the applicant's lot and expressed opinions about the source of the water flow.
- 29 The building professionals were as follows:

- a **Tymaline Building Services Pty Ltd.** Shortly after the water event, Tymaline inspected the applicant's lot on behalf of the OC. It reported that,

we believe the balcony tiles are the cause of the wet carpets.

- b **Webb Plumbing Services** inspected the applicant's lot on his behalf on 17 December 2017. It reported,

We ... confirmed the source of water damage into unit 4 to be the North cement sheet façade.

Webb Plumbing Services, watched by the applicant, spray tested the façade and found that water entered the applicant's apartment.

The applicant did not call Paul Webb, the author of that report, to give evidence and the OC argued that I should apply the principles in *Jones v Dunkel* and infer that Mr Webb's evidence would not have supported the applicant's case.¹ I do not accept that such an inference should be drawn. Mr Webb was only one of many authors of reports provided to the parties. None of those authors was called. In any event, the OC's Points of Defence specifically pleaded and sought to rely on Mr Webb's report.

- c **Flowreg Plumbing Pty Ltd** inspected the applicant's lot on 12 and 25 April 2017, on behalf of the OC. In the company of the applicant, Flowreg carried out flood tests to the balcony ("all OK no water

¹ HCA (1959) 101 CLR 298

leaking into the unit”) and the façade (“water entering into the unit no. 4”).

Experts

- 30 Both the applicant and the OC relied on expert evidence about the source of the water entry into the applicant’s apartment in August 2016.
- 31 The applicant called Glenn Jones of Boston Group to give evidence and also tendered a report by Mr Jones. Mr Jones was clear in his opinion that water could enter the applicant’s apartment, “from many locations to the north wall at all three levels of the rendered blue board substrate sheets which is currently held together by silicone”. He recommended removal and replacement of the blue board cladding on the north wall. He also stated that on inspection, he could find “no evidence of water ingress via the terracotta tile system to the external balcony [i.e. patio]”.
- 32 The OC’s expert was Matthew Osborne from Buildspec. The investigation upon which Mr Osborne relied consisted of constructing a coffer dam on the applicant’s patio, filled to a depth of 30 to 40 mm against the front, north wall of the bedroom in the applicant’s apartment. The water level was held for 2.5 hours. He concluded that water had entered partly as a result of the flooding test and that the flashings and waterproof membrane to the patio had “failed or are non-existent”.

Other possible causes

- 33 In the many reports about the water entry into the applicant’s apartment there are a number of references to possible sources of entry water – other than the façade and the patio. They are: condensate from the balcony above; a duct pipe for an air-conditioning unit installed by the applicant; screws attaching the air-conditioning flashing to the façade; the hidden box gutter to one of the apartments above; the stormwater system; the drainage gutters on the balconies above the applicant’s apartment. These make fleeting appearances, but there was no evidence to show that any was likely to be material.
- 34 Another possible source of water entry was mentioned by the applicant’s landlord insurer, AAMI, when on 16 June 2016 it said in an email, “... it is recommended by our restorer that we do not replace the carpet until the broken tile that has caused the leak is addressed by your body corporate”. As none of the building professionals or either expert witness referred to a broken tile, AAMI’s comment may safely be ignored.

The source of the water – conclusion

- 35 The evidence which identified the applicant’s patio as the source of water entry into the applicant’s apartment was confined to the reports of Tymaline Building Services Pty Ltd (written shortly after the water event) and the OC’s expert, Mr Osborne.

36 Tymaline's report to the OC said:

We cut an exploratory hole in the bedroom wall above the damp area and found the wall cavity dry. As the water is coming down the wall cavity we believe the balcony tiles are the cause of the wet carpets

37 The Tymaline report does not describe the "exploratory hole in the bedroom wall above the damp area". The evidence showed that the wall in question was of stud construction, so the exploratory hole is likely to have been of limited size. The cutting of a single inspection hole in a stud wall does not necessarily exclude the possibility that the water causing the damp area came down another part of the stud wall, then travelled to pool in the damp area. In that context, I noted the evidence of the applicant's expert witness, Mr Jones, that he had observed water travelling on the top of the stud wall's bottom plate.

38 Materially, Tymaline did not observe any evidence which supported its finding that the applicant's patio tiles were the source of the water.

39 Turning to the evidence of the OC's expert, Mr Osborne, I found his evidence not entirely convincing. Mr Osborne did not test, refer to or comment on the façade. His investigations consisted solely of a coffer dam flooding test, which, he said, was the test which he had been instructed to perform.

40 The test carried out by Mr Osborne had little or no connection with events in the real world. It is hard to imagine any rain event which would hold 30 to 40 mm of water against the wall at the southern end of the patio for 2.5 hours. Mr Osborne conceded as much in cross examination. In this regard, it is relevant that the applicant's expert, Mr Jones, gave evidence that the patio tiles fell away from the north wall of the applicant's apartment, towards a central drainage point.

41 In addition to doubting the probative value of the flooding test, I was not convinced about the conclusions which Mr Osborne drew from his test. Mr Osborne used a moisture measuring device to test the inside surface of the blue board cladding, at the bottom of the northern wall of the apartment. It was against this wall that the coffer dam held water. At some point prior to the test, the plaster board on the interior of the wall had been removed along the full length of the wall.

42 Throughout the flooding test, moisture readings remained between 0.6% (which Mr Osborne said was to be expected in a room under normal conditions) and 0.9%. Only one reading appeared to show a rise in moisture, from 0.9% to 1.4%, but that reading was taken at a point where a piece of the blue board was missing (apparently broken away), so that the device was measuring the moisture level of the tile. [The patio has a row of tiles, forming a skirting, at the foot of the north wall of the applicant's apartment.]

- 43 The absence of the blue board meant that the membrane, which would have been applied to the broken off piece of blue board, was absent. In the absence of the waterproofing membrane at that point, it is not surprising that an increase in moisture level occurred.
- 44 Another matter of concern was that Mr Jones used a thermal camera, which did not show any evidence of water ingress. He also said that he did not observe water pooling or dripping, or puddles of water.
- 45 In his report, Mr Osborne concluded that “There is evidence of water ingress to the inside of the front northern wall of unit four”. He gave as the cause:
- There is no evidence of waterproofing to the back of the exposed tile to the western corner of the north wall
- There is no evidence of a flashing behind the wall cladding at the junction of the patio floor.
- 46 The difficulty I have with that conclusion is that, in reaching it, Mr Osborne said that he relied on examination of the place where the small piece of blue board was missing. Yet in the absence of the missing piece of blue board, it is impossible (without removing the tiles, or being able to inspect the missing piece) to know whether or not a membrane was installed, as any membrane would have been applied to the blue board, not the tile.
- 47 In this context, the evidence given by Mark D’Aluisio of Alldry Damp Control, which renewed the patio in 2008, was relevant. He said that two layers of membrane had been laid before the tiling had been done.
- 48 It is noteworthy that Webb Plumbing Services carried out a flooding test of the patio in about December 2016. It concluded that there was no increase in moisture content or water ingress into the applicant’s apartment and that the patio passed the flooding test.
- 49 Also noteworthy is the fact that Flowreg Plumbing also carried out a flooding test to the patio in April 2017 and that it, too, concluded that no water was entering the applicant’s apartment from the patio.
- 50 Finally, the observation of the applicant’s expert, Mr Jones, is relevant. He observed that there were water ingress markings 200 to 300 mm above the floor level on the inside of the north wall. He commented in his evidence that, “Water does not flow upwards”.
- 51 In summary, I prefer the evidence of the applicant’s witnesses, Mr Jones and Mr D’Aluisio, over the evidence of Mr Osborne and Tymaline Building Services Pty Ltd. Confirmation for that view is provided by the lengthy history of problems with the façade of the building and the many reports identifying the cladding as the source of water ingress.

Water Act 1989

- 52 Section 16 of the *Water Act 1989* imposes on a landowner liability to pay compensation when an unreasonable flow of water from the landowner's land damages another's property, or causes economic loss to that other.
- 53 While in the circumstances of the present case, the OC would ordinarily be liable to the applicant under section 16, the OC argued that, by operation of section 16(5) it was excused of liability. Section 16(5) provides:
- (5) If the causing of, or the interference with, the flow (as the case requires) was given rise to by works constructed or any other act done or omitted to be done on any land at a time before the current occupier became the occupier of the land, the current occupier is liable to pay damages in respect of the injury, damage or loss if the current occupier has failed to take any steps reasonably available to prevent the causing of, or the interference with, the flow (as the case requires) being so given rise to.
- 54 Section 16(5) qualifies the liability of the respondent in circumstances where the causing of the flow occurred by works constructed or any other act done or omitted to be done on any land before the respondent became the occupier of the property, and it "failed to take any steps reasonably available" to prevent the flow.
- 55 In the case of *Connors v Boden International Pty Ltd*² Senior Member Young considered subsection (5) in the following terms:
- ... I consider that the words "steps reasonably available" includes a requirement that the current occupier has a sufficient and reasonable time in which to carry out those steps after being given notice or constutive (sic) notice of the unreasonable flow is imputed. Further, that their liability in the event of them not taking reasonable steps to cease the flow after such notice is limited to the time from which such steps should reasonably have been taken.
- ...
- Therefore, I find that "reasonable steps" in the Act infers that the current occupier takes the necessary steps within a reasonable time.
- 56 This formulation was cited with approval by Member Leshinsky in *Sidoti v Owners Corporation 633715B*.³
- 57 Accordingly, the questions in this case are, first, whether the OC had actual or constructive notice of the danger of water flowing through the façade cladding and into the applicant's apartment and secondly, whether the OC took steps reasonably available to it to prevent the entry of water into the applicant's apartment.

² [2008] VCAT 454 at paragraph 51

³ [2016] VCAT 1880

Notice

- 58 In the present case, the evidence showed that the residential apartment complex was constructed with widespread building defects which, as the OC submitted, “have from an early stage, manifested in water leaks in various areas throughout the complex over the past 19 years”.
- 59 That the OC had notice of the danger is obvious. The long history of leaks in the building, the many reports, all would have alerted the OC to the danger.

Reasonable steps taken?

- 60 The OC did not dispute that it had notice of the danger of water entering lot owners’ apartments, but argued that it had taken the reasonable steps which it should have taken to remove that danger. In support of that argument, it relied on the fact that Higgins Coatings, which provided a quotation dated 26 May 2009, had painted the whole building. In cross-examination, the applicant, who had been a member of the OC committee at the time, said that Higgins Coatings carried out the quoted works, which covered all of the apartments in the complex and included sealing up and painting over cracks in the façade.
- 61 While the OC may have engaged Higgins Coatings to paint and seal the cracks in the façade, I do not accept that the OC’s action in doing so was enough to afford the OC protection under section 16(5) of the *Water Act 1989*. I say that for a number of reasons.
- 62 First, TD&C’s report of 22 October 2008, which dealt with waterproofing repairs to a number of lots, including that of the applicant. Among other things, the report said:

As we have advised previously, the damage noted to these units is apparent elsewhere around the building – i.e. buckled tiling and cracked cladding.

...

We recommend that your Committee considered deciding to:

(i) repair all external cracked cladding (which leads to water entry such as in units 17 and 18)

...

Furthermore, Alldry could be engaged to simply caulk windows and cracked cladding joints outside units 17 and 18 as a temporary measure whilst the Committee discussed the need to address the general cladding issue. To simply patch cracked cladding will produce a visually poor result that will *probably not last*. Cladding should be removed and replaced – a major task! (Emphasis added)

- 63 In view of the dates of the TD&C report and the Higgins Coatings quotation, it is likely that the Higgins Coatings quotation was obtained in response to TD&C’s report. The OC’s use of Higgins Coatings to seal and

paint the cracks in the façade, without more, was the antithesis of the advice given to the OC by TD&C, which expressly warned that, “To simply patch cracked cladding will produce a visually poor result that will probably not last”.

64 Secondly, in 2013 the applicant’s apartment was damaged by water coming through the northern wall and the OC replaced the carpet.

65 Thirdly and most materially, on 27 January 2016, well before the water event in August 2016, Buildcheck reported to the OC about water entry in unit 12, on the south side of the building. The report recorded that the skirting board in the southern bedroom wall of apartment 12 was rotted, exposing the timber stud walls behind. The bottom cord and the bottom of the studs were “totally rotted out”. The report identified cracking in the external wall of unit 12, cracking in the external wall in the unit above it and general cracking in the façade throughout the complex. It also identified no evidence of head window flashings, in Apartment 12, but also in the complex generally.

66 In the opinion section of the report, Buildcheck said that water had entered unit 12 through cracking in the cladding and because of inadequate window flashings. It also suggested that there may have been leaking from a balcony in one of the units above. Buildcheck’s opinion continued:

The façade and windows to the *entire building* also have evidence of cracking and inadequate window flashings. (Emphasis added)

Cement sheet cladding relies on sound flexible jointing and regular membrane recoating to prevent cracking and moisture ingress. In this case the cracking of the cement sheet cladding appears to be due to failure of the sheet jointing *and lack of building maintenance*. (Emphasis added)

67 In response to the Buildcheck report of 27 January 2016, the OC did nothing and at the hearing, 1½ years later, adduced no evidence to show that anything had yet been done to repair the façade, or that it had taken any steps to stop the flow of water into the applicant’s apartment.

68 Materially, the events which I have set out above occurred against the background of the building’s long and troubled history, a history which had prompted the committee’s despairing comment in its report to the OC’s 2011 AGM, that “the waterproofing and drainage problem is the nemesis for 62 Wellington”.

69 In view of the plethora of signs, warnings and portents which appeared before the OC with metronomic regularity throughout the life of the building, it is hard to see how the OC can assert that it is entitled to rely on section 16(5) of the *Water Act 1989*. It was clear, and the OC conceded, that it had notice of the possibility that water could flow from the façade into the applicant’s apartment. I am not persuaded that, by engaging Higgins Coatings, the OC had taken all the steps reasonably available to it to prevent that flow of water. Higgins Coatings was engaged by the OC to do

what TD&C had said would only provide an interim solution, yet TD&C had made it clear that the façade needed major works. Then, in 2013, water damaged the applicant's apartment, followed by Buildcheck's 27 January 2016 report, again advising that major works be carried out to the façade. But the OC did nothing.

70 Accordingly, I find that the OC failed to take steps reasonably available to it to prevent the causing of the flow of water into the applicant's apartment in August 2016.

71 It follows that I also find that the OC is liable under section 16 of the *Water Act 1989* to pay damages to the applicant in respect of the damage to the applicant's apartment and the economic loss suffered by the applicant.

The OC's section 46 duty to repair and maintain

72 The history which I have set out above in relation to section 16 of the *Water Act 1989* is equally relevant to the question of the OC's duty under section 46 of the *Owners Corporations Act 2006*. That section says:

Owners Corporation to repair and maintain common property

An owners corporation must repair and maintain –

- (a) the common property; and
- (b) the chattels, fixtures, fittings and services related to the common property or its enjoyment.

73 The evidence made it plain that, from at least 2008 and the Tymaline report of 8 February 2008, the OC was well aware that the building's cladding was cracked, that it leaked and that it needed repair. By the OC's 2011 AGM, the OC's committee was describing waterproofing (together with drainage) as the building's nemesis.

74 In 2008 TD&C told the OC what was needed to fix the problem, but the OC ignored TD&C's advice, preferring a caulk and paint by a painting contractor, rather than the (expensive) repairs recommended by TD&C.

75 When, in 2013 water damaged the applicant's apartment, the OC did nothing.

76 Then, in early 2016, when Buildcheck presented the OC with evidence of dramatic damage to lot 12, caused by water entry through the façade and, again, recommended major remedial works to the whole façade, the OC, again, did nothing. And at the date of the hearing the OC had still done nothing.

77 The OC argued that its failure to repair the façade in the area of the applicant's apartment did not constitute a breach of its duty to repair. In arguing that, the OC relied on the fact that Tymaline's report, shortly after the water event, said that the applicant's patio tiles were the source of the water. But that reliance was simply not justified, in view of the crystal clear warnings given to the OC by TD&C on 22 October 2018, the Buildcheck

report of 27 January 2016 and the fact that in 2013 it had paid to repair water damage to the applicant's apartment.

- 78 It was plain from the evidence, and I find, that the OC breached its duty under section 46 to repair and maintain. It is equally plain, and I also find, that it was that breach which caused the damage to the applicant's apartment.

Damages

- 79 The applicant claimed damages by reason of the OC's breaches of section 46 of the *Owners Corporations Act 2006* and section 16 of the *Water Act 1989*, as follows:

- \$5,931.20 rectification costs, being the subject of a quotation to the applicant from Webb Plumbing Services
- \$2,606 rent forgone by reason of rent reduction after the water event
- \$45,806 rent from the date of departure of the applicant's tenants to the date of hearing and continuing at the rate of \$450 per week
- \$500 insurance excess paid after insurer replaced carpet
- Interest.

- 80 In relation to the applicant's claim for interest, the Tribunal does, under section 165 of the *Owners Corporations Act 2006*, have power to award damages by way of interest. The applicant did not, however, adduce any evidence in support of this head of claim and, accordingly, it was not made out.

- 81 Other than an argument about mitigation, the OC did not take issue with any of the amounts claimed by the applicant. In relation to mitigation, the OC said that the applicant had failed to mitigate his damage because he had not repaired the tiles in the patio. In view of the findings which I have made about the source of the water entry into the applicant's apartment, the applicant's submission is not relevant.

- 82 In relation to mitigation, the applicant said that he had engaged Webb Plumbing Services at his own expense to establish the source of the water coming into his apartment. Webb Plumbing Services advised him that the water had come through the cladding on the façade, at which point the applicant had concluded that he would have to rely on the OC to stop the water.

- 83 Evidence in support of the applicant's claim for rent lost was given by an estate agent, Ernie Caputa who said that the applicant's apartment was unlettable, by reason of the water damage. As Mr Caputa had not inspected the apartment, I attach little weight to his evidence. I attach more weight to the evidence of the applicant, who said that the apartment was still significantly affected by water. No evidence was adduced by the OC to rebut the applicant's evidence.

- 84 I find that the source of the water entry was the façade, which was the property of the OC. I further find that the applicant could not repair the façade and I also find that, while the façade was unrepaired, it was not possible for the applicant to let the apartment.
- 85 I find that the applicant has made out his claims for rectification costs, insurance excess, rent lost, rent forgone and continuing loss of rent. I will order accordingly. I will reserve to the applicant liberty to apply for an order for rent from the date of the hearing. I will also reserve liberty to apply on the question of costs.

Other relief

- 86 In addition to damages, the applicant sought an order that the OC repair and maintain the common property so as to make it watertight.
- 87 Were the Tribunal to make the order sought, the order would do no more than restate the duty already imposed on the OC by section 46 of the *Owners Corporations Act 2006*. Accordingly, the applicant's application for that order is refused.

R. Buchanan
Member

