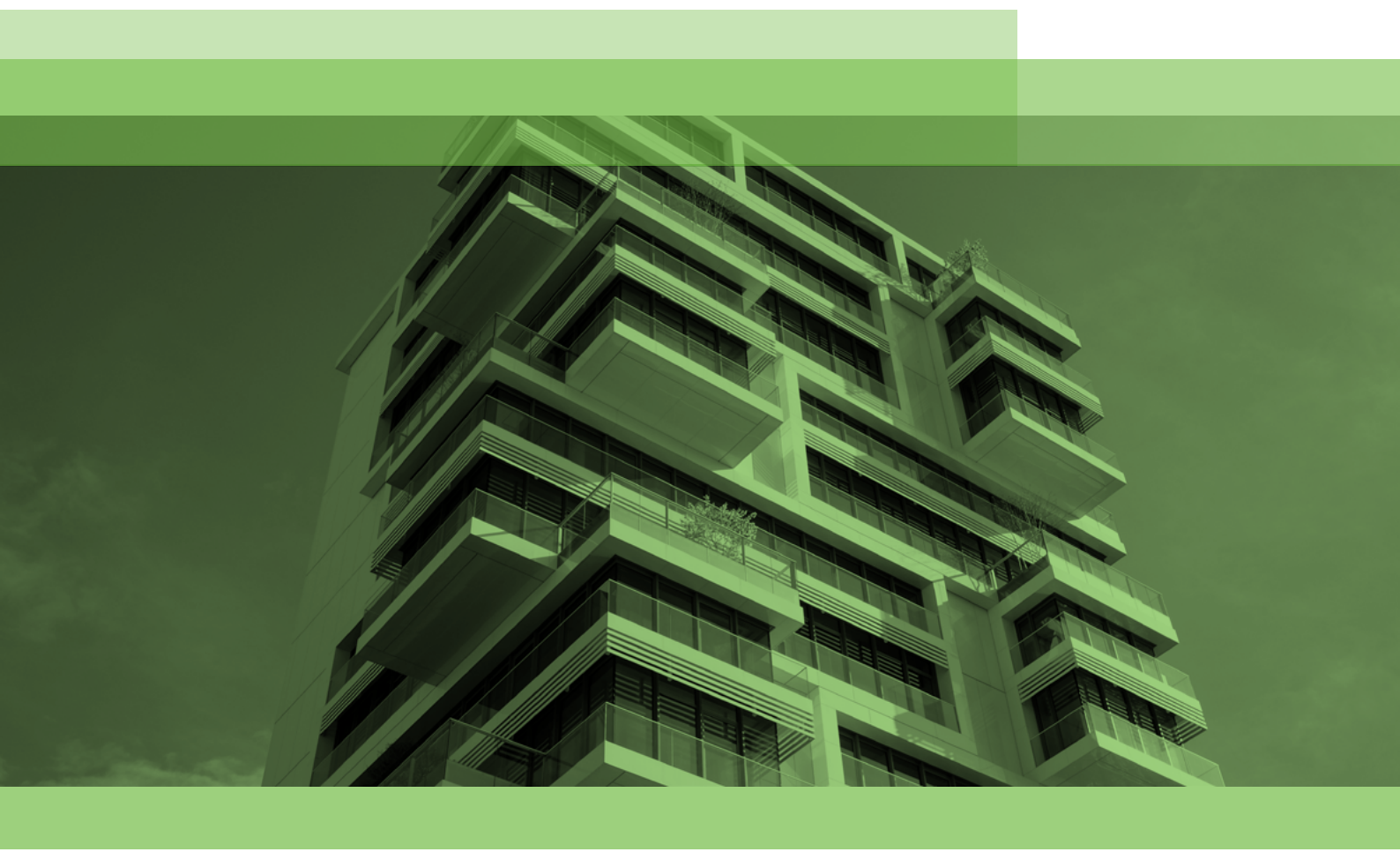


Lloyd v Beach Estate Body Corporate

Community Scheme Ombud Service - Adjudication Order

Case Number: CSOS 622/KZN/2017
Adjudicator: TGL Talbot
Date: 18 April 2018
Applicant: Michael Lloyd
Respondent: The Beach Estate Body Corporate



PARTIES

[1] The Applicant is Michael Lloyd, the owner of section 18, The Beach Estate Body Corporate, Zimbali, KwaZulu-Natal.

[2] The Respondent is the Trustees of The Beach Estate Body Corporate, situated at Zimbali, KwaZulu-Natal.

BACKGROUND

[3] The Applicant purchased a unit in the scheme in 2004.

[4] The following are common cause; namely:

4.1. The Applicant had communicated with the Respondent and the Developer at an early stage about problems that he had noticed relating to the roof *above* his unit and the gutter system.

4.2. The problems experienced with the roof include the following, namely:

4.2.1. The mortar between the collared ridge and hip cappings have cracked which has allowed the water to flow inside. The mortar has to be replaced and removed to ensure that the cappings are wetted before applying the mortar to prevent further damage.

4.2.2. The roof tiles on the southern side have loosened and must be replaced.

4.2.3. The valley iron on the south east corner is rusted.

4.2.4. The roof nails that are used to keep the roof tiles in place are steel. Steel nails should not have been used, rather a preferred however more expensive option would be that of copper nails. Copper nails apparently do not rust especially at coastal areas.

4.2.5. There are numerous cracked and damaged roof tiles. The entire roof must be refurbished with a new roof. The tiles that are used which are currently in place are no longer produced and that a completely new tile may have to be used and replaced.

4.2.6. Many of the damaged roof tiles have slipped back as a result of the rusted nails.

4.3. That the problems associated with the roof are due to poor workmanship and latent defects caused by the Developer.

4.4. That both the roof and gutters are part of the common property.

4.5. A report dated 09 May 2017 compiled by an expert in the field of inspection of property repairs and maintenance, Inspect A Home, was submitted by the Respondent as evidence. Both Applicant and Respondent agreed to the contents thereof. The Respondent arranged for the report.

4.6. The Applicant also submitted photographs confirming areas of the damaged roof and damage to the inside of the Applicant's unit, such photos were accepted by the Respondent.

4.7 That in November 2011, a fire caught alight to the geyser servicing the Applicant's unit. An insurance claim was submitted to the Body Corporate insurers and the geyser was replaced.

4.8 It is common cause that the damage to the interior of the unit was caused as a result of rain water leaking through the damaged roof, also through portion of the arear where the damaged water proof sheeting was in place.

[5] The Applicant approached CSOS for an order to the effect as follows:

5.1 For a qualified roofing contractor to be appointed within ten (10) business days to repair the roof in line with the report from Inspect-a-home as submitted by the Respondent. In the event of the Respondent is unable to appoint a contractor within ten (10) business days and updated quotations submitted by Seacon is to be accepted.

5.2 That the Respondent provides a new roofing certificate once the roof has been repaired.

5.3 That the Respondent is liable for consequential damage from the roof leaking over nine (9) years to be repaired and paid for by the Respondent within thirty (30) days of the roof being repaired. This includes but not limited to:

5.3.1 Replace all damaged ceilings showing mould to the same standard as the rest of the property.

5.3.2 Repairing (damp) and repainting / plastering of walls damaged by the defective roof / gutters both inside and outside to the same standard as the rest of the house.

5.3.3 Repair the electrical system and electrical fittings in the house which are tripping the DV board as a result of the leaking roof. Replace the DV board which is rusting on the wall. The Respondent to refund the Applicant the cost of replacing the electrical board in the garage mortar. The invoice was submitted to the Respondent in January 2018.

5.3.4 The Respondent to supply the Applicant with an electrical compliance certificate after completion of the work to the interior of the unit.

5.3.5 The Respondent is to replace all wooden flooring and skirting damaged by the leaking roof with matching flooring colour and quality.

5.3.6 The Respondent is to be liable for any further damage that may be uncovered during the repairs.

5.4 That the Respondent be ordered to pay for two separate air fare and car hire costs that he incurred.

5.5 For an order that a ruling by the Adjudicator is legally binding is not subject to approval of the Respondent or its confirmation.

APPLICANT'S CASE

ROOF

[6] The Applicant's case is that the roof is part of the common property and therefore it is the duty of the Respondent to repair and maintain common property. The Applicant referred to section 3(1)(l) of the Sectional Titles Schemes

Management Act 8 of 2011:

"the body corporate must perform the functions entrusted to it by or under this Act or the rules, as such functions include to maintain all the common property and to keep it in a state of good serviceable repair".

[7] Applicant argued further that this duty to maintain does not fall away where there are latent defects or poor workmanship to the common property area, as in the case at hand. The Respondent has a duty to ensure that the roof is maintained and in a serviceable state or repair despite latent defects and poor workmanship.

[8] The Applicant also raised a concern for safety namely that the roof tiles could fall off and cause damage to persons or property. Apparently a few have already fallen off the roof in the past.

[9] The Respondent has had ample time to resolve the matter and attend to the repair. They failed to do so.

DAMAGE TO INTERIOR OF UNIT

[10] Furthermore, extensive damage to the interior of Applicant's unit occurred due to the roof not being repaired by the Respondent. Therefore the Respondent is liable for damages to the interior of the unit as evidenced by the photographs submitted and set out in his prayer for relief.

RESPONDENT'S CASE

ROOF

[11] Mr Cody, for the Respondent, agreed that the common property, including the roof in question, is the duty of the Respondent to maintain and look after. However as the Developer was the cause of the latent defects and poor workmanship; the Respondent cannot be held liable for this. The Applicant should have pursued the Developer, not the Respondent as he purchased the unit from the Developer. The Applicant did raise this with the Developer however did not follow through with it once he knew that the Developer was not going to remedy the issues.

[12] Mr Cody argued further that the Respondent are not experts with roof design and that it was the Developer who designed the roof hence they are the party that should have remedied the faults, not the Respondent.

[13] The Respondent did not want to repair the roof for various safety reasons as it are not equipped to go on top of the roof and would need equipment referred to as a *cherry picker*.

[14] There are 3 (three) other units in the scheme which had similar roof problems however the owners of those units attended to the necessary repairs of the roofs at their own costs. The Applicant should have done as they did. It would be unfair to expect the Respondent to repair the roof when others were not offered the same options.

DAMAGE TO INTERIOR OF UNIT

[15] The Respondent denied liability for the damages to the interior of the unit. However Mr Cody admitted the damage to the inside was a result of the defect in the roof. He also argued that as a result of the fire to the geyser in 2011, damage to the waterproof sheeting was caused. As a result thereof, water would leak through the roof, through the damage portion of the water proof sheeting and would leak down into the unit below, causing damage. Mr Cody however advised that the Applicant was paid by the body corporate insurers to remedy the problem and restore the water proof sheeting to its original condition. Further to the adjudication, Mr Cody admitted that such payment was never infact made to Applicant and in fact the insurer of the Body Corporate dealt directly with the contractor; Domestic Industries. Mr Cody argued that the Applicant could have taken steps himself at an earlier stage in order to mitigate the loss.

APPLICANT'S RESPONSE TO THE RESPONDENT'S ARGUMENT

[16] The Applicant replied by saying that even though the Developer may have been the cause of the problems, the Respondent was still responsible to repair the roof. The Respondent themselves ought to have pursued the Developer, not the Applicant. The fact that the Applicant

raised with the Developer his concerns does not mean he waived his rights to claim from the Respondent, as this duty to repair remains the duty of the Respondent.

[17] The Applicant said further that he did not expect for the Respondent to repair the roof themselves rather that they could have instructed a contractor specializing in this area of work to do so.

[18] Furthermore that as the geyser was covered under Body Corporate insurance, the damaged caused as a result thereof should have all been for the responsibility of the Respondent. Hence the Respondent should have ensured that the necessary water proof sheeting was replaced and put back into its original condition. Applicant added that the main function of the roofs is to prevent water leaking into the interior. Therefore if the roof was in a serviceable order, the leaks would not have happened.

[19] The Applicant argued that as for the 3 owners who repaired the roofs, they were not obliged to do so as their roofs were part of common property. This duty remains the responsibility of the Respondent.

[20] Finally the Applicant was unable to confirm whether he had received the payment from insurers of the body corporate. He asked for proof from the Respondent. The Applicant maintained the stance that the geyser and water proof sheeting is common property and the duty of the Respondent to repair and replace. Furthermore that he only become aware of damage to the interior at the end of 2016 and that he raised with Respondent these issues yet they declined to act. By such time; damage to the interior had already started.

MY OBSERVATIONS

[21] The Body Corporate has a duty to maintain common property and keep it in a state of good and serviceable repair.

[22] The Issue(s) before me are to determine whether the Respondent is liable:

22.1 to maintain the roof and to keep it in a state of good serviceable repair where apparent latent defects and poor workmanship are present as mentioned above.

22.2 to repair the damage caused to the interior of the Applicant's unit as a result of the water leaking .

ROOF

[23] To answer the first question at 22.1; one must look at the very nature of common property. For example, just like the common property perimeter wall and the common property roads, if these areas had problems with latent defects and poor workmanship then what would the Respondent have done to remedy the problem?

[24] The Respondent would have ultimately pointed the finger at the Developer and insisted that the Developer take responsibility and repair the perimeter walls and roads alternatively they would have attended to the necessary repairs at their own cost and may have elected at some stage to take legal action against the Developer. The Respondent would not have apportioned liability on any one specific owner. I agree that the Applicant has not lost I waived his rights to pursue the Respondent as he initially pursued the Developer. The roof is something that cannot be discussed/ negotiated about without the involvement of the Respondent and Body Corporate. The roof simply does not belong to the Applicant nor the Developer.

[25] Hence the common property, in this case the roof, is not owned by the Applicant nor any individual owner. The roof is owned by all the members in an equal and undivided share. The Applicant owns his section. He does not own the common property. The Applicant has an equal and undivided share in the roof, just like any other owner/ member.

[26] It was therefore easy for the Respondent to assume that the Applicant was liable for the roof as he was living under it and therefore it would be his duty to resolve these developer issues.

[27] Such assumption is wrong.

[28] It is the Respondent's duty to ensure that the roof was kept in a state of good and serviceable repair despite the problems caused by the Developer.

[29] The Applicant acted responsibly by notifying the Respondent at an early stage of these issues. The Respondent ought to have taken steps to repair the damaged roof at an early stage. Unfortunately the Respondent elected not to.

DAMAGE TO INTERIOR OF UNIT

[30] I will now deal with the question set out in 22.2 above. The water proof sheeting is part of the common property and accordingly the duty of the respondent to repair and replace. The Respondent admitted to me in a subsequent communication that the Applicant was not paid by the insurers, as alleged at the adjudication, but rather payment was made for the loss directly from the insurers to the contractor appointed by the body corporate insurers. There is nothing before me that convinces me that Mr Lloyd was responsible in any way for the repair and or replacement of the water proof sheeting.

[31] Mr Cody confirmed in a subsequent email dated the 22 March 2018 that:

"had the waterproofing been put back over the affected I damaged area there would have been no damage to his unit."

[32] The Respondent however has incorrectly assumed that the Applicant was paid to remedy the damaged waterproof sheeting. The duty to repair and maintain the water proof sheeting remains the duty of the Respondent.

[33] As a result of their failure to do so, coupled with the fact that the Respondent failed to ensure that the contractor had done their job properly as they ought to have done, read with the admission in the email dated 22 March 2018, confirms for me that the is liable for the damage to the interior to the unit belonging to the Applicant. I believe the Applicant when he stated that he only became aware of the damage to the interior at the end of 2016. There is nothing before me that tells otherwise. Notwithstanding the waterproof damage issue, from what has been argued by the Applicant, should the roof had been repaired as it should have been done early on, the damage to the inside of the unit should have been nil or at the least, very minimal.

[34] In conclusion, I therefore I order the following:

34.1 That the Respondent is liable for the repairs to the roof at unit 18.

34.2 The Respondent is ordered to commence with repairs to the roof at unit 18 within 90 (ninety) days from the date of signature of this order in accordance with the guidelines of the report prepared by Inspect A Home dated 09 May 2017.

34.3 That the Respondent is liable for the damage caused to the inside of the Applicant's unit, as prayed for.

34.4 Separation of issues: Liability has been ordered upon as per above. However the quantum of damages suffered by Applicant for the interior of his unit be dealt with separately at a further adjudication hearing to be set down, under the same case / reference number. The Applicant bares the onus to prove the quantum of damages.