Supreme Court

New South Wales

Case Name:	The Owners – Strata Plan 85044 v Murrell; Murrell v The Owners – Strata Plan 85044
Medium Neutral Citation:	[2020] NSWSC 20
Hearing Date(s):	28, 29, 30 April and 14 May 2020
Date of Orders:	1 October 2020
Decision Date:	1 October 2020
Jurisdiction:	Equity - Real Property List
Before:	Williams J
Decision:	See summary of the Court's conclusions at [75].
Catchwords:	LAND LAW – covenants – restrictive covenants – construction – where restrictive covenant states that no matter or thing of any nature whatsoever shall be constructed on erected on placed on or permitted to remain on the servient tenement that exceeds a height of RL 26 AHD – where airspace above the servient tenement became part of the dominant tenement after registration of the restrictive covenant – whether on the proper construction of the restrictive covenant there is an implied positive covenant or easement allowing the owner of the servient tenement to enter into the airspace on a transitory basis – restrictive covenant held not to include a positive covenant or easement LAND LAW – easements – implied easements – easements of necessity – where airspace above the putative dominant tenement is owned by putative servient tenement – where that airspace previously formed part of the property of the putative dominant tenement until the registration of a plan of subdivision under which the airspace became part of the putative

servient tenement – whether easement over airspace is essential for the use of the putative dominant tenement – implied easement of necessity held to have arisen at the time of the registration of the plan of subdivision – easement not enforceable by current owners of putative dominant tenement

TORTS – trespass – trespass to land – title to sue - where owners corporation of a strata scheme is the registered proprietor of airspace which contains a view of Sydney Harbour and is located above an adjacent property – where airspace forms part of the common property of the owners corporation – owners corporation held to have standing to bring a claim for trespass to airspace

TORTS – trespass – trespass to land – where owners corporation of a strata scheme is the registered proprietor of airspace which contains a view of Sydney Harbour and is located above an adjacent property – where it is not possible for owner of the adjacent property to access roof of that property without encroaching into the airspace – where agents of adjacent property owner enter into airspace on several occasions to effect repairs to and survey the roof for possible future development – defence of necessity established in relation to some but not all of the encroachments into the airspace – trespass held to have occurred on the other occasions – compensatory damages awarded

TORTS – private nuisance – title to sue – whether the owners corporation of a strata scheme can bring a claim for private nuisance in respect of damages or loss allegedly suffered by individual lot owners in the strata scheme – owners corporation held not to have standing to bring a claim for private nuisance on behalf of lot owners

LAND LAW – covenants – restrictive covenants – application to modify or extinguish restrictive covenant pursuant to s 89 of the Conveyancing Act 1919 (NSW) – power to make orders – where proposed modification

to restrictive covenant seeks in substance to create an easement – no power to create an easement under s 89 of the Conveyancing Act

LAND LAW – easements – court-imposed easements – Conveyancing Act 1919 (NSW), s 88K – proposed easement to access the airspace owned by putative servient tenement as reasonably necessary and on a temporary basis to repair, maintain and/or improve structures on the putative dominant tenement – whether reasonably necessary for the effective use or development of the putative dominant tenement – proposed easement reasonably necessary for effective use or development insofar as it permits access to the airspace as necessary and on a temporary basis for repairs and maintenance only

LAND LAW – easements – court-imposed easements – Conveyancing Act 1919 (NSW), s 88K – compensation – whether the lot owners in a strata scheme are entitled to be compensated for any loss or other disadvantage arising from an easement to be imposed over common property of owners corporation – lot owners are not persons having an estate or interest in the common property that is evidenced by an instrument registered in the General Register of Deeds or the register kept under the Real Property Act 1900 (NSW) – lot owners not entitled to compensation – Community Association DP 270447 v ATB Morton Pty Ltd (2019) 240 LGERA 32; [2019] NSWCA 83 applied

LAND LAW – easements – court-imposed easements – Conveyancing Act 1919 (NSW), s 88K – whether reasonable attempts have been made to obtain the easement or an easement having the same effect – where first attempts to obtain the easement or an easement having the same effect made only after the commencement of proceedings – where attempts made after the commencement of proceedings were sufficient in circumstances where lengthy correspondence between the parties about access, and the owner of the putative servient tenement was not prepared to grant an easement on any terms prior to receiving the first

offer

PRACTICE AND PROCEDURE – applications – leave to amend pleadings – application to amend summons and statement of claim – application made on the last day of a four-day hearing – no adequate explanation for the delay in making the application – where the proposed amendment merely clarifies what was already implicit in the existing pleadings – application granted

LAND LAW – Torrens title – contents of Register – where restrictive covenant recorded in a previous folio of the dominant land – where that restrictive covenant is not recorded in current folio of dominant land – observations about whether the dominant and servient tenements' title is subject to the restrictive covenant

Legislation Cited:

Access to Neighbouring Land Act 2000 (NSW), s 11
Civil Procedure Act 2005 (NSW), ss 56, 57 and 58
Community Land Development Act 1989 (NSW), ss 15, 25, 31, 32, 33 and Sch 8
Community Land Management Act 1989 (NSW), s 5
Conveyancing Act 1919 (NSW) ss 88B, 88K, 89
Land and Environment Court Act 1979 (NSW), s 40
Real Property Act 1900 (NSW), ss 31B and 42
Strata Schemes Development Act 2015 (NSW), ss 8, 9, 10, 23, 24, 28 and 118
Strata Schemes (Freehold Development) Act 1973 (NSW), ss 6, 8, 18, 20, 21 and 24
Strata Schemes Management Act 1996 (NSW), s 227
Strata Schemes Management Act 2015 (NSW), ss 8 and 254
Woollarah Local Environment Plan 2014 (NSW)

Cases Cited:

Aon Risk Services Australia Ltd v Australian National University (2009) 239 CLR 175; [2009] HCA 27
Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288 (2014) 254 CLR 185; [2014] HCA 36
Community Association DP 270447 v ATB Morton Pty Ltd (2019) 240 LGERA 32; [2019] NSWCA 83
Currumbin Investments Pty Ltd v Body Corp Mitchell Park Parkwood Cts [2012] 2 Qd R 511; [2012] QCA 9
Cuzeno Pty Ltd v Owners – Strata Plan 65870 [2013] NSWSC 1385

EB 9 & 10 Pty Ltd v Owners of Strata Plan 934 (2018) 98 NSWLR 889; [2018] NSWCA 288
Elston v Dore (1982) 149 CLR 480
Fincob Pty Ltd v Campbelltown City Council [2010] NSWSC 349
Gordon v Lever (2018) 97 NSWLR 90; [2018] NSWCA 43
Gordon v Lever (No 2) (2019) 101 NSWLR 427; [2019] NSWCA 275
Govindan-Lee v Sawkins (2016) 18 BPR 35,883; [2016] NSWSC 328
Gray v Motor Accidents Commission (1998) 196 CLR 1; [1998] HCA 70
Hill v Higgins [2012] NSWSC 270
Horseshoe Pastoral Co Pty Ltd v Rixon [2018] NSWCA 121
ING Bank Australia Ltd v O'Shea (2010) 14 BPR 27,317; [2010] NSWCA 71
Jarosz v State of New South Wales (2019) 19 BPR 39407; [2019] NSWSC 62
Khattar v Wiese (2005) 12 BPR 23,235; [2005] NSWSC 1014
Kuru v New South Wales (2008) 236 CLR 1; [2008] HCA 26
Lamos Pty Ltd v Hutichson (1984) 3 BPR 9350
Marketform Managing Agency Ltd v Amashaw Pty Ltd (2018) 97 NSWLR 306; [2018] NSWCA 70
Markos v O R Autor (2007) 13 BPR 24,487; [2007] NSWSC 810
McElwaine v The Owners – Strata Plan 75975 (2017) 18 BPR 37,207; [2017] NSWCA 239
McGrath v Campbell (2006) 68 NSWLR 229; [2006] NSWCA 180
Moorebank Recyclers Pty Ltd v Tanlane Pty Ltd (2012) 16 BPR 31,257; [2012] NSWCA 445
Neeta (Epping) Pty Ltd v Phillips (1974) 131 CLR 286
Nickerson v Barraclough [1981] 1 Ch 426
North Sydney Printing Pty Ltd v Sabemo Investment Corp Pty Ltd [1972] 2 NSWLR 150
Owners – Strata Plan 43551 v Walter Construction Group Ltd (2004) 62 NSWLR 169; [2004] NSWCA 429
Panton v The Owners of Survey Strata Plan 46838 [2013] WASC 35

	Parish v Kelly (1980) 1 BPR 9394 Plenty v Dillon (1991) 171 CLR 635; [1991] HCA 5 Rainbowforce Pty Ltd v Skyton Holdings Pty Ltd (2010) 15 BPR 29,367; [2010] NSWLEC 2 Rixon v Horseshoe Pastoral Co Pty Ltd [2017] NSWSC 1293 Sedleigh-Denfield v O'Callaghan [1940] AC 880 Sertari Pty Ltd v Nirimba Developments Pty Ltd [2007] NSWCA 324 Simon v Condran (2013) 85 NSWLR 768; [2013] NSWCA 388 State of New South Wales v McMaster (2015) 91 NSWLR 666; [2015] NSWCA 228 Tanlane Pty Ltd v Moorebank Recyclers Pty Ltd [2008] NSWSC 1341 Tenacity Investments v Ku-Ring-Gai Council [2008] NSWLEC 27 The Owners – Strata Plan No 61233 v Arcidiacono (2019) 19 BPR 39,711; [2019] NSWSC 1307 Westfield Management Ltd v Perpetual Trustee Company Ltd (2007) 233 CLR 528; [2007] HCA 45 Wheeldon v Burrows (1879) 12 Ch D 31
Texts Cited:	B Edgeworth, Butt's Land Law (7th ed, 2017, Lawbook Co) R P Balkin and J L R Davis, Law of Torts (5th ed, 2013, LexisNexis Butterworths)
Category:	Principal judgment
Parties:	In proceeding 2019/201673: The Owners – Strata Plan 85044 (Plaintiff) George Anthony Calvert Murrell (First Defendant) Deirdre Frances Murrell (Second Defendant) In proceeding 2019/299582: George Anthony Calvert Murrell (First Plaintiff) Deirdre Frances Murrell (Second Plaintiff) The Owners – Strata Plan 85044 (Defendant)
Representation:	In proceeding 2019/201673: Counsel:

Mr J J Young with Mr M Dalla-Pozza (Plaintiff)
Mr T A Alexis SC with Ms M Ellicott (Defendants)

Solicitors:
Comino Prassas Lawyers (Plaintiff)
Hones Lawyers (Defendants)

In proceeding 2019/299582:

Counsel:
Mr T A Alexis SC with Ms M Ellicott (Plaintiffs)
Mr J J Young with Mr M Dalla-Pozza (Defendant)

Solicitors:
Hones Lawyers (Plaintiffs)
Comino Prassas Lawyers (Defendant)

File Number(s): 2019/201673; 2019/299582

Publication Restriction: N/A

JUDGMENT

Introduction

1 Professor George Murrell and Professor Deirdre Murrell are the owners of land known as 97 Wentworth Road, Vaucluse. They are presently undertaking certain work on that land, including extensive alterations to the residence. Throughout the hearing, their senior counsel has referred to them as the **Murrells**. The same terminology is adopted in these reasons, without intending any disrespect. References to **Professor Murrell** in these reasons are references to Professor George Murrell, who gave evidence at the hearing of these proceedings. (Professor Deirdre Murrell did not give evidence.)

2 The Owners – Strata Plan No 85044 is a body corporate constituted pursuant to s 8 of the *Strata Schemes Management Act* 2015 (NSW) by the owners of the lots in the strata scheme to which registered Strata Plan No 85044 relates (the **Owners Corporation**). The Owners Corporation is the registered proprietor of the common property of SP 85044 which comprises land known

as 95 Wentworth Road, Vaucluse and also airspace above part of the adjoining property at 97 Wentworth Road (the **Airspace**).[1]

3 The building on 95 Wentworth Road comprises four units, each of which occupies an entire level of the building. The building on 97 Wentworth Road is a residence that, as mentioned above, is presently undergoing redevelopment.

4 The apartments in the building on 95 Wentworth Road are oriented to the north and overlook 97 Wentworth Road, including a flat (but slightly sloping) concrete roof on part of the residence on 97 Wentworth Road. The concrete roof is being retained in the redevelopment. It is common ground that the concrete roof is between 11 and 16 centimetres below the lower horizontal boundary of the Airspace that is owned by the Owners Corporation.

5 The juxtaposition of 95 and 97 Wentworth Road, and the location of the flat concrete roof of 97 Wentworth Road, is shown in a photograph that was in evidence, a copy of which is reproduced in Annexure "A" to these reasons.[2] As can be seen from that photograph, each of the four apartments at 95 Wentworth Road has two terraces, one of which overlooks the flat concrete roof of 97 Wentworth Road. As can be seen from another photograph that was in evidence and that is reproduced in Annexure "B" to these reasons, the view from those terraces looking beyond the flat concrete roof is a view of Sydney Harbour.[3] The photograph in Annexure "B" also illustrates the close proximity of the flat concrete roof of the residence on 97 Wentworth Road to part of the terrace of Unit 2 at 95 Wentworth Road, from which the photograph was taken.

6 The dwelling on 97 Wentworth Road, including the flat concrete roof, has existed in its present form since at least about 1960.[4] In 1992, a restriction was created that prevented any improvements or other matter or thing on part of 97 Wentworth Road exceeding the height of RL 26.00 AHD. That part of 97 Wentworth Road above RL 26.00 AHD is the Airspace that became the property of the owner of 95 Wentworth Road in 1997. The apartment building

[1] Strata Schemes Management Act 2015 (NSW), s 8; Exhibit 1, page 444.
[2] Affidavit of George Murrell sworn on 6 February 2020, paragraph 22; Exhibit 1, page 573.
[3] Affidavit of Wayne Howse sworn on 23 August 2019, paragraph 17(i); Exhibit 1, page 585.
[4] Affidavit of George Murrell sworn on 6 February 2020, paragraph 11.

at 95 Wentworth Road was constructed more recently, and the strata plan for the building was registered in March 2011.

7 A dispute has arisen between the Murrells and the Owners Corporation in the context of the redevelopment of 97 Wentworth Road. The dispute concerns:

(1) the Murrells (or contractors engaged by them) undertaking certain work to a wall between 95 and 97 Wentworth Road. The precise location of the wall relative to the boundary between the two properties is in dispute, but it is nevertheless convenient to refer to the wall as the **Boundary Wall**; and

(2) the Murrells (or contractors engaged by them) entering onto the flat concrete roof of 97 Wentworth Road, and into the Airspace, for the purpose of inspecting the roof and carrying out certain work to the roof.

8 By summons filed on 28 June 2019, the Owners Corporation commenced proceeding 2019/201673 against the Murrells claiming damages (including aggravated and exemplary damages) and injunctive relief in relation to alleged trespass and nuisance. It is convenient to refer to this proceeding as the **Owners Corporation proceeding**.

9 By summons filed on 25 September 2019, the Murrells commenced proceeding 2019/299582 against the Owners Corporation claiming declaratory relief concerning the proper construction of the Restriction, an order under s 89 of the *Conveyancing Act* 1919 (NSW) modifying the Restriction or an easement under s 88K of the *Conveyancing Act*. It is convenient to refer to this proceeding as the **Murrell proceeding**.

10 The two proceedings were heard together, with evidence in one being evidence in the other.

Historical matters concerning the titles to the properties in issue

11 The following matters are not in dispute, save for two matters which are identified below.

12 The Murrells purchased their property at 97 Wentworth Road in November 2018.[5]

13 The Murrells' land at 97 Wentworth Road is now contained in folio 1/1254483 of the Register. However, at the time that the Murrells purchased the property

[5] Affidavit of George Murrell sworn on 6 February 2020, paragraph 4.

and at the time that these proceedings were commenced, this land was known as Lot 21 in DP 871094.[6] These reasons refer to the property as **Lot 21**, consistently with the pleadings and the terminology used by the parties in submissions. The area of Lot 21 that has been limited in height to RL 26.00 AHD since September 1997 is referred to as **Part Lot 21**.

14 The boundaries of Lot 21 at ground level were first established by plan of subdivision DP 399130, which was registered on 27 September 1955. The land was then known was Lot D in DP 399130.[7]

15 On 10 June 1992, the registration of DP 645772 created a covenant pursuant to s 88B of the *Conveyancing Act* burdening part of Lot D in DP 399130 and benefitting Lot E in DP 399130 and Lot 2 in DP 323528 on the other hand (the **Restriction**). The terms of the Restriction set out in the s 88B instrument are:[8]

> "No matter or thing of any nature whatsoever (including, without limiting the generality of the aforegoing, any improvements and any moveable items and any plants or natural growth of any nature whatsoever) shall be constructed on erected on placed on or permitted to remain on at any time (and whether in whole or in part) that part of the servient tenement indicated by the letter "B" in the plan which exceeds, in height, a height of 26.00 Australian Height Datum."

16 The Restriction applied to that part of what is now Lot 21 that is marked "B" on Lot D in DP 399130, as shown in DP 645772. Within the area marked "B" on that plan is a symbol with the following notation:

> "Cuts in edge of concrete roof slab RL 25.87 A.H.D"

17 The other part of the land affected by the Restriction – shown on DP 645772 as Lot E in DP 399130 and Lot 2 in DP 323528 – is part of the land at 95 Wentworth Road that is now owned by the Owners Corporation.

18 On 11 September 1997, plan of subdivision DP 871094 was registered. This plan subdivided the land marked "B" on Lot D in DP 399130 (that is, the part of 97 Wentworth Road affected by the Restriction) into "Part Lot 21" and "Part Lot 22" in DP 871094. Part Lot 22 is the Airspace that I have described in [2] above.

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[6] Affidavit of George Murrell sworn on 6 February 2020, paragraphs 4–7.
[7] Affidavit of George Murrell sworn on 6 February 2020, paragraph 8; Exhibit 1, page 412.
[8] Affidavit of George Murrell sworn on 6 February 2020, paragraph 9; Exhibit 1, pages 413–415.

19 Within the area of DP 871094 that is marked "Pt 21 & Pt 22", are the following four markings:[9]

(1) "Note 1", which records:

> "LOT 21 LIMITED IN HEIGHT TO THE LEVEL PLANE AT RL 26.0 AND UNLIMITED IN DEPTH.
>
> LOT 22 LIMITED IN DEPTH TO THE LEVEL PLANE AT RL 26.0 AND UNLIMITED IN HEIGHT."

(2) "A", which refers to "Covenant A 688587". The terms of that covenant were not in evidence and neither the Owners Corporation nor the Murrells contended that the covenant has any relevance to the issues in the proceedings;

(3) "B", which refers to "Restriction on the Use of Land (DP 645772)", being the Restriction referred to in [15] above; and

(4) "BM CUT IN ROOF SLAB RL 25.86 (DP 645772) BY SURVEY", which replicates note "BM2" in DP 645772 referred to in [16] above, save that the height at which the roof slab cuts in is recorded as RL 25.86 rather than RL 25.87 (nothing turns on that difference).

20 At the time that DP 871094 was registered, 97 Wentworth Road (which become Lot 21 on the registration of the plan) was owned by Mr Harry Michael and Ms Liliane Michael, and 95 Wentworth Road (which became Lot 22, including the Airspace, on registration of the plan) was owned by Stromness Pty Limited.[10] As a consequence of the registration of DP 871094, Mr and Mrs Michael's ownership of the land to which the Restriction applied was limited in height to RL 26.0 AHD and Stromness Pty Ltd became the registered proprietor of that land above the height of RL 26.0 AHD. It is therefore convenient to refer to DP 871094 as the **Airspace plan of subdivision**.

21 A survey plan of Lot 21 commissioned by the Murrells and prepared on 26 November 2018 states that the roof of the house on Lot 21 is partly tile and partly flat concrete, and that the height of the flat concrete part of the roof is between 25.84 and 25.89 metres AHD[11] – that is, between 11 and 16 centimetres below the horizontal boundary created by the registration of the Airspace plan of subdivision. It is clear from comparing this survey plan with DP 645772 and the Airspace plan of subdivision that the Restriction applied to

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[9] Exhibit 1, page 435.

[10] Exhibit 1, pages 416–435.

[11] Affidavit of George Murrell sworn on 6 February 2020, paragraph 10; Exhibit 1, pages 946–947.

part of Lot 21 that included, but was not limited to, the part of 97 Wentworth Road on which the flat concrete roof was constructed.

22 Although the statement of claim in the Murrell proceedings pleaded that the Airspace plan of subdivision *"purported to effect a stratum subdivision … at the level plan at RL 26 AHD"*, it was not in dispute that the registration of the plan was in fact effective to create that subdivision with the result that the Airspace became part of the title of Lot 22 in DP 871094.[12]

23 As I have mentioned above, the Restriction is recorded in notation "B" on the Airspace plan of subdivision. It is not in dispute that the subdivision created by registration of the plan was expressly subject to the Restriction. The Owners Corporation contends, and the Murrells dispute, that the Restriction became otiose on the registration of DP 871094.[13]

24 On 8 March 2011, plan of subdivision SP 85044 was registered. This had the effect of subdividing Lot 22 in DP 871094 into four strata lots and the common property. It is clear from Note 1 on SP 85044 that the common property includes the Airspace, with the depth limitation created by DP 871094.[14] The Owners Corporation submitted, and the Murrells disputed, that the Restriction *"fell away"* or *"fell off"* the Register upon the registration of SP 85044.

25 As referred to above, the Owners Corporation is the registered proprietor of the common property in SP 85044.[15]

26 The strata plan contains four lots:[16]

(1) Lot 1 (known as **Unit 1**), the registered proprietors of which are Hanoch Neishlos and Hana Neishlos;[17]

(2) Lot 2 (known as **Unit 2**), the registered proprietors of which are Wayne Derec Hose and Jennifer Anne Biviano;[18]

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[12] Murrells' closing written submissions dated 13 May 2020, paragraph 19.

[13] Transcript, page 31 (lines 23–39). The Murrells noted that the Owners Corporation had not pleaded that the Restriction was otiose following the registration of DP 871094, but took no issue with the Owners Corporation raising that issue in the proceeding save for reserving the Murrells rights in relation to costs: Transcript, page 45.

[14] Exhibit 1, pages 436–441.

[15] Exhibit 1, page 444.

[16] Title search at Exhibit 1, page 444.

[17] Title search at Exhibit 1, page 445.

[18] Title search at Exhibit 1, page 446.

(3) Lot 3 (known as **Unit 3**), the registered proprietors of which are Peter Theodore Bakaric and Nicole Nancy Bakaric;[19] and

(4) Lot 4 (known as **Unit 4**), the registered proprietor of which is Lin Jum Cheung.[20]

27 It is convenient to refer to the registered proprietors of the lots as the **Unit Owners**.

28 Whether or not the Restriction *"fell away"* on the registration of SP 85044, the practical effect of the above history of dealings concerning the land known as 95 Wentworth Road and 97 Wentworth Road is that any person standing on the flat concrete roof of the residence on 97 Wentworth Road now owned by the Murrells, and any thing of more than 11cm to 16cm in height that is placed on that flat concrete roof, intrudes into the Airspace owned by the Owners Corporation.

Nature of the proceedings and claims for relief

The Owners Corporation proceeding

29 By summons filed on 28 June 2019, the Owners Corporation commenced proceeding 2019/201673 against the Murrells.

30 Because this proceeding was commenced in the Common Law Division of the Court, the parties have referred to it in their written and oral submissions as the "common law proceeding". These reasons refer to this proceeding as the Owners Corporation proceeding.

31 In their amended statement of claim filed on 22 August 2019, the Owners Corporation claim:

(1) an order that the Murrells pay damages to the Owners Corporation for trespass and/or nuisance;

(2) further, exemplary or aggravated damages;

(3) further, an order that the Murrells restore the paintwork on the northern Boundary Wall of 95 Wentworth Road, Vaucluse to the colour and condition it is was in prior to it being painted by the Murrells (or their servants or agents) on or about 1 December 2018;

(4) further, an order that the Murrells remove the whole of the stud wall that was erected on or about 1 December 2018 within the northern boundary

[19] Title search at Exhibit 1, page 447.
[20] Title search at Exhibit 1, page 448.

of 95 Wentworth Road, Vaucluse thereby encroaching onto the property of SP 85044;

(5) an injunction in the following terms:

> "…an order that [the Murrells], by their servants or agents, be restrained, until a land access order pursuant to the *Access to Neighbouring Land Act 2000* is made in their favour (if any) from entering into or remaining upon or causing or allowing anything (including, without limitation, scaffolding and other building materials or equipment) to enter of [sic] remain upon the [Owners Corporation's] land, being the air space comprising part of Lot 22 in Deposited Plan 87094 (save for the purposes of performing building works of an emergency nature to the dwelling located on [the Murrells'] land being Lot 21 in Deposited Plan 871904)."

32 The Owners Corporation alleges that the Murrells trespassed on the Strata Plan common property, and created a substantial and unreasonable interference with the property rights of the Owners Corporation in relation to 95 Wentworth Road, by:

(1) entering the Strata Plan common property on or about 1 December 2018 and:

(a) constructing a stud wall adjacent to, but on the Owners Corporation's side of, the boundary that the Strata Plan common property shares with Lot 21. It is alleged that the stud wall covers and obstructs a ventilation void adjacent to the Boundary Wall; and

(b) painting an existing Boundary Wall that lies on the Owners Corporation's side of that same boundary,

(c) without permission from the Owners Corporation, or any Lot Owner, to do so; and

(2) repeatedly entering into or interfering with the Airspace in the period between about November 2018 to July 2019 in the course of carrying out work on the flat concrete roof of the residence on Lot 21.

33 The Murrells admit that their contractor erected the stud wall, but they do not admit it was erected on the Owners Corporation's side of the boundary. They contend that the stud wall was constructed on the common Boundary Wall, and that this was done because the common Boundary Wall was in disrepair. They do not admit that the stud wall covered a ventilation void. In addition, the Murrells say that the Owners Corporation's delegate consented to or authorised the erection of the stud wall.

34 The Murrells deny entering the Strata Plan common property to paint the existing Boundary Wall. They say that their contractor painted the surface of that wall that is on the Murrells' side of the boundary on or about 1 December 2018. They deny needing permission from the Owners Corporation to do so.

35 The Murrells admit that their contractors engaged in works to the roof of the residence on Lot 21 between about November 2018 and July 2019. They say that the work was urgent remedial work that was undertaken to repair water damage to the roof of the residence, including cracks in the concrete surface of the roof and water penetration.

36 The Murrells say that they have informed the Owners Corporation about the nature and circumstances of the work on the roof, and that their entry into the Airspace for the purpose of carrying out that work does not breach the Restriction, does not constitute trespass or a substantial and unreasonable interference with property rights (or, alternatively, that any trespass or nuisance is so temporary and minor that the Court should not grant any relief).

37 For the reasons in [28] above, there can be no dispute that, by entering onto the flat concrete roof of the residence on Lot 21, and permitting or causing their contractors to do so, during the period from November 2018 to July 2019, the Murrells entered into the Airspace.

38 However, the Murrells contend that this did not constitute a trespass on property of the Owners Corporation or a substantial and unreasonable interference with the property rights of the Owners Corporation because:

(1) the Strata Plan common property, including the Airspace, is subject to the Restriction;

(2) the Restriction, properly construed, includes an implied positive covenant or implied easement for the owner of Lot 21 to exceed the height of RL 26 AHD *"on a temporary or transitory basis" "to repair, maintain and/or improve"* any structures on Lot 21 below that height, and that implied positive covenant or implied easement continued to operate following the registration of DP 871094;[21]

[21] The Murrells did not plead the contention that an implied positive covenant was included in the Restriction or the alternative contention that an implied easement of necessity arose on the subdivision of the Airspace by the registration of DP 871094. However, the Owners Corporation responded to the substance of these contentions during the hearing and did not identify any prejudice to the Owners Corporation arising from the Murrells relying on these contentions, save in relation to costs: Transcript, pages 45–47.

(3) alternatively, on the registration of DP 871094 on 11 September 1997, an implied easement of necessity was created for the benefit of Lot 21 permitting the owners of Lot 21 to exceed the height of RL 26.00 AHD on a temporary or transitory basis in order to repair, maintain and/or improve structures on Lot 21 that exist below the height of RL 26.00 AHD; and

(4) the owner of Lot 21 may therefore enter the Airspace in order to *"repair, maintain and/or improve"* any structures on Lot 21 without committing a trespass.

39 The Owners Corporation admits that the subdivision of the Airspace from the balance of Lot 21 that was effected by the registration of DP 871094 in September 1997 was expressly subject to the Restriction. However, the Owners Corporation contends that:

(1) the Restriction, properly construed, did not include a positive covenant or easement permitting the owner of Lot 21 from exceeding the height of RL 26 AHD *"on a temporary or transitory basis" "to repair, maintain and/or improve"* any structures on Lot 21 below that height;

(2) at general law, the owner of Lot 21 would be justified in exceeding the RL 26.00 AHD notwithstanding the Restriction *"if they do so with reasonable care and if doing so is reasonably necessary"* for the preservation of property of the owner of Lot 21. It was submitted on behalf of the Owners Corporation at trial that this reflected the defence of necessity that is available at general law to a claim in trespass; and

(3) on the registration of DP 871094 (the plan of subdivision that created the title to the Airspace that is now held by the Owners Corporation), the Restriction became otiose in the sense that it had no work to do;

(4) alternatively, if the Restriction had any work to do following the registration of DP 871094, that work was to give the dominant tenement owners a right to claim damages in the event that it had to take action to remove any matter or thing encroaching into the Airspace in breach of the Restriction;

(5) no implied easement of necessity arose on registration of DP 871094; and

(6) the Restriction "*fell off*" the Register when SP 85044 was registered.

40 The Owners Corporation acknowledges that the Murrells have statutory rights to access the Strata Plan common property (including the Airspace) for the purpose of carrying out work under s 11 of the *Access to Neighbouring Land Act* 2000 (NSW), in addition to such rights as the Murrells have at general law under the defence of necessity to any claim in trespass. The existence of those

rights form part of the basis of the Owners Corporation's contention that no implied easement of necessity arose on registration of DP 871094.

41 The Murrells admit that they did not make any application under the *Access to Neighbouring Land Act* in respect of the erection of the stud wall, the painting of the existing Boundary Wall or the works carried out on the roof of the residence on Lot 21. They deny that it was necessary to make such an application.

42 The Owners Corporation claims to have suffered the following loss by reason of the alleged trespass and nuisance:

(1) the cost of removing the stud wall;

(2) the cost of rectifying damage caused by dampness penetrating the wall of Lot 1 in the area of the stud wall;

(3) the cost of re-painting the existing Boundary Wall to its original colour;

(4) loss of privacy occasioned by the proximity to the balconies of Units 1, 2 and 3 of workmen carrying out work on the flat concrete roof of the residence on Lot 21;

(5) loss of amenity caused by the noise and disturbance occasioned by those works on the flat concrete roof;

(6) loss of amenity occasioned by the obstruction of views from 95 Wentworth Road during the duration of the works on the flat concrete roof; and

(7) the cost of engaging solicitors, surveyors and building consultants to investigate and advise the Owners Corporation in relation to the incidents of trespass.

43 However, the Owners Corporation did not adduce any evidence of the costs referred to in (1) to (3) and (7) above. At the hearing, the Owners Corporation sought a lump sum for general damages for the alleged trespass relating to the Boundary Wall and the Airspace.

44 The Owners Corporation also makes a claim for aggravated and exemplary damages in respect of the alleged trespass and nuisance.

45 In relation to the alleged trespass or nuisance constituted by the Murrells entering into the Airspace, the Owners Corporation seeks an order restraining the Murrells from entering into or remaining in, or causing or allowing anything to enter or remain in, the Airspace (save for the purpose of any works of an

emergency nature to the dwelling on 97 Wentworth Road), until such time as a land access order is made in favour of the Murrells under the *Access to Neighbouring Land Act*.

46 In relation to the alleged trespass or nuisance constituted by the Murrells painting the Boundary Wall and the construction of the stud wall, the Owners Corporation seeks orders requiring the Murrells to restore the Boundary Wall paintwork to its former colour and condition and to remove the stud wall.

The Murrell Proceeding

47 By summons filed on 25 September 2019, the Murrells commenced proceeding 2019/299582 against the Owners Corporation.

48 The parties frequently referred to this proceeding as "the equity proceeding". In these reasons, this proceeding is referred to as the **Murrell proceeding**.

49 In the statement of claim filed in the Murrell proceeding on 25 November 2019, the Murrells claim:

(1) a declaration that, on the proper construction of the Restriction, the owner of Lot 21 may exceed the height of RL 26.00 AHD on a temporary or transitory basis to repair, maintain and/or improve any structures on Lot 21 that exist below that height. As I have already referred to above, the Murrells contend that this is a positive covenant or easement that is implied in the Restriction;

(2) a declaration that the subdivision of Lot 21 at the level plan of RL 26.00 AHD in DP 871094 is subject to the Restriction on its proper construction, so that the owner of Lot 21 may enter the Airspace on a temporary or transitory basis to repair, maintain and/or improve any structures on Lot 21 without committing trespass;

(3) alternatively, an order that the Restriction and DP 871094 be modified pursuant to s 89 of the *Conveyancing Act* so that the owner of Lot 21 may enter the Airspace on a temporary or transitory basis to repair, maintain and/or improve any structures on Lot 21 without committing trespass;

(4) alternatively, an order imposing an easement over the Airspace pursuant to s 88K of the *Conveyancing Act* to permit the owner of Lot 21 to enter the Airspace *"as reasonably necessary to repair, maintain and/or improve any structures on Part Lot 21"*.

50 In relation to the declaratory relief concerning the proper construction of the Restriction, the Murrells plead that:

(1) as at June 1992, when the Restriction was created by the registration of DP 645772, there was an existing dwelling on the servient tenement (that is, the land referred to in these reasons as Lot 21) with a flat concrete roof below the height of RL 26.00 AHD by a margin of only approximately 15 centimetres (the margin is in fact between 11 centimetres and 16 centimetres: see [19(4)] above);

(2) the manifest purpose of the Restriction was to preserve views for the benefit of the dominant tenement above RL 26.00 AHD in the direction of Sydney Harbour;

(3) on its proper construction, the Restriction was not intended to prohibit the owner of Lot 21 from exceeding the height of RL 26.00 AHD to repair, maintain and/or improve any structures on the servient tenement that exist below RL 26.00 AHD. On the contrary, the Restriction contained an implied positive covenant or easement permitting the owner of Lot 21 to exceed the height of RL 26.00 AHD for that purpose. Alternatively, implied easement of necessity arose as a matter of law upon the registration of the Airspace plan of subdivision.[22] The owner of Lot 21 may therefore enter the Airspace for that purpose without committing a trespass; and

(4) because the registration of DP 871094 was expressly subject to the Restriction, and SP 85044 and CP/SP 85044 expressly record the common property in the strata scheme being limited in stratum in the manner described in DP 871094, the Owners Corporation's rights to the Airspace are subject to the Restriction.

51 As I have referred to earlier in these reasons, the Owners Corporation accepts that DP 871094, which created the horizontal subdivision that separated title to the Airspace from title to the remainder of Lot 21, was expressly subject to the Restriction. However, the Owners Corporation disputes that the Restriction contained the implied positive covenant or easement for which the Murrells contend. The Owners Corporation contends that the Restriction had no work to do following the registration of DP 871094.

52 The Owners Corporation also accepts that SP 85044 and folio CP/SP 85044 expressly record that the common property in the strata scheme (including the Airspace) is limited in stratum in the manner described in DP 871094. However, the Owners Corporation contends that this does not have the effect of rendering its title to the common property subject to the Restriction. The Owners Corporation denies that its rights in respect of the Airspace are subject to the Restriction.

[22] This alternative contention was not pleaded, but was raised in closing submissions.

53 The Murrells' alternative claims for relief under s 89 of the *Conveyancing Act*, and the Owners Corporation's defence of those claims, proceed on the assumption that the Restriction did survive the registration of SP 85044 and, on its proper construction, did not include the implied positive covenant or easement for which the Murrells contend.

54 Section 89 of the *Conveyancing Act* relevantly provides:

> "(1) Where land is subject to an easement or a profit à prendre or to a restriction or an obligation arising under covenant or otherwise as to the user thereof, the Court may from time to time, on the application of any person interested in the land, by order modify or wholly or partially extinguish the easement, profit à prendre, restriction or obligation upon being satisfied—
>
> (a) that by reason of change in the user of any land having the benefit of the easement, profit à prendre, restriction or obligation, or in the character of the neighbourhood or other circumstances of the case which the Court may deem material, the easement, profit à prendre, restriction or obligation ought to be deemed obsolete, or that the continued existence thereof would impede the reasonable user of the land subject to the easement, profit à prendre, restriction or obligation without securing practical benefit to the persons entitled to the easement or profit à prendre or to the benefit of the restriction or obligation, or would, unless modified, so impede such user, or
>
> (b) …
>
> (b1) … or
>
> (c) that the proposed modification or extinguishment will not substantially injure the persons entitled to the easement or profit à prendre, or to the benefit of the restriction or obligation.
>
> (1A) …
>
> (2) Where any proceedings are instituted to enforce an easement, profit à prendre, restriction or obligation, or to enforce any rights arising out of a breach of any restriction or obligation, any person against whom the proceedings are instituted may in such proceedings apply to the Court for an order under this section.
>
> (3) The Court may on the application of any person interested make an order declaring whether or not in any particular case any land is affected by an easement, profit à prendre, restriction or obligation, and the nature and extent thereof, and whether the same is enforceable, and if so by whom."

55 If the Restriction prevents the owner of Lot 21 from exceeding the height of RL 26.00 AHD to repair, maintain and/or improve the flat concrete roof of the dwelling on Lot 21 on a temporary or transitory basis (contrary to the construction of the Restriction for which the Murrells contend), then the Murrells contend that this impedes the reasonable user of Lot 21 without

securing any practical benefit to the Owners Corporation or the Unit Owners because:

(1) the flat concrete roof on Lot 21 has sustained water damage and cannot be accessed to effect repairs without exceeding the height of RL 26.00 AHD;

(2) the Owners Corporation, as a body corporate, derives no practical benefit from the Restriction, as it does not enjoy views or amenity above RL 26.00 AHD;

(3) the effect on views towards Sydney Harbour or any loss of amenity caused by repairs, maintenance and/or improvements to the flat concrete roof of a temporary or transitory nature will not substantially injure the Owners Corporation or Unit Owners.

56 The Murrells seek an order modifying the Restriction so as to permit the owner of Lot 21 exceeding the height of RL 26.00 AHD on a temporary or transitory basis for the purpose of repairing, maintaining and/or improving the flat concrete roof of the dwelling on Lot 21. The order is sought under s 89(1)(a) of the *Conveyancing Act* or, alternatively, under s 89(1)(c) of the *Conveyancing Act* on the basis that the modification will not substantially injure the Owners Corporation or the Unit Owners.

57 The Owners Corporation denies that the Restriction impedes the reasonable user of Lot 21 without securing any practical benefit to the Owners Corporation or Unit Owners for three reasons.

58 First, the Owners Corporation contends that the Restriction does not prevent the owners of Lot 21 from exceeding the height of RL 26.00 AHD to repair, maintain and/or improve the flat concrete roof on a temporary or transitory basis because:

(1) the owners Lot 21 are justified in exceeding that height if they do so with reasonable care and if it is reasonably necessary to do so in order to preserve the property of the owners of Lot 21; and

(2) further or alternatively, the owners of Lot 21 have rights to access the Airspace for the purpose of carrying out pursuant to s 11 of the *Access to Neighbouring Land Act*.

59 Second, the Owners Corporation does not admit that the Murrells have suffered water damage to the flat concrete roof of the residence on Lot 21.

60 Third, the Owners Corporation contends that the Restriction does secure a practical benefit to the Owners Corporation and Unit Owners because:

(1) Unit Owners are disturbed by noise and loss of privacy when persons enter into the Airspace for the purpose of carrying out work on the flat concrete roof of Lot 21 and the views of Unit Owners towards Sydney Harbour are obstructed while the works are carried out; and

(2) the Owners Corporation has standing to sue for those losses suffered by the Unit Owners.

61 For the same three reasons, the Owners Corporation denies that the modification of the Restriction sought by the Murrells will not substantially injure the Owners Corporation or the Unit Owners.

62 The Owners Corporation therefore opposes the Murrells' application for orders under s 89(1)(a) and/or s 89(1)(b) of the *Conveyancing Act* modifying the Restriction.

63 Section 88K of the *Conveyancing Act* relevantly provides:

> "(1) The Court may make an order imposing an easement over land if the easement is reasonably necessary for the effective use or development of other land that will have the benefit of the easement.
>
> (2) Such an order may be made only if the Court is satisfied that—
>
> (a) use of the land having the benefit of the easement will not be inconsistent with the public interest, and
>
> (b) the owner of the land to be burdened by the easement and each other person having an estate or interest in that land that is evidenced by an instrument registered in the General Register of Deeds or the Register kept under the *Real Property Act 1900* can be adequately compensated for any loss or other disadvantage that will arise from imposition of the easement, and
>
> (c) all reasonable attempts have been made by the applicant for the order to obtain the easement or an easement having the same effect but have been unsuccessful.
>
> (3) The Court is to specify in the order the nature and terms of the easement and such of the particulars referred to in section 88(1)(a)–(d) as are appropriate and is to identify its site by reference to a plan that is, or is capable of being, registered or recorded under Division 3 of Part 23. The terms may limit the times at which the easement applies.
>
> (4) The Court is to provide in the order for payment by the applicant to specified persons of such compensation as the Court considers appropriate, unless the Court determines that compensation is not payable because of the special circumstances of the case.
>
> (5) The costs of the proceedings are payable by the applicant, subject to any order of the Court to the contrary."

64 As referred to in [49(4)] above, the terms of the order sought by the Murrells under s 88K in the summons and statement of claim filed on 25 September 2019 and 25 November 2019 respectively are an easement to permit:

> "the owner of Part Lot 21 to enter the airspace of Part Lot 22 as reasonably necessary to repair, maintain and/or improve any structures on Part Lot 21".

65 Late in the afternoon on the final day of the hearing, the Murrells applied for leave to amend their pleadings to seek an easement under s 88K to permit:

> "the owner of Part Lot 21 to enter the airspace of Part Lot 22 as reasonably necessary **and on a temporary basis** to repair, maintain and/or improve any structures on Part Lot 21".

66 Given the timing of the amendment application, the Murrells' submissions in support of the application and the Owners Corporation's submissions opposing the proposed amendment were made in writing following the conclusion of the hearing and the Court's decision in respect of the amendment application was reserved to be delivered at the same time as judgment in the proceeding.

67 The Murrells contend that, if the Restriction prevents the owner of Lot 21 from exceeding the height of RL 26.00 AHD to repair, maintain and/or improve the flat concrete roof of the dwelling on Lot 21 on a temporary or transitory basis (contrary to the construction of the Restriction for which the Murrells contend), then an easement in the terms sought is reasonably necessary for the effective use or development of Lot 21 because the flat concrete roof cannot otherwise be accessed to effect repairs without exceeding the height of RL 26.00 AHD due to the space of only 11 to 16 centimetres between the roof and RL 26.00 AHD. As noted above, the Murrells contend (and the Owners Corporation denies) that the roof has sustained water damage.

68 The Owners Corporation denies that the proposed easement is reasonably necessary, referring again to:

(1) the owners Lot 21 being justified in exceeding the height of RL 26.00 AHD if they do so with reasonable care and if it is reasonably necessary to do so in order to preserve the property of the owners of Lot 21 (again, this is a reference to the availability of a defence of justification to claims in trespass); and

(2) the rights of the owners of Lot 21 to access the Airspace for the purpose of carrying out pursuant to s 11 of the *Access to Neighbouring Land Act*.

69 The Murrells further contend that the use of Lot 21 with the proposed s 88K easement will not be inconsistent with the public interest. The Owners Corporation denies this.

70 The Murrells contend that the Owners Corporation can be adequately compensated for any loss or disadvantage arising from the imposition of the proposed s 88K easement, noting that:

(1) the Owners Corporation does not enjoy views or amenity above RL 26.00 AHD; and

(2) the effect on views towards Sydney Harbour or any loss of amenity caused by repairs, maintenance and/or improvements to the flat concrete roof of a temporary or transitory nature will not substantially injure the Owners Corporation or Unit Owners.

71 The Murrells' statement of claim contains an offer to compensate the Owners Corporation in such amount as may be determined by the Court.

72 The Owners Corporation denies that it can be adequately compensated.

73 The Murrells claim that they have made, and continue to make, all reasonable attempts to obtain the proposed easement, but they have been unsuccessful. The Owners Corporation denies that the Murrells have made all reasonable attempts to obtain the easement.

74 For completeness, I mention here that the Owners Corporation opposes the Murrells' application for leave to amend the terms of the easement sought under s 88K of the *Conveyancing Act*. It will be necessary to return to that issue later in these reasons, before determining the application under s 88K (either on the basis of the original pleading, or the amended pleading if leave to amend is granted).

Issues in dispute and summary of conclusions

75 The issues to be resolved in order to determine the parties' claims in the two proceedings, and my conclusions in relation to each issue, may be summarised as follows:

(1) Does the Restriction, properly construed, include a positive covenant or easement permitting the owner of Lot 21 to exceed the height of RL 26.00 AHD on a temporary or transitory basis in order to repair, maintain and/or improve structures on Lot 21 that exist below the height of RL 26.00 AHD?

Conclusion: No

(2) Did the Restriction become otiose on the registration of the Airspace plan of subdivision and "*fall off the Register*" on the registration of SP 85044?

Conclusion: The Restriction had no work to do after the Airspace plan of subdivision was registered, but the Restriction did not "fall off" the Register. The question whether the Owners Corporation's title to the Airspace is subject to the Restriction depends on the operation of s 42 of the Real Property Act 1900 (NSW). The parties' submissions did not address s 42, so it is inappropriate to determine whether the Owners Corporation's title is subject to the Restriction.

(3) If the Restriction includes the positive covenant or easement contended for by the Murrells, should the Court exercise its discretion to make declaration in the terms sought in prayers 1 and 2 of the statement of claim in the Murrell proceeding?

Conclusion: The Restriction does not include the positive covenant or easement (see Issue 1 above). The Murrells have failed to establish the legal and factual bases for the proposed declarations.

(4) On the registration of DP 871094 on 11 September 1997, did Lot 21 have the benefit of an implied easement of necessity permitting the owners of Lot 21 to exceed the height of RL 26.00 AHD on a temporary or transitory basis in order to repair, maintain and/or improve structures on Lot 21 that exist below the height of RL 26.00 AHD? Do the Murrells, as the current owners of Lot 21, have the benefit of any such easement?

Conclusion: On registration of DP 871094, Lot 21 had the benefit of an implied easement of necessity permitting the owners of Part Lot 21 to exceed the height of RL 26.00 AHD on a temporary or transitory basis for the purpose of maintenance or repair to structures existing on Lot 21 below the height of RL 26.00 AHD. The Murrells cannot enforce that implied easement of necessity against the Owners Corporation by reason of s 42 of the Real Property Act.

(5) Did the Murrells commit a trespass or create a nuisance by entering the Airspace during the period between November 2018 and July 2019 in order the course of carrying out work on the flat concrete roof of the residence on Lot 21?

Conclusion: The Murrells committed a trespass, save for those occasions on which they entered into the Airspace for the purpose of repairing cracks in the concrete roof during the period from 6 May 2019 to 27 June 2019. The Murrells did not create a nuisance, and the Owners Corporation does not have standing to sue on the cause of action in nuisance in any event.

(6) If the Murrells committed trespass or created a nuisance by entering the Airspace, what damages should be awarded to the Owners Corporation in respect of the trespass or nuisance?

Conclusion: The Owners Corporation is awarded $10,000 general damages in respect of the Murrells' trespass into the Airspace during the period from November 2018 to July 2019.

(7) If the Murrells committed trespass or created a nuisance by entering the Airspace, should aggravated and exemplary damages be awarded to the Owners Corporation in respect of the trespass and/or nuisance?

Conclusion: No.

(8) If the Restriction continues to apply following the registration of SP 85044 but does not include the implied positive covenant or easement for which the Murrells contend, should the Restriction be modified pursuant to s 89 of the *Conveyancing Act* in the terms sought in prayer 3 of the statement of claim in the Murrell proceeding?

Conclusion: No. The Court does not have power under s 89 of the Conveyancing Act to modify the Restriction in the manner sought by the Murrells.

(9) Should leave be granted to the Murrells to amend the terms of the easement under s 88K of the *Conveyancing Act* sought in prayer 4 of the statement of claim in the Murrell proceeding?

Conclusion: Yes.

(10) Is an easement in the following terms reasonably necessary for the effective use or development of Lot 21:

(a) permitting the owner of Lot 21 to enter the Airspace as reasonably necessary to repair maintain and/or improve any structures on Lot 21; or

(b) (if leave to amend is granted) permitting the owner of Lot 21 to enter the Airspace as reasonably necessary and on a temporary basis to repair maintain and/or improve any structures on Lot 21.

Conclusion: No. However, an easement in terms to the following effect is reasonably necessary for the effective use or development of Lot 21:

> "The owner of Part Lot 21 / DP871094 (now known as Part Lot 1 DP 12534483) (the **dominant tenement**) is permitted to access Part Lot 22 DP 871094 (now being part of the land comprised in folio CP/SP85044 of the Register) (the **servient tenement**) as necessary and on a temporary basis to repair and maintain any structure on the dominant tenement and to take onto the servient tenement on a temporary basis anything reasonably necessary for that purpose."

(11) If so, would the use of Lot 21 with the benefit of such an easement be inconsistent with the public interest?

Conclusion: No.

(12) If so:

(a) what loss or disadvantage will the Owners Corporation suffer from the imposition of the easement? Can the Owners Corporation be adequately compensated for that loss or disadvantage; and

(b) what persons other than the Owners Corporation have estates or interests in the Airspace that is evidenced by a registered instrument? Can any such persons be adequately compensated for any loss or other disadvantage that will arise from imposition of the easement?

Conclusion: The Owners Corporation will not suffer any loss or other disadvantage from the imposition of the easement. No other person has an estate or interest in the Airspace to which s 88K(2)(b) of the Conveyancing Act applies. The requirements of s 88K(2)(b) are therefore satisfied.

(13) Have the Murrells made all reasonable attempts to obtain the easement?

Conclusion: By the time of the hearing, the Murrells had made all reasonable attempts to obtain the easement.

(14) If "yes" to (10) to (13) above, should the Court grant an easement under s 88K in the terms sought by the plaintiffs and what amount of compensation (if any) should the Court specify as payable to the Owners Corporation or Unit Owners pursuant to s 88K(4)?

Conclusion: An order should be made under s 88K of the Conveyancing Act imposing an easement in terms to the effect set out in (10) above. In

the special circumstances of this case, no compensation is payable under s 88K(2)(b) and s 88K(4) of the Conveyancing Act.

(15) Should the Court grant an injunction restraining the Murrells, by their servants or agents, from entering onto or remaining on, or causing or allowing anything to enter or remain on the Owners Corporation's Airspace, save for the purpose of performing building words of an emergency nature to the dwelling on Lot 21, unless and until a land access order is made in favour of the Murrells under the *Access to Neighbouring Land Act*?

Conclusion: No.

(16) Did the Murrells commit a trespass or create a nuisance by erecting the stud wall?

Conclusion: No.

(17) If so:

(a) what (if any) loss or damage did the Owners Corporation suffer by reason of the trespass or nuisance;

(b) should aggravated and exemplary damages be awarded to the Owners Corporation in respect of the trespass and/or nuisance;

(c) should the Court make an order requiring the Murrells to remove the whole of the stud wall?

Conclusion: Does not arise.

(18) Did the Murrells commit a trespass or create a nuisance by painting the existing Boundary Wall?

Conclusion: No.

(19) If so:

(a) what (if any) loss or damage did the Owners Corporation suffer by reason of the trespass or nuisance;

(b) should aggravated and exemplary damages be awarded to the Owners Corporation in respect of the trespass and/or nuisance; and

(c) should the Court make an order requiring the Murrells to restore the paintwork on the Boundary Wall to its former colour and condition?

Conclusion: Does not arise.

76 The detailed reasons for each my conclusions summarised above follows, structured in same the order as the issues set out above.

Issue 1: Proper construction of the Restriction

77 Although there is an issue as to whether the Owners Corporation's title to the Airspace is subject to the Restriction at all (see Issue 2 below), it is convenient to address first the issues raised by the Murrells concerning the proper construction of the Restriction.

Change in the Murrells' submissions during the hearing

78 The declarations sought by the Murrells are in the following terms:

> "1. A declaration that upon the proper construction of the restriction on the use of land created by Deposited Plan 645772 (**Restriction**), the owner of the lot burdened by the restriction (now Part Lot 21 in Deposited Plan 871094) may exceed the height of RL 26 AHD on a temporary or transitory basis to repair, maintain and/or improve any structures on the servient tenement that exist below that height.
>
> 2. A declaration that the stratum subdivision of Part Lot 21 and Part Lot 22 at the level plane of RL 26 in Deposited Plan 871094 is subject to the Restriction on its proper construction, so that the owner of Part Lot 21 may enter the airspace of Part Lot 22 on a temporary or transitory basis to repair, maintain and/or improve any structures on Part Lot 21 without committing a trespass."

79 In their written closing submissions, the Murrells described the declaration sought as a declaration that the Restriction, properly construed, does not prohibit the servient tenement owner from exceeding the height of RL 26 AHD for those purposes.

80 However, in oral opening submissions and oral closing submissions,[23] senior counsel for the Murrells submitted that the Restriction includes an implied positive covenant or easement for the owners of Lot 21 to exceed the height of RL 26 AHD, and that this implied positive covenant continued to operate, in substance as an easement, following the registration of the Airspace plan of subdivision because DP 871094 included the Restriction as notation "B" (see [23] above).

81 In the Murrells' oral closing submissions, the implied positive covenant or easement contention overtook the more circumspect contention that the Restriction did not prohibit or prevent owner of Lot 21 from exceeding the height of RL 26.00 AHD on a temporary or transitory basis in order to repair,

[23] Transcript, page 27 (line 40) – page 29 (line 29).

maintain and/or improve structures on Lot 21 that exist below the height of RL 26.00 AHD. I will nevertheless address both contentions below.

Applicable legal principles

82 It was common ground that, in construing a restrictive covenant registered on Torrens title land:

(1) the Court strives to discover the intention of the parties as revealed by the language they used in the document in question;

(2) the words of the covenant must be construed in the context of the instrument as a whole;

(3) the words of the covenant are generally to be given the meaning they bear in their colloquial or ordinary sense, as opposed to some technical or legal meaning; and

(4) the Court does not take into account extrinsic materials beyond the scope of the Register (see *Westfield Management Ltd v Perpetual Trustee Company Ltd* (2007) 233 CLR 528; [2007] HCA 45 at [35]–[45]), with the exception that the Court may take into account the physical characteristics of the dominant and servient tenements (*Westfield Management Ltd v Perpetual Trustee Company Ltd* (*supra*) at [40]; *Sertari Pty Ltd v Nirimba Developments Pty Ltd* [2007] NSWCA 324 at [15]–[16].)

83 However, there was some dispute between the parties as to the nature of the physical characteristics of the tenements that the Court may take into account.

84 The Murrells submitted that the Court should have regard to physical characteristics of the tenements that are recorded on the Register (in this case, the height of the flat concrete roof approximately 11 to 16 centimetres below the height limitation of Part Lot 21) or about which information was otherwise readily available to third parties (in this case, geographical location of 95 and 97 Wentworth Road and the orientation of both properties towards views of Sydney Harbour).

85 The Owners Corporation accepted that it is permissible to take into account the boundaries of the land and neighbouring lots, and the view from the properties, for the purpose of ascertaining objectively the parties' intentions and construing the Restriction. However, the Owners Corporation submitted that it is not permissible to take into account the height of the concrete roof, for two reasons. First, the roof is not necessarily a permanent structure on the land and should not be treated as a *"structure of title, if there is such a thing"*.

Second, the area to which the Restriction applied was much larger than the area of the concrete roof (as to which, see [21] above).[24]

86 I accept the Murrells' submission that, because the height of the flat concrete roof was expressly noted on registered plan DP 645772 that created the Restriction, the height of that roof compared to the height of RL 26.00 AHD stipulated in the Restriction is a matter that the Court can and should take into account in construing the Restriction.

87 I accept, as the Murrells submitted, that the Register includes not only the certificates of title but also, amongst other things, the folios, dealings and deposited plans: *Real Property Act* 1900 (NSW), s 31B; *Westfield Management Ltd v Perpetual Trustee Company Ltd* (*supra*) at [4]–[5] (*per curiam*); *Sertari Pty Ltd v Nirimba Developments Pty Ltd* (*supra*) at [15]–[16].

88 In my opinion, it is clear from the judgment of the High Court in *Westfield Management Ltd v Perpetual Trustee Company Ltd* (*supra*) that the underlying principle that informs the scope of extrinsic circumstances that may be taken into account in construing easements and restrictive covenants is the scheme of the Torrens system, normally that the information in the folios of the public register and the registered dealings provides third parties with *"the information necessary to comprehend the extent or state of the registered title to the land in question"*.[25] As the Court said:[26]

> "The third party who inspects the Register cannot be expected, consistently with the scheme of the Torrens system, to look further for extrinsic material which might establish facts or circumstances existing at the time of the creation of the registered dealing and placing the third party (or any court later seized of a dispute) in the situation of the grantee."

89 I respectfully agree with the *obiter dicta* of Fryberg J in *Currumbin Investments Pty Ltd v Body Corp Mitchell Park Parkwood Cts* [2012] 2 Qd R 511; [2012] QCA 9 at [48]–[49] that cases may arise where even a physical characteristic of the tenement cannot be taken into account in construing an easement or restriction because the nature of the characteristic is such that a third party, at the time easement or restriction falls to be construed, may be unable to

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[24] Transcript, page 270 (line 32) – page 271 (line 43).
[25] Westfield Management Ltd v Perpetual Trustee Company Ltd (2007) 233 CLR 528; [2007] HCA 45 at [5].
[26] Ibid at [39].

ascertain whether the relevant characteristic existed at the time the easement or restriction was created. In such cases, it would be inconsistent with the scheme of the Torrens system, as confirmed by the High Court in *Westfield Management Ltd v Perpetual Trustee Company Ltd* (*supra*), to have regard to those physical characteristics.[27]

90 I accept the Owners Corporation's submission that the height of the flat concrete roof on Lot 21 may change over time. Indeed, the roof, or the whole of the residence, may be rebuilt at a different height to that noted on the plan. However, a third party wishing to understand the height of the roof at the time that the Restriction was created in order to understand the nature and extent of the Restriction, properly construed, will be able to do so by reviewing DP 645772, which forms part of the Register and contains a notation of the height of the concrete roof. The proper construction of the Restriction is an exercise in ascertaining objectively the parties' intention at the time the Restriction was created. It is therefore permissible, in my opinion, to take into account the height of the flat concrete roof in determining the proper construction of the Restriction in this case.

Consideration

91 Applying the principles referred to above, the height of the flat concrete roof as recorded on DP 645772 is not the only physical characteristic of the tenements to be taken into account in determining the meaning of the Restriction.

92 It was common ground that the relevant physical characteristics include the orientation of 95 and 97 Wentworth Road towards views of Sydney Harbour.

93 In my opinion, the relevant characteristics must also include that, at the time that the Restriction was created, the title to the dominant tenement (now Lot 21) included the Airspace.

94 It was submitted on behalf of the Murrells that the following matters support the making of a declaration in the terms sought (as set out in [78] above):

(1) the terms of the Restriction refer only to the *"construction"*, *"erection"*, *"placing on"* or *"permitting to remain on"* the servient tenement of any

[27] See also Panton v The Owners of Survey Strata Plan 46838 [2013] WASC 35 at [35].

"matter or thing" that exceeds the height of RL 26.0 AHD. The words *"matter or thing"* do not, in their ordinary meaning, include persons;

(2) the words *"construction"*, *"erection"*, *"placing on"* or *"permitting to remain on"* are an important textual clue that the Restriction is directed at preventing the impairment of views from the dominant tenement from obstruction by something physical of some permanence;

(3) this interpretation of the Restriction is also supported by the physical characteristics of the tenements, namely that 95 Wentworth Road is to the south of 97 Wentworth Road and both properties are on the eastern side of Wentworth Road in close proximity to Sydney Harbour. By reason of the orientation of the tenements, the effect of the Restriction is to preserve views from 95 Wentworth Road to the south towards Sydney Harbour. It was submitted that this was not only the effect, but also the manifest purpose, of the Restriction;

(4) further, in *Panton v The Owners of Survey Strata Plan 46838* [2013] WASC 35, the Court took into account that the words *"erect"* and *"structure"* appeared in the context of a restriction, breach of which could have serious consequences, in determining that those words imported a requirement of some element of permanence rather than structures with a merely temporary or transient existence on the servient tenement;

(5) the registered plan – DP 645772 – also supports the interpretation of the Restriction as limited to the *"construction"*, *"erection"*, *"placing on"* or *"permitting to remain on"* the servient tenement by something physical of some permanence because notation "B" on the plan describes the Restriction as a *"restriction on the use of land: height restriction RL 26.00 AHD"*; and

(6) Notation "BM2" on registered plan DP 399130, which recorded the edge of the concrete roof slab at RL 25.87 AHD, provided objective evidence of the small distance between the height of the roof and the height limit imposed by the Restriction, and this was a further matter *"which weighs against ascribing an intention to the parties of prohibiting access by the owner of the servient tenement for the limited purposes contemplated"* by the proposed declaration because *"[t]o construe the Restriction otherwise, so as to prohibit any entry above RL 26 AHD, would lead to absurd results in that it would foreclose access to the Concrete Roof for the purposes of carrying out any necessary repairs or maintenance"*.

95 The Murrells relied on the sixth submission referred to immediately above as not only supporting a construction of the Restriction as not preventing the servient tenement owner from exceeding the height of RL 26 AHD on a temporary or transitory basis to repair, maintain and/or improve any structures on the servient tenement that exist below that height, but also as warranting a construction of the Restriction as including an implied positive covenant or easement entitling the servient tenement owner to do so. It was submitted that

the *"absurd results"* referred to in the submission could only be avoided by interpreting the Restriction as including the implied positive covenant or easement for which the Murrells contended.

96 I accept the Murrells' first submission that the words *"matter or thing"* do not, in their ordinary meaning, include persons. The submissions of the Owners Corporation acknowledged that an interpretation of *"matter or thing"* as including persons would be awkward. In my opinion, there is nothing in the language of the Restriction, read in the context of the whole of the s 88B instrument, that warrants such a strained interpretation of those words. In particular, the examples of *"matter or thing"* set out in the Restriction are *"improvements"*, *"moveable items"* and *"plants or natural growth"*. Whilst those examples do not limit the generality of the expression *"matter or thing"*, they do not warrant construing those words as including persons in this context.

97 Subject to one qualification, I accept the Murrells' second, third and fourth submissions, for the following reasons.

98 I accept the submission of the Owners Corporation that the words *"matter or thing of any nature whatsoever"* (my emphasis), the inclusion of *"moveable items"* in the examples of such matters or things, and the words *"placed on or permitted to remain on at any time"* (in addition to the words *"constructed on"* and *"erected on"*) clearly point to the parties' intention at the time the Restriction was created to prohibit the placing of items on the servient tenement that exceed the stipulated height of RL 26.00 AHD, irrespective of whether those items were of a nature designed to be affixed or to remain permanently in place. (I add that the inclusion of those words distinguishes the terms of the Restriction from the terms considered in *Panton* (*supra*), and the interpretation of the words *"erect"* and *"structure"* in the context of the instrument under consideration in *Panton* is not applicable to the interpretation of similar words in the different context of the Restriction.)

99 However, having regard to the very small distance between the height of the concrete roof and the RL 26.00 AHD height limit imposed by the Restriction, as plainly recorded in DP 645772, this construction of the Restriction would result in the servient tenement owners being unable to use equipment of height

greater than 11 to 16 centimetres when accessing the roof for the purposes of repairs and maintenance, unless the words *"placed on or permitted to remain on at any time"* are construed as meaning placed or permitted to remain other than on a temporary basis. This construction of the words *"placed on or permitted to remain on at any time"* avoids the absurd result that the servient tenement owners are themselves able to access the roof, but are unable to use equipment of a height greater than 11 to 16 centimetres on the roof for the purposes of repairs and maintenance. That result would be absurd owing to the obvious potential detriment and prejudice to the servient tenement owners, which is disproportionate to the benefits sought to be conferred on the dominant tenement owners by the Restriction (to which I refer further immediately below). In my opinion, the Court should not attribute to the parties an intention to detract from the servient tenement owner's ability to use their own airspace in a manner that achieves such an absurd result. (The Airspace was still part of the servient tenement when the Restriction was created).

100 I consider that the physical characteristics of the tenements on which the Murrells rely in their third submission provide further support for my construction of the words *"placed on or permitted to remain on at any time"* as meaning placed or permitted to remain *other than on a temporary basis*. However, the qualification is that I should not be taken as accepting that the physical characteristics of the tenements demonstrate that the object or purpose of the Restriction was limited to securing the views from 95 Wentworth Road towards Sydney Harbour. In my view, the physical characteristics of the tenements are equally consistent with the Restriction having additional objects, such as to secure the privacy of the owners or occupants of 95 Wentworth Road. My construction of the Restriction does not undermine either the object of securing harbour views or the object of securing privacy.

101 As to the Murrells' fifth submission, I do not consider that the description of the Restriction in notation "B" on DP 399130 adds to or detracts from the analysis immediately above. It is clear from the terms of the Restriction as set out in the s 88B instrument that the prohibition applies only to the extent that the matters or things exceed the height of RL 26.00 AHD.

102 In relation to the sixth submission, the Restriction, upon its proper construction, does not prevent the servient tenement owner from exceeding the height of RL 26 AHD on a temporary or transitory basis to repair, maintain and/or improve any structures on the servient tenement that exist below that height, for the reasons that I have explained in [96]–[100] above.

103 However, it does not follow, in my opinion, that the Restriction includes an implied positive covenant or easement entitling the servient tenement owner to exceed the height of RL 26.00 AHD on the servient tenement on a temporary or transitory basis to repair, maintain and/or improve any structures on the servient tenement that exist below that height. The Restriction, properly construed, avoids the absurdity that the Murrells refer to without the implication of the positive covenant or easement contended for. At the time the Restriction was created (being the relevant time for the purpose of determining its proper construction), the servient tenement owners were entitled to use all of their land, including the Airspace, in any manner they saw fit, subject to environmental and planning laws and the limitations imposed by the Restriction. There is no evidence that the parties contemplated, at that time, that the servient tenement owners would cease to own the Airspace in the future. There is no basis for attributing to the parties an intention to confer on the servient tenement owners a positive right that they already had as a matter of law, or an easement over their own land.

104 The Murrells' submissions in support of construing the Restriction as including an implied positive covenant or easement drew directly or by analogy on principles relevant to easements of necessity. However, it follows from my construction of the Restriction that any relevant "necessity" arose only on the registration of the Airspace plan of subdivision[28] and is therefore irrelevant to the construction of the Restriction. It will be necessary to return to the question whether the Murrells have the benefit of an easement of necessity in addressing Issue 4 below.

[28] As senior counsel for the Murrells acknowledged in closing oral submissions: Transcript, page 258 (lines 1–11).

Conclusions in relation to Issue 1

105 For the reasons above, the Restriction, upon its proper construction, does not prevent the owner of Lot 21 from exceeding the height of RL 26.00 AHD on a temporary or transitory basis to repair, maintain and/or improve any structures on the servient tenement that exist below that height. However, the Restriction does not include a positive covenant or easement expressly permitting the owner of Lot 21 to exceed that height for those purposes.

106 In the present circumstances, it is not the Restriction that impedes the Murrells' ability to exceed the height of RL 26.00 AHD on Lot 21 for those purposes. Rather, that impediment is attributable to the change in ownership of the Airspace after the Restriction was created, together with the inability of the Murrells to enforce against the Ownership Corporation any easement of necessity that arose as a matter of law in favour of the owners of Lot 21 on the registration of the Airspace plan of subdivision. The Murrells inability to enforce any such easement of necessity is addressed under Issue 4 below.

107 Because the Restriction *per se* does not impede the Murrells' ability to exceed the height of RL 26.00 AHD on Lot 21 for the purposes specified in the proposed declaration in prayer 1 of the statement of claim in the Murrell proceeding, that proposed declaration is of no practical utility, and therefore should not be made,[29] in my opinion.

108 Accordingly, the Murrells' claim for declaratory relief in prayer 1 of the statement of claim in the Murrell proceeding is dismissed.

109 Because the Restriction does not include a positive covenant or easement expressly permitting the owner of Lot 21 to enter the Airspace on a temporary or transitory basis for the purpose of repairing, maintaining or improving structures on Lot 21, the Murrells have failed to establish the factual and legal basis for the declaration sought in prayer 2 of the statement of claim in the Murrell proceeding. That claim for declaratory relief is also dismissed.

110 For completeness, I note the Owners Corporation's submissions to the effect that the Court should not make the declarations sought in prayers 1 and 2 of

[29] Neeta (Epping) Pty Ltd v Phillips (1974) 131 CLR 286 at 306–307 (Barwick CJ and Jacobs J).

the statement of claim in the Murrell proceeding because the declarations are not necessary in order to permit the Murrells to enter into the Airspace for the purpose of performing any emergency work. The Owners Corporation submitted that the doctrine of necessity will provide the Murrells with a defence to a claim in trespass in respect of any entry into the Airspace that is reasonable necessary for the purpose of addressing a situation of immediate danger. I have not found it necessary to address these submissions in the context of Issue 1 because the terms of the declaratory relief sought by the Murrells was not confined to emergency work or situations of immediate danger. However, it will be necessary to return to the subject of the doctrine of necessity in the context of Issue 4 and Issue 5 below.

Issue 2: Did the Restriction become otiose on the registration of the Airspace plan of subdivision and/or "fall off the Register" on the registration of SP 85044? Are the rights of the Owners Corporation in respect of the Airspace subject to the Restriction?

Consideration

111 The Owners Corporation did not seek to withdraw its admission on the pleadings that the Airspace plan of subdivision was expressly subject to the Restriction. However, the Owners Corporation submitted that, because the Restriction does not include an implied positive covenant or easement entitling the owners of Lot 21 to enter into the Airspace for a specified limited purpose, the Restriction had no work to do once the Airspace plan of subdivision was registered, notwithstanding that the Restriction remained part of the Register at that time. It was in this sense that the Owners Corporation submitted that the Restriction was "*otiose*" from the time of registration of the Airspace plan of subdivision.

112 The Murrells submitted that the Restriction did have work to do following the registration of the Airspace plan of subdivision because:

(1) the Restriction, properly construed, included an implied positive covenant or easement entitling the owners of Lot 21 to exceed RL 26.00 AHD on a temporary or transitory basis for the repairs of repairing, maintaining or improving structures that exist on Lot 21 below RL 26.00 AHD;

(2) on the basis of that construction of the Restriction, and the notation of the Restriction on the Airspace plan of subdivision, the Court should

attribute to the parties who created that subdivision a common intention that the owners of Lot 21 should continue to have the benefit of that implied positive covenant or easement; and

(3) this would not involve any derogation from title. On the contrary, the circumstances were such that an implied easement of necessity to the same effect would arise as a matter of law on registration of the Airspace plan of subdivision.

113 I have already rejected the first element of the Murrells' submissions in determining Issue 1 above. I reject the second and third elements of the submission for the same reasons, as they depend on the acceptance of the first element.

114 Technically, after the registration of the Airspace plan of subdivision, the Restriction continued to apply to all activities on Lot 21 below the height of RL 26.00 AHD that had the potential to result in *"matters or things"* on Lot 21 exceeding that height. However, this added nothing to the practical realities that flowed from the fact that the owners of Lot 21 no longer owned the Airspace above RL 26.00 AHD. I therefore accept the Owners Corporation's submission that the Restriction, properly construed, had no meaningful or practical work to do once the Airspace plan of subdivision was registered.

115 The issue of whether the Murrells have the benefit of an implied easement of necessity arising at general law is considered separately under Issue 4 below.

116 As I have referred to in [52] above, the Owners Corporation denies that its rights to the Airspace are subject to the Restriction. The submission made in support of this denial was that the Restriction had "*fallen away*" on the registration of SP 85044 because:[30]

(1) the Restriction is not recorded in the folio for the common property (CP/SP 85044). Item 3 of Schedule 2 of the certificate of title for that folio states that the land in the folio is limited in stratum in the manner described in the Airspace plan of subdivision (DP 871094), but does not refer to the Restriction;[31]

(2) the only limitations in stratum recorded on DP 871094 are contained in Note 1 on that plan, which relates to the area marked as "Pt 21 & Pt 22". Note 1 on DP 871094 states that Lot 21 is limited in height to the level plane at RL 26.0 and unlimited in depth and that Lot 22 is limited in

[30] Transcript, page 29 (line 35) – page 31 (line 21); Owners Corporation's closing written submissions dated 13 May 2020, paragraphs 16–17.
[31] Exhibit 1, page 444.

depth to the level plane at RL 26.0 and unlimited in height. Note 1 does not include any reference to the Restriction. The Restriction is recorded in a note on DP 871094 marked "B", but the Restriction is not a limitation in stratum that is picked up by Item 3 of Schedule 2 in the certificate of title for the folio;[32] and

(3) SP 85044 itself does not record the Restriction affecting any part of Lot 22. Lot 22 is marked on SP 85044 as *"Common Property (Limited in Depth) – Pt Lot 21 DP 8781094 (Limited in Height) – Note 1"*. Note 1 reads:[33]

> "PART LOT 22 IS A STRATUM LOT. FOR FULL BOUNDARY AND HEIGHT LIMITATION SEE DP 871094"

(4) the boundary and height limitations of Lot 22 recorded on DP 871094 are the limitations in Note 1 on that plan, as referred to above. Note 1 does not include any reference to the Restriction. The Restriction is recorded in a note on DP 871094 marked "B", but the Restriction is not a boundary or height limitation that is picked up by Note 1 on SP 85044.

117 It was submitted on behalf of the Murrells that the Owners Corporation's contention that the Restriction had *"fallen off"* the Register erroneously assumes that the Register comprises nothing more than the certificate of title or folio for the common property of SP 85044. It was submitted that the Register comprises all that is on the Register, and that the folio for the common property:[34]

> "… expressly picks up DP 871094 in the second schedule. As does the strata plan. And so anyone searching the Register would be left in no doubt that the land that is now the subject of the strata scheme was created by the stratum subdivision in DP 871094. And that that stratum subdivision is expressly subject to notates [sic – notation] B which refers in turn to the restriction…".

118 It was also submitted on behalf of the Murrells that the Owners Corporation's contention that the Restriction had "*fallen away*" is contrary to the assumption implicit in the Owners Corporation's defence of the Murrells' claims for relief under s 89 of the *Conveyancing Act* that the Restriction remains on the title, but should not (in the Owners Corporation's submission) be modified pursuant to s 89.

119 The submissions of the Owners Corporation summarised in [116] above accurately describe the information recorded in the folio for the common property, in SP 85044 and in DP 871094. In my opinion, those submissions

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[32] Exhibit 1, page 435.
[33] Exhibit 1, page 436.
[34] Transcript, page 255 (line 50) – page 226 (line 4).

also accurately describe the interaction between the information recorded in that folio and the notations on SP 85044 and DP 871094. That is to say, I accept that the information recorded in the folio does not incorporate by reference the Restriction recorded on DP 871094. Rather, the information recorded in the folio incorporates only the limitation in depth of that part of the common property comprising the Airspace to RL 26.00 AHD.

120 In my opinion, the Restriction did not "*fall off*", or cease to form part of, the Register upon the registration of SP 85044. As submitted by the Murrells, the Register comprises more than the folio for each parcel of Torrens system land, and includes registered plans and dealings: *Real Property Act*, s 31B; *Westfield Management Ltd v Perpetual Trustee Company Ltd* (*supra*) at [4]–[5] (*per curiam*); *Sertari Pty Ltd v Nirimba Developments Pty Ltd* (*supra*) at [15]–[16]. The Restriction could not cease to form part of the Register without any application being made under s 89 of the *Conveyancing Act* to extinguish the Restriction.

121 It does not necessarily follow that the Owners Corporation's title to the Airspace is subject to the Restriction. That question depends, in my view, on the application of s 42 of the *Real Property Act* to the recordings in the folio of the Register for the common property referred to in [116] above, and whether the indefeasible title of the Owners Corporation to the Airspace is held subject to any personal equity. However, the Owners Corporation's submissions did not raise any issue concerning s 42. The pleaded contention that its title to the Airspace is not subject to the Restriction was put solely on the basis that the Restriction had "*fallen off*" the Register. Accordingly, the submissions made on behalf of the Murrells also did not address the application of s 42 or any relevant personal equity.

122 In my view, absent any evidence of any relevant personal equity, it is doubtful that the Owners Corporation's title to the Airspace is subject to the Restriction. However, it would not be appropriate to express a final view about this question which was not addressed by the parties. In any event, having regard to my conclusions concerning the proper construction of the Restriction (see Issue 1 above) and my conclusions concerning the Murrells' claim for relief under s 89

of the *Conveyancing Act* (assuming that the Owners Corporation's title is subject to the Restriction, although the Restriction has no work to do as I have held above), the question whether the Owners Corporation's title to the Airspace is subject to the Restriction is not determinative of the parties' claims for relief in these proceedings.

Conclusions in relation to Issue 2

123 Following the registration of DP 87104, the Restriction became otiose in the sense that there was no scope for the Restriction to operate in a manner that imposed limitations on the owner of Lot 21 in addition to the limitations that resulted from the Airspace being owned by the proprietor of Lot 22. However, the Restriction did not "*fall off*" the Register.

Issue 3: Declaratory relief

124 For the reasons set above under Issue 1, the Murrells' claims for declarations in the terms of prayers 1 and 2 of the statement of claim in the Murrell proceeding are dismissed. As the Murrells failed to establish the factual and legal basis for the declarations sought, it is not necessary to address the parties' submissions concerning whether declaratory relief should be refused on discretionary grounds.

Issue 4: Easement of necessity

125 The Murrells submitted that an easement permitting the owners of Lot 21 to enter the Airspace on a temporary or transitory basis for the purpose of maintenance, repair or improvement of structures on Lot 21 below the height of RL 26.00 AHD was implied on two bases:

(1) as a matter of construction of the Restriction so as to give effect to the common intention of the parties at the time the Restriction was created; and

(2) alternatively, as a matter of law on the registration of the Airspace plan of subdivision because the easement is necessary for the use of Lot 21.

126 I have already rejected the first basis for the reasons set out under Issue 1 above.

127 This section of these reasons deals only with the second basis, which was raised for the first time in the Murrells' closing submissions.

128 The applicable legal principles were summarised by Brereton J (as his Honour then was) in *Rixon v Horseshoe Pastoral Co Pty Ltd* [2017] NSWSC 1293 (citations omitted):[35]

> "44. An easement may be implied of necessity where, on the sale by a common owner of part of its land, either the grantor or the grantee is left without any access to its property. An easement of necessity is implied where the right claimed is essential for the use of the dominant tenement; it must be more than a matter of convenience. The prevailing view is that this is based on the presumed common intention of the parties.
>
> …
>
> 46. The critical time for the implication of an easement by necessity is the time of the sale by the common owner …"

129 In relation to the prevailing view that the implication of an easement of necessity is based on the presumed common intention of the parties, Brereton J referred to *North Sydney Printing Pty Ltd v Sabemo Investment Corp Pty Ltd* [1972] 2 NSWLR 150, in which Hope J (as his Honour then was) reviewed the authorities in detail and concluded (at 160, emphasis added):

> "… the balance of authority establishes that **a way of necessity arises in order to give effect to an actual or presumed intention**. No doubt difficulties could arise in some cases because of differing actual intentions on the part of the parties, but it seems to me that **at the least one must be able to presume an intention on the part of the grantor**, in a case such as the present, **that he intended to have access to the land retained by him over the land conveyed by him** before one can imply the grant or reservation of a way of necessity over the land conveyed."

130 In *Nickerson v Barraclough* [1981] 1 Ch 426, Brightman LJ referred to *North Sydney Printing v Sabemo Investment Corp* (*supra*) with approval in concluding (at 440–441) that the doctrine of easements of necessity is not founded on public policy, but on implication from the circumstances. The Court endeavours to ascertain the parties' intentions by construing the document recording the conveyance of the land and by having regard to the circumstances associated with the conveyance. Everleigh and Buckley LLJ agreed with Brightman LJ on that issue. Buckley LJ said (at 447):

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[35] In Rixon v Horseshoe Pastoral Co Pty Ltd [2017] NSWSC 1293, Brereton J concluded that, on the assumption that there is room within the Torrens system for an easement to arise by implication, at least as against the grantor rather than the grantor's successor in title, the facts did not support an easement of necessity or an easement under the rule in Wheeldon v Burrows (1879) 12 Ch D 31. An application for leave to appeal was dismissed: Horseshoe Pastoral Co Pty Ltd v Rixon [2018] NSWCA 121.

> "… the law relating to ways of necessity rests not upon a basis of public policy but upon the implication to be drawn from the fact that unless some way is implied, a parcel of land will be inaccessible. From that fact the implication arises that the parties must have intended that some way giving access to the land should have been granted."

131 The first question is whether a right for the owners of Lot 21 to enter the Airspace on a temporary or transitory basis for the purpose of maintenance, repair or improvement of structures on Lot 21 below the height of RL 26.00 AHD was essential, as opposed to merely convenient, in all the circumstances that existed when the Airspace plan of subdivision was registered on 11 September 1997. The relevant circumstances included that the height of the concrete roof on part of Lot 21 was only between 11 centimetres and 16 centimetres below the boundary between Lot 21 and the Airspace, meaning that the entry of any persons and placement of any equipment on that roof for the purpose of repairs, maintenance and improvements to the roof would inevitably result in entry into the Airspace.

132 In determining whether the right was essential rather than merely convenient at the time of registration of the Airspace plan of subdivision on 11 September 1997, it is necessary to take into account that:

(1) at that time, the *Access to Neighbouring Land Act*, referred to by the Owners Corporation as providing a statutory regime for the owners of Lot 21 to lawfully enter the Airspace under certain circumstances, had not been enacted. Neither party identified any equivalent or similar legislation in existence at that time;

(2) the owners of Lot 21 would be able to rely on a defence of necessity to any claim in trespass only if they entered into the Airspace for the purpose of taking steps that were reasonably necessary to address a situation of immediate danger or imminent peril, provided that the situation had not arisen as a result of their own negligence: *Kuru v New South Wales* (2008) 236 CLR 1; [2008] HCA 26 at [40] (Gleeson CJ, Gummow, Kirby and Hayne JJ); *Simon v Condran* (2013) 85 NSWLR 768; [2013] NSWCA 388 at [33]–[34] and the authorities there cited (Leeming JA, Macfarlan JA and Sackville AJA agreeing); *State of New South Wales v McMaster* (2015) 91 NSWLR 666; [2015] NSWCA 228 at [214]–[222] and the authorities there cited (Beazley P, McColl and Meagher JJA agreeing); R P Balkin and J L R Davis, *Law of Torts* (5th ed, 2013, LexisNexis Butterworths) at [6.21]–[6.23];

(3) it cannot be assumed that the owners of the Airspace would act reasonably in considering a request by the owners of Lot 21 for permission to enter the Airspace for the purpose of undertaking work in circumstances not involving imminent danger;

(4) if the owners of Lot 21 were unable to obtain the consent of the owners of the Airspace for entry into the Airspace in circumstances not involving immediate danger or imminent peril, they would need to apply to the Court for an easement under s 88K of the *Conveyancing Act*; and

(5) any application under s 88K would ordinarily be a time consuming and costly process, with the likelihood of the owners of Lot 21 having to pay compensation to the Airspace owners and having to pay the Airspace owners' costs of the application irrespective of the outcome (cf s 88K(5)).

133 In my opinion, it is unlikely that the owners of Lot 21 and Lot 22 intended, at the time when the Airspace plan of subdivision was registered, that the owners of Lot 21 who had hitherto been able to enter onto their flat concrete roof for the purpose of any repairs, maintenance and improvements to the roof (provided that such repairs, maintenance or improvements did not result in the structures on Lot 21 exceeding the height of RL 26.00 AHD except on a temporary or transitory basis), should bear the cost and burden of a s 88K application if they should wish to repair, maintain or improve the roof in the future, save for repairs to address immediate danger posed by the state of the roof.

134 On the contrary, I consider that the Court should attribute to the owners of Lot 21 and Lot 22 at that time an intention that the owners of Lot 21 would be entitled to enter the Airspace on a temporary or transitory basis for the purpose of maintenance and repair of structures on Lot 21 below the height of RL 26.00. In my opinion, such a right of entry for maintenance and repairs was necessary, rather than merely convenient. Without such a right, the owners of Lot 21 would be unable to take sensible steps for the ongoing maintenance of the roof so as to avoid situations of imminent danger arising from the state of the roof. By contrast, a right for the owners of Lot 21 to enter the Airspace for the purpose of improvements may have been convenient, but was not necessary.

135 For those reasons, an implied easement of necessity arose by operation of law on the registration of the Airspace plan of subdivision on 11 September 1997, which permitted the owners of Lot 21 to enter the Airspace on a temporary or transitory basis for the purpose of maintenance and repair of structures on Lot 21 below the height of RL 26.00 AHD.

136 However, at that time, Mr and Mrs Michael were the registered proprietors of Lot 21 and Stromness Pty Ltd was the registered proprietor of Lot 22, including the Airspace. The Murrells are the successors in title to Mr and Mrs Michael and the Owners Corporation is the successor in title to Stromness Pty Ltd. Lot 21 and Lot 22 are Torrens title land.

137 Because the issue of an implied easement of necessity was raised for the first time in the Murrells' closing submissions, neither the Murrells nor the Owners Corporation addressed the question whether any implied easement of necessity that arose on registration of the Airspace plan of subdivision could be enforced by the successors in title to the original owners of Lot 21 against the successors in title to the original owners of the Airspace.

138 In my opinion, the implied easement of necessity that I have found arose for the benefit of Lot 21 on registration of the Airspace plan of subdivision cannot be enforced by the Murrells against the Owners Corporation as the successor in title to the registered proprietor of Lot 22 at the time the easement arose, by reason of s 42 of the *Real Property Act*. Indeed, there is some doubt about whether an easement of necessity could have been enforced by Mr and Mrs Michael against Stromness Pty Ltd, even assuming for present purposes that Mr and Mrs Michael had a personal equity against Stromness Pty Ltd: *Parish v Kelly* (1980) 1 BPR 9394 at 9401–9402; *Lamos Pty Ltd v Hutichson* (1984) 3 BPR 9350 at 9356; *McGrath v Campbell* (2006) 68 NSWLR 229; [2006] NSWCA 180 at [102]–[118] (Tobias JA, Giles and Hodgson JJA agreeing); *Rixon v Horseshoe Pastoral Co Pty Ltd* (*supra*) at [37]–[43]; *Cuzeno Pty Ltd v Owners – Strata Plan 65870* [2013] NSWSC 1385 at [93].

Conclusions in relation to Issue 4

139 An implied easement of necessity arose by operation of law on the registration of the Airspace plan of subdivision on 11 September 1997, which permitted the owners of Lot 21 to enter the Airspace on a temporary or transitory basis for the purpose of maintenance or repair of structures on Lot 21 below the height of RL 26.00 AHD.

140 However, the Murrells cannot enforce that implied easement against the Owners Corporation by reason of s 42 of the *Real Property Act*.

Issue 5: Did the Murrells commit trespass or create a nuisance by entering into the Airspace during the period between November 2018 and July 2019?

Applicable legal principles

141 The legal principles applicable to causes of action in trespass and in nuisance were not in dispute.

142 The Murrells submitted, and the Owners Corporation did not dispute, that:[36]

(1) the elements of a cause of action in trespass are that:

(a) the plaintiff is in exclusive possession of the land;

(b) the defendant enters onto the land, or otherwise directly interferes with the plaintiff's possession of the land; and

(c) the entry onto the land is a voluntary act, or the direct interference with the plaintiff's possession of the land is an intentional act;

(2) it is a defence to an action in trespass that:

(a) the entry or interference was reasonable necessary to protect a person or property from a threat of real and imminent harm;[37]

(b) the plaintiff has the consent of the defendant for the entry onto the land or interference with the plaintiff's exclusive possession of the land; or

(c) the defendant has lawful authority under statute or common law for the entry onto the land or interference with the plaintiff's exclusive possession of the land.

143 The dispute between the parties in relation to the cause of action in nuisance, turned on the questions whether the Murrells' entries into the Airspace were permitted by the Restriction (and they were not, for the reasons explained under Issue 1 above) and, if not, whether those entries constituted a substantial and unreasonable interference with the property, or some right over or in connection with property:[38] *Marketform Managing Agency Ltd v Amashaw Pty Ltd* (2018) 97 NSWLR 306; [2018] NSWCA 70 at [52] (Meagher JA, Leeming JA agreeing).

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[36] Murrells' closing written submissions dated 13 May 2020, paragraphs 138–139.

[37] See also [132(2)] above.

[38] Murrells' closing written submissions dated 13 May 2020, paragraph 166; Owners Corporation's closing written submissions dated 13 May 2020, paragraphs 150–151.

A preliminary issue: standing of the Owners Corporation to bring proceedings for the alleged nuisance and trespass

144 The Owners Corporation's pleaded case in trespass and nuisance was a claim for loss and damage said to have been suffered by the Owners Corporation as a result of the alleged trespass and/or nuisance.

145 The particulars of loss and damage said to have been suffered by the Owners Corporation as a result of the entries into its Airspace were set out in paragraphs (iv) to (vii) of paragraph 25 of the amended statement of claim in the Owners Corporation proceeding:

> "(iv) Loss of privacy occasioned by the proximity of the workmen performing the work on the flat part of the roof of 97 Wentworth Road to the balconies of apartments 1, 2 and 4.
>
> (v) Loss of amenity by the noise and disturbance occasioned by the works performed to the roof.
>
> (vi) Loss of amenity occasioned by the obstruction of the views from 95 Wentworth Road during the duration of the works to the roof of 97 Wentworth Road.
>
> (vii) The cost of engaging consultants to investigate and advise the plaintiff in relation to the incidents of trespass and nuisance, being:
>
> (A) Legal Services provided by Comino Prasass Solicitors;
>
> (B) Surveying services as to RL 26 and airspace boundary;
>
> (C) Building Consultant Services RUSH-N-AROUND."

146 Ultimately, there was no evidence to support the claim for damages in respect of the expenses particularised in (vii) above, and that aspect of the claim was not pursued by the Owners Corporation.[39]

147 The nature of the loss of privacy and loss of amenity particularised in (iv) to (vi) above means that it can only have been suffered by Unit Owners and not by the Owners Corporation.

148 That issue was raised by paragraph 23(b) of the defence filed by the Murrells in the Owners Corporation proceeding, and reiterated in closing submissions made on behalf of the Murrells.[40]

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[39] Transcript, page 280 (lines 14–37); Owners Corporation's closing written submissions dated 13 May 2020, paragraphs 147–153.

[40] Murrells' closing written submissions dated 13 May 2020, paragraph 174.

149 In relation to the cause of action in nuisance, the submissions made on behalf of the Owners Corporation accepted that the alleged interference was to the Unit Owners' use and enjoyment of their land, but submitted that it could prosecute the action in nuisance *"on the principles of agency"*. [41]

150 The Owners Corporation's submissions did not address the question whether it could prosecute the action in trespass to recover damages for loss of privacy or amenity suffered by individual Unit Owners.

151 Under the statutory scheme pursuant to which the Owners Corporation holds title to the common property (including the Airspace) as agent for the Unit Owners, the Unit Owners have a beneficial interest in the Airspace. The salient features of that statutory scheme under the *Strata Schemes Development Act* 2015 (NSW) (the **2015 Act**), which commenced in November 2016, and under the *Strata Schemes (Freehold Development) Act* 1973 (NSW) (the **1973 Act**) as it applied when SP 85044 was registered on 11 March 2011 may be summarised as follows:

(1) the *Real Property Act* applies to lots and common property in strata schemes in the same way as it applies to other land, and the strata schemes legislation is to be read and interpreted with the *Real Property Act* as if it formed part of that Act: 2015 Act, s 8; 1973 Act, s 6;

(2) a registered strata plan must include an administration sheet specifying the unit entitlements for each lot in the scheme: 2015 Act, ss 9–10; 1973 Act, s 8;

(3) on registration of a strata plan, the common property vests in the owners corporation of the strata scheme: 2015 Act, s 24; 1973 Act, s 18;

(4) the owners corporation holds the common property in the scheme as agent for the lot owners as tenants in common in shares proportional to the unit entitlement of the owners' lots: 2015 Act, s 28(1); 1973 Act, s 20; and

(5) common property may be dealt with only in accordance with the strata schemes legislation: 2015 Act, s 23; 1973 Act, s 21. In particular:

(a) a lot owner's interest in the common property cannot be severed from, or dealt with separately from, the owner's lot: 2015 Act, s 28(2); 1973 Act, s 24(2); and

(b) a dealing or caveat relating to an owner's lot also affects the owner's interest in the common property even if the common

[41] Owners Corporation's closing written submissions dated 13 May 2020, paragraph 151.

property is not expressly referred to in the dealing or caveat: 2015 Act, s 28(3); 1973 Act, s 24(1).

152 I note that s 24(2) of the 1973 Act expressly described the interest of a lot owner in common property as a "*beneficial interest*", whereas s 28(2) of the 2015 Act simply refers to a lot owner's "*interest*" in the common property.

153 At the time that the 2015 Act was enacted, it was well established that the statutory "*agency*" pursuant to which an owners corporation holds the common property of a strata scheme is, or is analogous to, a trust and that the owners of lots in the scheme have an equitable interest in the common property: *Owners – Strata Plan 43551 v Walter Construction Group Ltd* (2004) 62 NSWLR 169; [2004] NSWCA 429 at [41]–[46] (Spigelman CJ, Ipp and McColl JJA agreeing) and the authorities there referred to; *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* (2014) 254 CLR 185; [2014] HCA 36 at [10] (French CJ); see also *McElwaine v The Owners – Strata Plan 75975* (2017) 18 BPR 37,207; [2017] NSWCA 239 at [37] (White JA, Basten JA and Sackville AJA agreeing),[42] endorsed in *EB 9 & 10 Pty Ltd v Owners of Strata Plan 934* (2018) 98 NSWLR 889; [2018] NSWCA 288 at [31] (Barrett AJA, Meagher and Gleeson JJA agreeing). In *Community Association DP 270447 v ATB Morton Pty Ltd* (2019) 240 LGERA 32; [2019] NSWCA 83 at [80]–[83], Leeming JA (with whom Bell P and Payne JA agreed) referred to this line of authority with approval, subject to the caveat that his Honour regarded it as proceeding on the basis that the statute (namely, the 1973 Act considered in those cases) referred not only to the "*agency*" of the owners corporation but also to the "*beneficial interest*" of lot owners in common property.

154 Reading s 28(2) in the context of the 2015 Act as whole, I do not consider that the reference to "*interest*" rather than "*beneficial interest*" in s 28(2) should be interpreted as displacing this well established characterisation of the interests of lot owners in common property and downgrading it to something less than an equitable interest in the common property.

155 Although the word "*beneficial*" has not been used in the redrafting of the provision that precludes a lot owner's interest in the common property from

[42] The judgment in McElwaine was delivered after the 2015 Act was enacted, but concerned the provisions of the 1973 Act.

being dealt with separately from the owner's lot, the very fact that the legislature saw fit to include s 28(2) in the 2015 Act suggests that a lot owner's interest in common property would otherwise be capable of being "*dealt with*" independently of his or her interest in their lot. The words "*dealt with*" in s 28(2) have been construed as referring to *"dealings in a conveyancing sense, that is, as referring to matters such as the creation, disposition, variation, surrender or extinguishment of interests in or rights over common property"*: *McElwaine v The Owners – Strata Plan 75975* (*supra*) at [41] (White JA, Basten JA and Sackville AJA agreeing).

156 Moreover, s 118 of the 2015 Act, which relates to the resumption of common property, describes the interests of owners in common property as beneficial interests. Section 118(b) provides that the owners' beneficial interests in common property that is to be resumed are taken to be vested in the owners corporation to the exclusion of the owners for the purpose of any claim for compensation in relation to the resumption.

157 As I have mentioned above, and as is confirmed by the discussion of the evidence and the findings of fact below, the nature of alleged loss of privacy or loss of amenity resulting from the alleged trespass or nuisance is such that it cannot have been suffered by the Owners Corporation as opposed to Unit Owners. Moreover, in this case, the evidence does not establish that any such loss was suffered by all Unit Owners.

158 To the extent that any Unit Owner has suffered loss of privacy or loss of amenity, the determination of the claim in nuisance depends, in substance, on whether this constituted a substantial and unreasonable interference with the enjoyment by that Unit Owner of their property rights derived from the ownership of their Unit together with their beneficial interest in the Airspace.

159 The Owners Corporation has no estate or interest in the Units. It is not the trustee or agent of the Unit Owners' estate or interest in their Units. The Owners Corporation is only the legal owner of the Airspace. In my opinion, the statutory agency pursuant to which the Owners Corporation holds the legal title to the Airspace for the benefit of the Unit Owners does not confer on the Owners Corporation standing to bring an action in nuisance for an alleged

substantial interference with each Unit Owner's enjoyment of his or her property rights derived from ownership of the Unit merely because the enjoyment of those individual property rights is associated with enjoyment of the amenity provided by the Airspace.

160 I acknowledge that, under s 254 of the *Strata Schemes Management Act* 2015 (NSW), the Owners Corporation has a statutory right to take (or defend) proceedings in relation to the common property if the owners of the lots are jointly entitled to take such proceedings (or are liable to have proceedings taken against them jointly). However, s 254 applies only to an action taken by an owners corporation affecting all lot owners: *Owners Corporation – Strata Plan 43551 v Walter Construction Group Ltd* (*supra*) at [11]–[20] (Spigelman CJ, Ipp and McColl JJA agreeing).[43] Any judgment or order given in favour of (or against) the owners corporation in proceedings under s 254 has the effect as if it were a judgment or order in favour of (or against) the lot owners, and lot owners are liable to contribute to any such judgment debt against them in proportion to their unit entitlements: s 254(3) and (4).

161 In my opinion, even if the alleged interference with property rights affected all Unit Owners in this case (and the evidence does not establish this, as discussed further below), their entitlement to bring the action in nuisance would not be a joint entitlement within the meaning of s 254. Reading the words "*jointly entitled*" in s 254(2) in the context of s 254(3) and (4), it seems to me that those words refer to a right that lot owners have in common, and in respect of which there is one remedy to which they are entitled jointly, such that it would be just that they share in the fruits of any judgment (or the burden of any judgment debt) in proportion to their unit entitlements. The claim in nuisance in this case turns not only on the fact that the Murrells entered the Airspace, but also on the resulting impact on each Unit Owner's enjoyment of their property rights. Even if evidence had been adduced concerning the impact on each Unit Owner (and it was not, as discussed further below), the impact must necessarily vary between Unit Owners having regard to the different locations

[43] This case concerned s 227 of the Strata Schemes Management Act 1996 (NSW), which was in exactly the same terms as s 254 of the Strata Schemes Management Act 2015 (NSW).

of each Unit relative to the concrete roof on Lot 21 (as illustrated in the photograph reproduced in Annexure "A" to these reasons).

162 The basis of the action in trespass is the unauthorised entry onto the Owners Corporation's property, rather than interference with the use and enjoyment of Unit Owners' property rights. Because the Owners Corporation holds the legal title to the Airspace as agent for Unit Owners who have an equitable interest in the Airspace, the better view in my opinion is that the statutory agency confers standing on the Owners Corporation to bring claims in trespass as agent for individual Unit Owners for loss and damage alleged suffered by them as a result of the Murrells' entries into the Airspace, even though the loss or damage is likely to vary between Unit Owners: *Owners Corporation – Strata Plan 43551 v Walter Construction Group Ltd* (*supra*) at [49]–[51] (Spigelman CJ, Ipp and McColl JJA agreeing). In any event, as will become apparent in the section of these reasons addressing Issue 6 below, the Owners Corporation's claim for damages for trespass into the Airspace did not focus on compensation for the loss of amenity particularised. Rather, the claim was ultimately put as a claim for general damages vindicating the Owners Corporation's property rights in respect of the Airspace.

163 It follows that the Owners Corporation's claim relating to alleged trespass in the Airspace falls to be determined on the basis that the Owners Corporation has standing to prosecute that claim.

164 I have concluded that the Owners Corporation does not have standing to prosecute the claim in nuisance insofar as it relates to entries into the Airspace. However, in case of any appeal, I will indicate below the findings that I would have made concerning the claim in nuisance if the Owners Corporation had been found to have standing to prosecute that claim.

Summary of evidence and findings concerning entry into the Airspace

165 As I have already noted, the Murrells accept that their contractors entered onto the concrete roof of the dwelling on Lot 21, and therefore entered into the Airspace, during the period November 2018 and July 2019.[44]

[44] Murrells' closing written submissions dated 13 May 2020, paragraph 159.

166 The evidence concerning the occasions on which this occurred, and the circumstances in which this occurred, may be summarised as follows. To the extent that aspects of that evidence are the subject of dispute, I have identified the dispute and recorded my findings in the summary below.

167 Mr Howse is one of the owners of Unit 2 and is the Secretary of the Owners Corporation. In his affidavit sworn on 23 August 2019, Mr Howse has catalogued 13 occasions during the period between November 2018 and June 2019 on which the Murrells, or their contractors, entered the Airspace. Mr Howse has exhibited to his affidavit photographs taken by him on each of those occasions, depicting persons standing on the concrete roof of Lot 21. On some occasions several persons appear in the photographs to be viewing and discussing the roof. On other occasions, one or two persons appear to be scraping, cleaning, painting or carrying out other work on the roof, including placing and installing pipes on the roof.

168 In addition, Mr Howse deposed that contractors acting on behalf of the Murrells have brought and left equipment on the concrete roof of Lot 21 during the period from November 2018 to June 2019. Mr Howse has exhibited a photograph depicting a bucket left on the roof.

169 Mr Howse was not cross-examined about his evidence concerning the occasions on which the Murrells' contractors have entered the Airspace.

170 The submissions made on behalf of the Owners Corporation did not refer to the Murrells' entries into the Airspace as having had any particular impact on the Owners Corporation or Unit Owners, or as having interfered with the Unit Owners' or Owners Corporations' enjoyment of their respective property rights. Nor did the submissions identify any particular facts, matters or circumstances relied on in support of the Owners Corporation's contention that any such interference was substantial and unreasonable.

171 Mr Howse deposed that the works carried out on the roof had caused *"significant disturbance to myself and other units owners within the OC property which can be clearly heard through conversations, the use of machinery and scraping machines and vacuum cleaner units and other apparatus used by them. That noise is clearly audible from each of the units on*

the northern side of the OC property at 95 Wentworth Road and in particular inside those apartments which at times is particularly loud and disturbing."[45]

172 Again, Mr Howse was not cross-examined about this evidence. However, his evidence carries little weight to the extent that purports to relate to disturbance experienced by persons other than himself, or from within units other than Unit 2. Mr Howse's evidence did not identify any basis for his assertions relating to other persons and other units.

173 It is also relevant to note that Mr Howse gave no evidence of the duration of the contractors' presence in the Airspace on each of the occasions that he identified, or the duration of any disturbance that he experienced as a result of their presence in the Airspace on any of those occasions. There is simply no evidence as to whether each of the 13 occasions involved noise disturbance for a matter of minutes, hours or the best part of a day. Some of the activities described as having been carried out by the workmen, such as painting, are not inherently noisy. I assume that other activities, such as scraping and vacuuming involve some noise, and I accept Mr Howse' unchallenged evidence that noise of that nature was clearly audible from Unit 2. Similarly, I accept Mr Howse' unchallenged evidence that conversations between persons on the roof involve was clearly audible from within Unit 2. However, there was no evidence about whether such activities or conversations were constant, frequent or only intermittent during the occasions on which those persons were present on the roof (noting, again, that the duration of those occasions was not proved).

174 I note that, in his affidavit sworn on 6 February 2020, Mr Howse did give evidence about significant noise disturbance and dust that he had experienced due to jackhammering and the use of mechanical excavators as part of the work being carried out by the Murrells. Mr Bakaric, the owner of Unit 3 and the Chairman of the Owners Corporation, also complained in his affidavit sworn on 8 February 2020 about intrusive noise caused by *"heavy machine based jackhammering"* and construction works causing the whole building at 95 Wentworth Road to shake. However, there is no evidence that any such work

[45] Affidavit of Wayne Howse sworn on 23 August 2019, paragraph 18.

has been carried out on the roof of the dwelling on 97 Wentworth Road. It is clear from the photographs of the other works being carried on at the property that these works are likely to have been carried out at ground level, on Lot 21 (that is, without entering the Airspace).[46]

175 In the final paragraph of his affidavit sworn on 6 February 2020, Mr Howse deposed:

> "I have over that time felt oppressed by what I have felt to be continuous noise and invasion of privacy which has felt like a severe disturbance to the enjoyment of our home."

176 To the extent that the invasion of privacy referred to in the final paragraph of that affidavit relates to entries into the Airspace, Mr Howse has not explicitly described how the presence of workmen on the roof of 97 Wentworth Road, or the work carried out on the roof by those workmen from time to time, has interfered with his privacy in Unit 2. However, Mr Howse deposed in paragraph 4 of his affidavit sworn on 13 June 2019 that Unit 2 is situated directly next to the dwelling at 97 Wentworth Road, and that the distance between the balustrade on the balcony of Unit 2 and the surface of the flat roof on 97 Wentworth Road is less than 2 metres.

177 The photographs exhibited to Mr Howse's 23 August 2019 affidavit show that the balcony of Unit 2 is almost level in height with the surface of the flat roof on 97 Wentworth Road, and that persons present on that roof have a clear line of sight through the glass balustrade of that balcony into the balcony space of Unit 2. One of the photographs also suggests that persons on the roof of 97 Wentworth Road would also be able to see into one of the internal living areas of Unit 2, at least if the door between that living area and the balcony were open. I therefore infer that the presence of persons on the flat roof of 97 Wentworth Road caused some loss of privacy to occupants of Unit 2, at least whilst they are using that part of their balcony that is adjacent to that roof. As can be seen clearly from other photographic evidence reproduced in Annexure "A" to these reasons,[47] the balcony of Unit 2 extends around to the other side

[46] Exhibit 2.
[47] Exhibit 1, page 573.

of the building on 95 Wentworth Road, from which the flat roof on 97 Wentworth Road would not be visible.

178 On the basis of the evidence referred to above, I characterise the loss of privacy to Unit 2 on the occasions when persons entered the Airspace as incidental, in the sense that it involves the presence of persons in the vicinity of part of Unit 2's balcony, but there is no evidence that those persons have been looking directly into the balcony or any other part of Unit 2. On the contrary, the photographic evidence exhibited to Mr Howse's affidavit depicts the persons on the roof of 97 Wentworth Road being preoccupied with their inspection of the roof, or work being carried out on the roof, and not looking in the direction of Unit 2 at all.

179 Mr Howse's evidence did not refer to the presence of contractors on the roof of 97 Wentworth Road interfering with his enjoyment views of the harbour from Unit 2 at 95 Wentworth Road. It is clear from the photographs exhibited to Mr Howse's affidavit sworn on 23 August 2019 that their presence caused some interference with those views, but did not obstruct the view of the harbour. As the evidence does not establish the duration of the contractors' presence on the roof on each occasion, the duration of interference of views on each occasion is not proved.

180 In his affidavit sworn on 8 February 2020, Mr Bakaric complained that:

> "… there are workmen looking directly into our main bedroom and main bathroom on multiple occasions whilst they are within the airspace above No. 97 standing on the flat roof looking straight into our living areas.
>
> We have both observed Mr Murrell looking directly into our bedroom and bathroom on multiple occasions."

181 If the roof of 97 Wentworth Road provides a vantage point for looking directly into Unit 2 (as Mr Howse description of Unit 2 suggests and as the photographs exhibited to his affidavit depict), it is difficult to understand how a person standing on that roof would also be able to look directly into Unit 3, which is one floor higher than Unit 2. This is illustrated by the photograph reproduced in Annexure "A" to this reasons. Having regard to that photograph and to Mr Howse's evidence, the evidence adduced by the Owners Corporation does not establish on the balance of probabilities that entry into

the Airspace by the Murrells (or contractors engaged by the Murrells) has caused lack of privacy to the owners of Unit 3 by persons being able to look inside Unit 3.

182 I note that Mr Bakaric gave no evidence concerning any noise heard within Unit 3 as a result of the activities of persons on the roof of 97 Wentworth Road (as opposed to noise resulting from other construction activities on 97 Wentworth Road).

183 The owners of Units 1 and 4 at 95 Wentworth Road gave no evidence at all.

184 For all of those reasons, I find that:

(1) the Murrells, or contractors engaged on their behalf, entered the Airspace from time to time during the period from November 2018 to June 2019, including on the 13 occasions identified in paragraph 17 of Mr Howse's affidavit sworn on 23 August 2019;

(2) the presence of persons in the Airspace on those occasions caused some incidental interference with the privacy of the occupants of Unit 2 at 95 Wentworth Road, but there is no evidence of the duration of such interference on each occasion;

(3) the presence of persons in the Airspace on those occasions caused some temporary interference with the views of the harbour enjoyed from Unit 2 at 95 Wentworth Road, but there is no evidence concerning the duration of such interference with views on each occasion and the harbour views were not obstructed – the harbour remained clearly visible; and

(4) the presence of persons in the Airspace and/or works carried out by those persons caused noise that disturbed the occupants of Unit 2 at 95 Wentworth Road on at least some of those occasions, but there is no evidence about the extent or duration of such noise.

185 There is no evidence that:

(1) the presence of the Murrells, or contractors engaged on behalf of the Murrells, in the Airspace from time to time during the period from November 2018 to June 2019, and works carried out by those persons, interfered with the privacy of the occupants of Units 1, 3 and 4 at 95 Wentworth Road; or

(2) the presence of persons in the Airspace from time to time during the period from November 2018 to June 2019, and works carried out by those persons, interfered with the harbour views from Units 1, 3 and 4 at 95 Wentworth Road; or

(3) the presence of persons in the Airspace from time to time during the period from November 2018 to June 2019, and works carried out by

those persons, caused noise that disturbed the occupants of Units 1, 3 and 4 at 95 Wentworth Road.

Summary of evidence concerning the condition of the roof and negotiations for access

186 A significant volume of evidence was adduced concerning the condition of the roof of Lot 21 during the period November 2018 to June 2019, and the communications between the Owners Corporation and the Murrells in relation to the entries into the Airspace up to the date of the hearing. Aspects of that evidence are relevant to the causes of action in trespass and nuisance, including the claims for aggravated and exemplary damages, and also to the claims for relief under s 89 and s 88K of the *Conveyancing Act*. It is convenient at this point to set out a chronological summary of all of that evidence so that relevant aspects of it can be understood in context. To the extent that the evidence was disputed, I have indicated this and set out my findings within this chronological summary.

187 On or about 15 November 2018, Professor Murrell met with Mr Howse and Dr and Mrs Bakaric to discuss certain changes that the Murrells proposed to make to 97 Wentworth Road. According to Professor Murrell's notes of the meeting, he informed Mr Howse and Dr and Mrs Bakaric that he wanted to change the colour of the concrete roof and *"change it over for some upturned metal seam zinc"*. Professor Murrell did not seek the Owners Corporation's consent at this meeting to do this work, or to enter onto the roof and into the Airspace for that purpose, but no objection was raised by those present.[48]

188 On 23 November 2018, Professor Murrell sent an email to Mr Howse and Dr Bakaric referring to the meeting the previous week and stating that painting of the roof would start the following week.[49]

189 Mr Howse replied to Professor Murrell by email on the same day, stating:[50]

> "Following our meeting last week, we have not agreed to anything at all …
>
> …
>
> We can not [sic] prevent you painting the roof of the property at 97 Wentworth Road, Vaucluse, providing you do not enter our airspace (RL26) which is

[48] Affidavit of George Murrell sworn on 6 February 2020, paragraphs 24–25; Exhibit 1, page 577.
[49] Affidavit of George Murrell sworn on 6 February 2020, paragraph 26; Exhibit 1, page 581.
[50] Affidavit of George Murrell sworn on 6 February 2020, paragraph 26; Exhibit 1, page 582.

> 200mm above the existing roof line of 97 Wentworth Road, Vaucluse. You would need some very small people to achieve this.
>
> We maintain our stance that anything above RL26 belongs to us and at this stage, you are not, and will not, be granted access to this area without our express permission."

190 On 24 November 2018, Professor Murrell sent a further email to Mr Howse, indicating that he had met with and consulted with Mr Howse and Dr and Mrs Bakaric out of courtesy only and was disappointed that they had changed their position. Professor Murrell attached his notes of the meeting on 15 November 2018 to the email.[51]

191 Consultants or contractors engaged by the Murrells accessed the concrete roof of Lot 21 on or about 27 November 2018 and 23 January 2019, intruding into the Airspace on each occasion.[52]

192 In his affidavit sworn on 6 February 2020, Professor Murrell deposed that he engaged Partridge Structural Pty Limited in about February 2019 to provide advice on the structural adequacy and the feasibility of modifying the dwelling on Lot 21. Professor Murrell deposed that he sought this advice because he became concerned about the structural integrity of the dwelling after it suffered some water damage to part of the ceiling beneath the pitched section of the roof (not the flat concrete roof) during a storm in December 2018 and after he reviewed a building report prepared for his insurer in connection with that damage. The building report does not mention the flat concrete roof.[53]

193 On about 9 April 2019, contractors engaged by or on behalf of the Murrells removed the membrane from the concrete roof of Lot 21.[54] This was done on the advice of the engineers and builders whom the Murrells had engaged for the purpose of a proposed development of Lot 21. The objective of removing the membrane was to carry out investigations to ascertain the state of the concrete roof. Professor Murrell gave evidence that, before the membrane was removed, he was concerned about the roof for several reasons, including that it

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[51] Affidavit of George Murrell sworn on 6 February 2020, paragraph 28; Exhibit 1, page 584.
[52] Affidavit Wayne Howse sworn on 23 August 2019, paragraph 17; see also [167] above.
[53] Affidavit of George Murrell sworn on 6 February 2020, paragraphs 29–33; Exhibit 1, page 590; Transcript, page 90 (line 48) – page 91 (line 36).
[54] Affidavit of George Murrell sworn on 6 February 2020, paragraph 34; affidavit of Wayne Howse sworn on 23 August 2020, paragraph 17; see also [167] above.

had been built as long ago as about 1960, water pooled on the roof whenever it rained and he was advised that the vents installed on the roof by the previous owner were likely to be a sign that there was a problem with water collecting between the concrete roof and the membrane.[55]

194 Mr John Comino, the solicitor for the Owners Corporation, wrote to the Murrells on 9 April 2019 stating that the entry of workmen onto the concrete roof, and the performance of work on that roof was encroaching on the Airspace which was on the Owners Corporation's title or subject to an easement for the benefit of SP 85044. The letter stated that the Owners Corporation had not approved this encroachment. The letter continued:[56]

> "3. Workers are not to enter into our client's airspace above the roof without the express written approval from our client.
>
> 4. If there is any further work and erection of any temporary or permanent structures erected or placed within our client's airspace in contravention to the directions contained in this letter, you are put on formal notice that our client will commence immediate proceedings in the Supreme Court by way of injunction and such other relief to which it is entitled so as to protect our client's property rights and restrain any further intervention upon and trespass over those property rights."

195 Professor Murrell replied to Mr Comino's letter on 10 April 2019. Professor Murrell wrote:[57]

> "The property 97 Wentworth Rd has recently suffered water damage and is in need of repair. We have engaged contractors to re-surface the flat roof. The location and dimensions of the roof will remain unchanged and the surface will continue to remain below Strata Plan 85044. It will continue to be non-trafficable. I apologise if your clients are under any alternative impression. The scaffolding is essential to create a safe working environment while they complete the resurfacing as soon as practicable. It is not for any other purpose."

196 In cross-examination, Professor Murrell readily accepted that the water damage referred to in his 10 April 2019 correspondence was water damage to the pitched roof.[58] It was put to him, and he denied, that the terms of his letter had been intended to mislead the Owners Corporation into believing that there had been water damage caused by the flat roof, and it was necessary to engage contractors to re-surface the roof in order to rectify that damage or

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[55] Transcript, page 125 (line 14) – page 126 (line 34).
[56] Affidavit of George Murrell sworn on 6 February 2020, paragraph 35; Exhibit 1, page 602.
[57] Affidavit of George Murrell sworn on 6 February 2020, paragraph 36; Exhibit 1, page 611.
[58] Transcript, page 90 (line 48) – page 91 (line 36).

prevent further damage. Professor Murrell maintained that his letter did not say that there had been damage to, or damage caused by, the concrete roof. Rather, the letter simply stated that there had been water damage, and that repairs were necessary. According to Professor Murrell's evidence, repairs were necessary to the whole house on Lot 21.[59]

197 The wording of Professor Murrell's 10 April 2019 letter was unclear as to whether the proposed re-surfacing of the roof was related to water damage. However, I accept Professor Murrell's denial of any intention to mislead the Owners Corporation by the terms of that letter. In my opinion, that letter needs to be read in the context of the information conveyed to the Owners Corporation at the meeting on 15 November 2018 and his 12 April and 18 April 2019 correspondence referred to below. It was clear from those communications that Professor Murrell wished to apply a new surface to the concrete roof from as early as November 2018 (prior to the December 2018 water damage referred to in the 10 April 2019 letter). The information provided in the 12 and 18 April 2019 correspondence made it clear that the new surface then proposed involved the application of additional material, such as gravel, to the roof once a new waterproof membrane had been applied. The provision of this information in November 2018, and on 12 and 18 April 2019 is inconsistent with the alleged intention to mislead the Owners Corporation on 10 April 2019.

198 It appears from Mr Walford's evidence referred to below that the Murrells were contemplating a green roof (including plants) as part of a potential development of Lot 21 as at April 2019. The evidence does not reveal at what point in time the Murrells decided that they wished to proceed with the proposed development, including the green roof. It may have been as late as July 2019.[60] The green roof proposal was not referred to in any correspondence from the Murrells to the Owners Corporation or Mr Comino during the period April to June 2019. It may have been one of the three options that the Murrells would have shown the Owners Corporation if a meeting that they proposed between their architects and members of the Owners Corporation on 5 June 2019 had

[59] Transcript, page 136 (line 48) – page 139 (line 24).
[60] Exhibit 3.

proceeded.[61] In the events that happened, the Murrells first advised the Owners Corporation of their plans for a green roof on about 25 July 2019.[62]

199 On 12 April 2019, Mr Peter Standen and Mr Tadd Walford of Partridge Structural Pty Ltd (**Partridge Structural**) inspected the concrete roof of Lot 21 on behalf of the Murrells.[63] Mr Walford is a civil engineer with 14 years' experience, including in the fields of concrete and steel and the investigation, reporting and remediation of building defects. Mr Walford gave expert evidence in these proceedings, as will be referred to below.

200 Mr Walford's evidence is to the effect that the Murrells had engaged Partridge Structural in connection with a proposed development of Lot 21, including the creation of a green roof on the existing concrete roof. The inspection by Mr Standen and Mr Walford on 12 April 2019 was an initial inspection of the condition of the roof for the purpose of discussing the design for the proposed development. Ms Margaret Worth, a design engineer employed by Partridge Structural, was also involved in inspection and investigatory work relating to the roof, although she did not attend the inspection on 12 April 2019.

201 Mr Walford's evidence about the purpose of the inspection on 12 April 2019 is consistent with Professor Murrell's evidence in his affidavit sworn on 7 April 2020, in which he deposed (referring to the period from April to June 2019) that:

> "The workmen on the Concrete Roof were my consultants and contractors that were engaged by me to inspect and determine the structural adequacy of the Concrete Roof and to advise on repairs and the structural feasibility of modifying the Dwelling."

202 On 12 April 2019, Professor Murrell received a further letter from Mr Comino. The letter referred to Professor Murrell's correspondence of 10 April 2019 and stated:[64]

> "We remain concerned that works currently being carried out to the roof of No. 97 and further works have already or will encroach into the airspace and title area of Strata Plan 85044.

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[61] See [241] below.
[62] See [255] below.
[63] Affidavit of Wayne Howse sworn on 23 August 2019, paragraph 17; see also [167] above.
[64] Affidavit of Wayne Howse sworn on 6 February 2020, paragraph 6; affidavit of George Murrell sworn on 6 February 2020, paragraph 38; Exhibit 1, page 613.

> In particular, due to the close proximity of the roof at No. 97 to Unit 2 in our client's strata building, there is currently direct trespassing into our client's airspace by workmen and consultants who have been accessing the roof of No. 97, ostensibly for repairing the existing flat roof.
>
> No permission has been sought by you for entering into our client's airspace for the carrying out of this work nor has any application for permission been applied for pursuant to the Access to Neighbouring Lands Act."

203 The letter then sought information about the nature of the works proposed to the roof on Lot 21, the materials, equipment and machinery intended to be brought onto the roof, the period of time over which the works were proposed to be conducted and the frequency of visits to the roof and times of day at which work was proposed to be carried out.

204 Professor Murrell replied by email on 12 April 2019, stating that he could not provide all of the details requested within the timeframe imposed by Mr Comino's letter but that he was able to provide the following information:[65]

> "The old membrane on the concrete roof (including previous vents) have been removed.
>
> Our consultants (engineers) have inspected the concrete surface today. There are a number of cracks in this surface which will be initially attended to and sealed.
>
> The surface will need to be smoothed.
>
> A 150mm metal (likely aluminium) upturn will be attached to the periphery of the roof.
>
> The surface of the roof will be waterproofed with a bitumen based waterproofing membrane agent.
>
> The outside edges of the concrete roof will be tidied up via render and painted. The format will be not dissimilar to the existing concrete edge.
>
> A further plastic membrane will be added. Additional material (likely gravel or similar) will be placed over the plastic membrane and held in place by the 150mm metal upturn. In this way the material will remain under the title area of Strata Plan 85044.
>
> You are correct my initial plan of a zinc upturned metal seamed roof is not feasible in respect to falls and the strata plan and has been abandoned for the flat roof.
>
> …
>
> The works will be completed as expeditiously and with as little disruption as possible during working hours."

[65] Affidavit of George Murrell sworn on 6 February 2020, paragraph 39; Exhibit 1, page 615.

205 On 15 April 2019, Mr Comino wrote to Professor Murrell stating that the Owners Corporation remained *"greatly concerned"* that the works on the concrete roof had already encroached or will encroach on the Airspace. The letter also complained that people had been present on the roof that day *"trespassing on our client's airspace, without first seeking any permission"* and asserted that this was *"currently a direct and very significant invasion of our residents' privacy and amenity"*. The letter made a further request for detailed information about the work proposed to be carried out to the roof, so that the Owners Corporation could consider whether to grant *"limited consent"* or whether to commence proceedings in the Supreme Court without further notice. The information requested included details of the *"precise length of time"* over which the works were proposed to be carried out and a *"schedule of the work proposed to be carried out and of the workmen and consultants who are proposed to be requiring access to the roof area"*. The letter also asked what the Murrells proposed to do for the protection of the privacy of Unit Owners.[66]

206 On 18 April 2019, Professor Murrell sent an email to Mr Comino setting out in more detail the works that he intended to carry out to the concrete roof, as already described in his 12 April 2019 email.[67] In relation to the duration of the works, the email stated:

> "• The works will be carried out during working hours as rapidly and as safely as practicable.
>
> • If there is rain, and/or the surface remains wet, completion will be delayed accordingly.
>
> • There will be no work during public holidays.
>
> • We anticipate that each stage will take a week (excluding rain delays and public holidays."

207 Given that the email had described six stages of work yet to be undertaken on the roof, the effect of this advice was that the work would take approximately six weeks, subject to wet weather delays.

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[66] Affidavit of Wayne Howse sworn on 6 February 2020, paragraph 8; affidavit of George Murrell sworn on 6 February 2020, paragraph 40; Exhibit 1, pages 625–626.

[67] Affidavit of George Murrell sworn on 6 February 2020, paragraph 41; Exhibit 1, page 627.

208 Professor Murrell's email of 18 April 2019 offered to arrange ways to improve privacy for Unit Owners whilst the works were carried out on the roof. He suggested by way of example that additional scaffolding or fencing could be erected to ensure privacy for Unit 2 whilst the works were carried out, if that were of interest to the Owners Corporation.

209 Following the initial inspection of the roof by Mr Standen and Mr Walford on 12 April 2019, Slab Scan Pty Ltd (**Slab Scan**) were engaged in order to ascertain what reinforcement was in the concrete roof so that Partridge Structural could assess whether the roof was strong enough to support a green roof and also whether supports were required for the roof during the development process.

210 A report prepared by Slab Scan dated 29 April 2019 stated that their investigations indicated that the concrete slab was conventionally reinforced and had a thickness of between 100mm and 120mm. Reinforcement cover varied significantly across the slab, with cover on the underside of the slab generally between 10–15mm and cover on the top side of the slab varying between 10mm and 50mm.[68]

211 Consultants or contractors engaged by the Murrells accessed the concrete roof on Lot 21 on or about 1, 2 and 3 May 2019, intruding into the Airspace on each occasion.[69]

212 On 1 May 2019 at 12.16pm, Mr Comino sent a further email to Professor Murrell complaining that there was currently a workman on the concrete roof. The email also stated:[70]

> "The email you forwarded on 12 April 2019 does not answer the specific information requested in our previous correspondence as to personnel (by name and qualification as to why their access is required by you); specific dates and timespans that access is sought for works to the roof of No. 97 Wentworth Road; and further details.
>
> You are directed to immediately instruct your building contractor to notify all consultants, workmen etc that they are not to access the roof unless and until this information is provided in the proper form and considered by our client as to whether it is reasonable and necessary to grant such access to the Strata property.

[68] Affidavit of George Murrell sworn on 6 February 2020, paragraph 42; Exhibit 1, pages 629–633.
[69] Affidavit of Wayne Howse sworn on 23 August 2019, paragraph 17; see also [167] above.
[70] Affidavit of George Murrell sworn on 6 February 2020, paragraph 43; Exhibit 1, page 634.

> Please confirm in writing that this direction has been acted on. We require this confirmation prior to 2.00pm this afternoon otherwise legal action will commence against you without further notice in the Supreme Court of NSW seeking damages and costs."

213 I interrupt the chronology to note that Mr Comino's email of 1 May 2019 did not acknowledge receipt of Professor Murrell's email of 18 April 2019, in which Professor Murrell had provided a six week estimate for the duration of the works on the roof in response to Mr Comino's request in his letter dated 15 April 2019 for details of the *"precise length of time"* over which the works were proposed to be carried out. Predicting the duration of building works is never an exercise in precision, given the need to co-ordinate different trades to carry out the work in stages in the order necessary to achieve the desired end result. In addition, the roof works were clearly liable to be delayed by wet weather. It is difficult to see how Professor Murrell could provide an estimate with greater precision than the estimate in his 18 April 2019 email of 6 weeks, subject to rain delays. The request on 1 May 2019 for *"specific dates and timespans"* was plainly unrealistic, in my opinion.

214 On 2 May 2019, Mr Comino wrote to Professor Murrell complaining again about the alleged lack of satisfactory response to his letter of 15 April 2019.[71] Again, Mr Comino failed to acknowledge Professor Murrell's email of 18 April 2019. The letter reiterated that Professor Murrell had not sought, and did not have, permission for persons working on his behalf to enter the Airspace above the concrete roof. The letter made it clear that no such consent would be granted by the Owners Corporation unless and until the Murrells answered the specific asked in the previous correspondence, and the Owners Corporation considered those answers. As I have already indicated above, it is in my opinion that the Owners Corporation was demanding an unrealistic level of precision in the information requested, meaning that the prospect of the Owners Corporation consenting to access to the roof was also unrealistic by this time. In Mr Comino's letter of 2 May 2019, the Owners Corporation added to its previous demands by stating that:

> "… it will be an irrevocable pre-condition of our client considering whether to give its consent that the costs (incurred by the Owners Corporation in

[71] Affidavit of Wayne Howse sworn on 6 February 2020, paragraph 9; affidavit of George Murrell sworn on 6 February 2020, paragraph 44; Exhibit 1, page 638.

> protecting its rights, including engaging our firm and Barrister, Surveyors and other costs necessarily incurred as a result of the unauthorised works and trespass carried out by you) are paid."

215 Finally, Mr Comino's letter of 2 May 2019 again sought the Murrells' written undertaking that they and their contractors, builders or workmen would not trespass into the Airspace *"until our client's concerns are properly addressed"*.

216 On 6 May 2019, Professor Murrell replied to Mr Comino's letter of 2 May 2019.[72] Professor Murrell referred Mr Comino to the information that he had already provided in his email of 18 April 2019. He also informed Mr Comino that, following rain the previous weekend, there were two areas where water was coming through the concrete roof and damaging the ceiling. Professor Murrell attached photographs. The letter continued:

> "Given the small distance between the level of the roof and the air height limit immediately above, it is not possible to undertake repairs without there being some intrusion into the airspace above the roof. It is not possible to otherwise undertake repairs and maintenance to the roof. Clearly, having regard to the fact that the existing dwelling was in existence at the time when the subdivision of the airspace was undertaken, minor and temporary intrusions into the airspace must have been contemplated as there is no other means of attending to repairs and maintenance of the roof.
>
> …
>
> As previously outlined, we merely seek to repair a damaged roof. Similar repairs have been made by the previous owner several years ago.
>
> Having regard to the limited nature and duration of the intrusions and their purpose, especially when the absence of repairs has already resulted in damage and the risk of further damage remains, we believe that it is appropriate for those works to be carried out.
>
> I have been advised there are mechanisms to ensure access for this purpose, and if necessary, we shall seek same via courts. I would, however, prefer to minimise the disruption and cost to your client and seek to settle this matter in a more amicable and cost-effective manner. To that end, I request a Without Prejudice meeting between myself and Mr John Comino. … In the meantime, I have asked my workers to limit their work on the roof of 97 Wentworth Rd to emergency measures with respect to the recent ingress of water."

217 In relation to Professor Murrell's letter of 6 May 2019, Mr Howse said in his affidavit sworn on 6 February 2020:[73]

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[72] Affidavit of Wayne Howse sworn on 6 February 2020, paragraph 10; affidavit of George Murrell sworn on 6 February 2020, paragraphs 45–46; Exhibit 1, page 646.

[73] Affidavit of Wayne Howse sworn on 6 February 2020, paragraph 10.

> "As no full response was received to the specific requests made previously by [the Owners Corporation], [the Owners Corporation] was of the view that [the Murrells] were not making a genuine attempt to resolve matters."

218 Mr Comino replied by letter dated 8 May 2019.[74] The letter again complained that the Murrells had failed to provide the specific information previously requested, including in relation to *"times, dates etc regarding access by your contractors and builders"*. The letter acknowledged that part of the works that the Murrells wished to undertake were repairs to the concrete roof. However, the letter stated that the works described in the Murrells' previous correspondence – the installation of an upturned lip around the perimeter of the roof and placing pebbles across the whole roof area – went beyond repairs and would extend into the Airspace and *"to that extent, is prohibited"*.

219 I note that the upturned lip described in Professor Murrell's email of 12 April 2019 was 150mm, which would result in it intruding into the Airspace by up to 4mm at certain places but being within the height boundary of Lot 21 at other places. It is this intrusion that the Owners Corporation communicated was prohibited in Mr Comino's letter of 8 May 2019: see [21] and [204] above.

220 Mr Comino's letter of 8 May 2019 concluded by indicating that the Owners Corporation was only prepared to discuss access on the condition that the Murrells provided the specific information previously requested and paid the Owners Corporation's costs said to have been incurred in connection with *"this issue of unauthorised works, trespass and access"*. The letter stated that those costs were in the process of being quantified.

221 I interpolate to note that these conditions on any *discussion* about access were imposed notwithstanding that the Owners Corporation recognised that the reason for access included the need for repair works.

222 The pattern of the correspondence by this stage was that the Owners Corporation was countering each round of information provided by Professor Murrell with a demand for further detail and/or the imposition of additional conditions that the Murrells would have to agree to before the Owners Corporation would even consider granting permission for them to enter into the

[74] Affidavit of Wayne Howse sworn on 6 February 2020, paragraph 11; affidavit of George Murrell sworn on 6 February 2020, paragraph 47; Exhibit 1, pages 650–651.

Airspace for the purpose of accessing their roof. As I have indicated above, the level of precision of information demanded by the Owners Corporation had reached an unrealistic level by 1 May 2019. As is clear from Mr Howse's evidence referred to in [217] above, the Owners Corporation chose to interpret the Murrells failure to comply with its unrealistic demands for information as a failure on the part of the Murrells to make a genuine attempt to resolve matters.

223 This interpretation was consistent with the unwavering attitude of Mr Howse and the Owners Corporation at all times from the commencement of discussions in November 2018, namely that the Murrells were not to be trusted and that the Murrells were not entitled to undertake any repairs, maintenance or improvements to the concrete roof which required access to the Airspace above RL 26.00 AHD, unless Professor Murrell successfully applied for access under the *Access to Neighbouring Land Act* or the Murrells obtained the Owners Corporation's permission to undertake emergency repairs to protect their property from risk of damage by fire, rain or storm. In the emergency scenario, however, the Owners Corporation would require information.[75] In my opinion, it is plain from the pattern of correspondence that I have set out above (which continued, as will become apparent below) that the level of information required by the Owners Corporation would thwart the Murrells from averting any risk posed by an emergency situation. It is clear from the evidence that the predicament that this placed the Murrells in was a source of amusement for Mr Howse,[76] and that the Owners Corporation was determined not to grant consent or an easement (when an easement was later sought) due to what Mr Howse described as *"the track record of Mr Murrell"*.[77]

224 I understand Mr Howse's reference to the *"track record"* to be a reference to the manner in which the Murrells carried out the development of their property at 40 Fitzwilliam Road, Vaucluse (which adjoins Lot 21). The Owners Corporation strenuously objected to development consent being granted for the development, and once consent was granted, alleged numerous breaches by the Murrells of the terms and conditions of the development consent. Land and

[75] Transcript, page 190 (lines 30–50), page 196 (line 35) – page 199 (line 10), page 219 (line 16) – 220 (line 15).
[76] See [189] above and Transcript, page 197 (line 25) – page 198 (line 40).
[77] Transcript, page 198 (line 41) – page 199 (line 9).

Environment Court proceedings followed, the outcome of which was that the court *"basically upheld what* [the Murrells] *wanted to do"*.[78]

225 During the course of the development of 40 Fitzwilliam Road, Mr Howse was interviewed by police in September 2016 concerning an allegation of malicious damage to property after he removed certain formwork that he considered was protruding from 40 Fitzwilliam Road on to the Owners Corporation's property by 5cm. Concrete had been due to be poured into the formwork the following day. Mr Howse was not charged with any offence.[79]

226 It was in the context of that history of neighbourly relations that the discussions between the Owners Corporation and the Murrells concerning access to the concrete roof began in November 2018, with the Owners Corporation having already formed a view that the Murrells were not to be trusted.

227 Professor Murrell's correspondence from November 2018 onwards steadfastly ignored the Owners Corporation's complaints that the workmen's entry onto the roof involved a trespass into the Airspace. As will become apparent below, the Murrells did not take action to prevent their contractors and consultants from entering into the Airspace until after the Owners Corporation proceeding was commenced on 28 June 2019, and did not seek the Owners Corporation's consent for entry into the Airspace until 8 November 2019.

228 In cross-examination, Professor Murrell steadfastly maintained that he had not sought the Owners Corporation's consent and did not believe he was trespassing because he had received legal advice in about November 2018 to the effect that it was lawful for him to effect repairs and maintenance or improvements on the concrete roof.[80]

229 I reject that evidence given by Professor Murrell. If he had received such legal advice, it is to be expected that he would have referred to it in his correspondence with the Owners Corporation. In cross-examination, he sought to explain his failure to refer to it in his November 2018 correspondence by saying that he believed that *"further communications with the Owners*

[78] Transcript, page 189 (line 1) – page 190 (line 50).
[79] Transcript, page 191 (line 1) – page 192 (line 1).
[80] Transcript, page 79 (line 35) – page 81 (line 10), page 83 (line 25) – page 85 (line 27), page 119 (line 16) – page 122 (line 40), page 136 (lines 39–46).

Corporation would serve no purpose".[81] However, the fact is that Professor Murrell did continue his communications with the Owners Corporation after November 2018. Letters or emails were exchanged between them on a regular basis until July 2019.

230 Moreover, Professor Murrell's letter of 6 May 2019 did set out the substance of the legal advice (or, at least, his understanding of the advice) that he had received at that time. Professor Murrell claimed to have been advised that it was open to him to make an application to a court *"to ensure access for this purpose"*. He did not claim to have been advised that he had any legal right to enter the Airspace without first applying to a court.

231 This contemporaneous account given by Professor Murrell on 6 May 2019 of the legal advice he had received is more reliable than his evidence given one year later during the hearing.

232 I also note that, when the Murrells sought advice from their solicitor on 21 July 2019 concerning whether they were required to obtain written consent of the Owners Corporation to allow access to the Airspace to construct the proposed green roof, their solicitors did not advise that consent was not required.[82]

233 I find that the Murrells' conduct in continuing to cause or permit their contractors and consultants to enter the Airspace during the period from November 2018 to June 2019 was not informed by any legal advice that they had received at that time. Rather, it reflected their frustration at what they saw as the Owners Corporation's constant objections to what they considered to be minor works of a nature similar to work that had been carried out on the roof by previous owners in the past, and the Owners Corporation's refusal to be satisfied with any level of information that the Murrells provided about the work. As Professor Murrell said in cross-examination:[83]

> "I kept providing details that they were asking and I kept getting hysterical letters."

[81] Transcript, page 83 (lines 21–41).
[82] See [253]–[254] below.
[83] Transcript, page 144 (lines 28–39).

234 On 9 May 2019, Professor Murrell replied to Mr Comino's letter of 8 May 2019 in the following terms:[84]

> "I appreciate your recognition of the importance of repairing the damaged roof of 97 Wentworth Road.
>
> With regard to specific information requested, I have previously outlined the likely timetable for the works that need to be undertaken which is estimated to be 6 weeks. … at the moment, it is not possible to specify precise times because these are dependent upon workers' schedules, your client's support and weather. As previously communicated, we would aim to complete the works as expeditiously as possible.
>
> We will ensure that the height of the repair/re-cladding (including lip) of the roof will be under RL 26.0. To this end, I would be grateful a copy of your client's surveyor's report.
>
> …
>
> With respect to costs, I note that the Access to Neighbouring Lands Acts [sic] states that costs are to be paid by the applicant. To that end, without prejudice, I am willing to pay your clients reasonable costs incurred by them since the erection of scaffolding to repair the roof and, going forward, for completing an agreement that allows us to access their airspace for repairs and maintenance and the like.
>
> If this is acceptable to your clients, we would like to instruct my workers to begin treating the cracks in the roof surface early next week to avoid further damage. Once I receive your confirmation, I will forward you their names and likely hours in which they will be accessing the roof space."

235 Professor Murrell received no response to his letter of 9 May 2019, despite sending a follow up email on 15 May 2019.

236 On about 17 May 2019, Professor Murrell noticed that the ceiling beneath the concrete roof that had been damaged by water ingress earlier in May had deteriorated further.[85] On 27 May 2019, Professor Murrell wrote to Mr Comino advising him of this further damage and stating that:[86]

> "… it is critical that my workers perform emergency measures to prevent further water damage. To that end they will take measures to prevent the egress of water over the edges of the flat roof … and reinsert bitumen-based waterproofing over the flat roof (to protect all areas from water damage). They anticipate these emergency works will start on Monday 27th May and will be completed relatively quickly within a week or two. I appreciate your client's forbearance in this regard.
>
> I reiterate, without prejudice, my willingness to pay your clients reasonable costs incurred by them since the erection of scaffolding to repair the roof and,

[84] Affidavit of George Murrell sworn on 6 February 2020, paragraph 48; Exhibit 1, page 654.
[85] Affidavit of George Murrell sworn on 6 February 2020, paragraph 50; Exhibit 1, page 667.
[86] Affidavit of George Murrell sworn on 6 February 2020, paragraph 51; Exhibit 1, page 670.

> going forward, for completing a formal agreement that allows us to access their airspace for repairs and maintenance and the like."

237 Consultants or contractors engaged by the Murrells accessed the concrete roof of 97 Wentworth Road on or about 28, 29 and 30 May 2019, intruding into the Airspace on each occasion.[87]

238 On 4 June 2019, Mr Comino replied to Professor Murrell's letter of 27 May 2019.[88] Mr Comino's letter reiterated several times that the Murrells had not provided specific answers in the specific form previously required by the Owners Corporation, disputed that the work being undertaken on the roof was for the purpose of the repairs described in Professor Murrell's most recent correspondence and stated that Professor Murrell's conduct in causing or allowing his contractors to trespass into the Airspace on several occasions *"has created serious distrust as to your motives"*. The letter referred to the estimate of the Owners Corporation's costs as still being finalised. The letter set out a further list of demands that the Owners Corporation required to be met in order to *"properly consider your request for access for the carrying out of remedial work to the roof on 97 Wentworth Road"*, including:

(1) *"architectural and detailed construction plans of what you are proposing to construct on the roof of number 97"*; and

(2) written confirmation and undertaking that the Murrells, their contractors and consultants would not enter the Airspace *"**AT ALL** without express permission first sought from and given by the Owners Corporation"*.

239 I note that the effect of this letter was that the Owners Corporation withdrew its previous acknowledgement (in Mr Comino's 8 May 2019 letter) that part of the work that the Murrells sought to undertake on the roof involved repair works, required detailed plans for all of the work that the Murrells were proposing or considering carrying out on the concrete roof before it would even consider consenting to access, and was asserting that the Murrells did not have a right to access the roof for any purpose whatsoever. No explanation was given for the assertion that that the works did not involve repairs, when the Owners Corporation had previously acknowledged that part of the work did involve repairs. In my opinion, it was abundantly clear from this letter, together with the

[87] Affidavit of Wayne Howse sworn on 23 August 2019, paragraph 17; see also [167] above.
[88] Affidavit of George Murrell sworn on 6 February 2020, paragraph 52; Exhibit 1, pages 678–680.

prior correspondence to which I have referred above, that a detailed, time consuming and cumbersome process was involved in having the Owners Corporation even consider a request for consent to access the roof and enter the Airspace, irrespective of the purpose for which access was sought.

240 I also note that the distrust referred to in Mr Comino's letter of 4 June 2019 is consistent with sentiments expressed in an email from Mr Howse dated 29 May 2019 to an officer Woollahra Council, in which Mr Howse called on the Council to *"put a stop work order on this site"* and stated that *"Mr Murrell can not* [sic] *be trusted"*.[89]

241 On 5 June 2019, Professor Murrell wrote to Mr Comino in response to his 4 June 2019 letter.[90] Professor Murrell reiterated that the concrete roof was leaking and that he sought to prevent further water damage. He offered to meet with Mr Comino and representatives of the Owners Corporation together with his architect to show them the three options under consideration for the final surface material to be applied to the roof after waterproofing. He advised that he had engaged surveyors to assist with the roof repairs, and offered to provide documentation by them, once completed, to demonstrate that the completed works were below RL 26.00 AHD. Professor Murrell stated:

> "… I have previously noted that the Access to Neighbouring Lands Act states that costs are usually paid by the applicant with respect to obtaining access for the purpose of maintaining or repairing a property. To that end, I repeat the following offer: 'without prejudice, I am willing to pay your clients reasonable costs incurred by them since the erection of scaffolding to repair the roof and, going forward, for completing an agreement that allows us to access their airspace for repairs and maintenance and the like.' This would include the barrister's and surveyor's fees."

242 Consultants or contractors engaged by the Murrells entered the Airspace on 11, 13 and 27 June 2019.[91]

243 On 28 June 2019, Mr Comino wrote to Mr Murrell stating that he had continued to trespass into the Owners Corporation's property, and serving him with the

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[89] Affidavit of Wayne Howse sworn on 13 June 2019, paragraph 13; Exhibit 1, page 673.
[90] Affidavit of George Murrell sworn on 6 February 2020, paragraph 53; Exhibit 1, pages 681–682.
[91] Affidavit of Wayne Howse sworn on 23 August 2019, paragraph 17; Affidavit of Wayne Howse sworn on 13 June 2019, paragraph 8; see also [167] above.

summons filed that day (commencing the Owners Corporation proceeding) and an affidavit of Mr Howse sworn on 13 June 2019.[92]

244 On 3 July 2019, Mr Jason Hones of Hones Lawyers (solicitors acting for the Murrells) wrote to Mr Comino[93] stating that, from a review of the correspondence and the summons, it appeared that the Owners Corporation accepted that emergency work can be carried out by the Murrells notwithstanding that this would *"impinge upon"* the Airspace and the Owners Corporation wishes to know what emergency works are to be undertaken. The letter requested confirmation that Mr Hones' understanding accords with the Owners Corporation's position. The letter stated that the Murrells had instructed their workers and consultants not to access the roof until further notice (except for the purpose of removing tools) and continued:

> ".. to the extent that any works have been recently carried out, those works have been in the nature of essential emergency works, partially involving placing a new lip, treating, sealing and finishing of the concrete roof. Regrettably, that work has been hampered by poor weather.
>
> …[the Murrells'] consultants and contractors have scheduled to shortly carry out important exploratory and additional remedial work to address the previously identified issues with the roof and building. To that end, we respectfully request that those consultants and contractors be permitted access to your client's airspace this week for that important work. If it is of assistance, we can provide you with their names and likely times of work."

245 Ms Worth of Partridge Structural prepared a report addressed to the Murrells' architects and dated 4 July 2019.[94] Ms Worth referred to the Slab Scan report of 29 April 2019. Ms Worth's report noted that a minimum cover of 45mm to all external reinforcing bars would be recommended for an exposed concrete slab in a coastal exposure zone to achieve a 50 year design life, whereas Slab Scan had identified that external cover varied from 50mm down to only 10mm.

246 Ms Worth's report also stated that there were visual signs of corrosion to some of the exposed reinforcing bars and that, due to the age of the slab and insufficient cover to the bars, it was to be expected that there is further corrosion not yet visible. Failure of the roof slab due to corrosion of reinforcing

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[92] Affidavit of George Murrell sworn on 6 February 2020, paragraph 54; Exhibit 1, pages 698–699.
[93] Affidavit of George Murrell sworn on 6 February 2020, paragraph 55; Exhibit 1, pages 700–701.
[94] Affidavit of George Murrell sworn on 6 February 2020, paragraph 57; Exhibit 1, pages 704–708.

would likely be a brittle failure, and would therefore be a sudden collapse of the roof into areas below.

247 Ms Worth's report recommended that certain investigative works be undertaken urgently to confirm the extent of the corrosion and adequacy of the slab, and to reduce the risk of the slab collapsing. The report described these works as repairs that were critical to the structural integrity of the roof and that should be undertaken as soon as possible to avoid further loss of integrity and associated increase in remediation costs.

248 On 4 July 2019, Mr Comino replied to Hones Lawyers' letter dated 3 July 2019.[95] Mr Comino wrote:

> "… our clients advise that there are no tools on the roof of No 97 except for a single bucket which may contain tools. Our client's instructions are that one person can access the roof briefly solely to remove the bucket at a time approved in advance by our client and provided details of the identity of that person is provided.
>
> No further access of any kind will be granted to consultants and contractors referred to in the second last paragraph of your letter not least because, on the information provided, the work does not appear to be emergency work."

249 Mr Comino's letter requested *"sufficient information so as to satisfy our clients and this firm why the proposed work is emergency work"*, clarification of the Murrells' intentions concerning the removal of scaffolding and pipes that were said to be trespassing into the Airspace, and a response to the Owners Corporation's concerns that the Murrells *"may be delaying the roofing work due to a pending DA seeking to construct additional rooms at No 97 which will require access to our client's airspace and that your clients may well be proposing to gain access to our client's airspace in order to construct those new structures"*.

250 I note that the last mentioned concerns had not been raised in previous correspondence. However, the Owners Corporation did have some basis for apprehending that the Murrells were planning additional development work. As referred to above, development work had been in contemplation when Mr Standen and Mr Walford of Partridge Structural conducted their initial inspection of the concrete roof on 12 April 2019. On 4 August 2019, a building

[95] Affidavit of Wayne Howse sworn on 6 February 2020, paragraph 12; affidavit of George Murrell sworn on 6 February 2020, paragraph 56; Exhibit 1, pages 702–703.

certifier issued a complying development certificate (or **CDC**) to the Murrells for a development on Lot 21. In so far as it concerned the roof, the complying development involved the installation of a green or gravel surface on the existing concrete roof below the height of RL 26.00 AHD. The CDC stated that the Owners Corporation's approval would be required for workers to access the roof for the purpose of that part of the development work.[96] In addition, Woollahra Council issued development consent for a development application relating to Lot 21 on 8 November 2019.[97] However, this approval related to specific works within the dwelling and did not directly concern the concrete roof. There was no evidence to suggest that those works were likely to require access to the Airspace.

251 The dispute in Mr Comino's 4 July 2019 letter about whether the immediate need to access the roof related to *"emergency work"* or *"repairs"* had been raised in previous correspondence. As referred to above, Professor Murrell had provided information about leaks that occurred through the concrete roof, and resulting ceiling damage on 6 May and 27 May 2019, including photographic evidence of the damage. In my opinion, it was reasonably clear from the tone and contents of the correspondence emanating from Mr Comino by 4 July 2019 that no amount of information would satisfy the Owners Corporation that the works, or even part of the works, were intended to prevent further leaks and water damage.

252 On 19 July 2019, Mr Geoff French of My Building Certifier Pty Ltd wrote to the Murrells advising that their application for a complying development certificate had been registered and neighbours had been notified. The letter set out a list of arrangements that the Murrells would need to make prior to the issue of the certificate, including:[98]

> "Obtain and submit written consent from the Owners Corporation of SP 85044 to allow access to the common property to construct the proposed roof garden. Alternatively, obtain and submit a legal opinion confirming that no such consent is required."

[96] Affidavit of George Murrell sworn on 6 February 2020, paragraphs 58–59; Exhibit 1, pages 712, 740 and 750.
[97] Affidavit of George Murrell sworn on 6 February 2020, paragraphs 62–63; Exhibit 1, page 955.
[98] Exhibit 3.

253 On 22 July 2019, Mr Hones of Hones Lawyers sent a letter to the Murrells in the following terms:[99]

> "We note that you have sought our advice concerning whether or not you are required to obtain written consent of the Owners Corporation SP85044 to allow access to the common property to construct the proposed roof garden.
>
> Our advice follows.
>
> **Advice**
>
> The answer to your question can be answered quite concisely.
>
> The requirement for owners consent arises in relation to the question of carrying out work on "land".
>
> In this case, the only land on which work is to be carried out is your property. That is, there is not work being carried out on or to the common property of the owners corporation land.
>
> Accordingly, there is no requirement to obtain their consent for the purposes of your proposed CDC.
>
> That is not to say that there may not be some question later in relation to the ability to carry out that work. That is, there may be some requirement at some time in the future to negotiate access for the purposes of carrying out the work on your land however, that is a separate question to whether or not the owners corporations' [sic] consent is required to the making a valid CDC [sic]."

254 I interpolate to note that the final paragraph of the letter quoted above leaves unanswered the very question posed in the first paragraph of the quote. I infer that the Murrells' failure to obtain a legal opinion confirming that the Owners Corporation's consent was not required is the reason why the CDC stated that the Owners Corporation's approval would be required for workers to access the concrete roof for the purpose of that part of the development work.[100]

255 The Murrells advised the Owners Corporation of their plans to create a "green roof" garden on or about 25 July 2019, before the CDC was issued on 4 August 2019.[101]

256 The Murrell proceeding was commenced on 25 September 2019.

257 Mr Walford of Partridge Structural prepared a report addressed to the Murrells' architects and dated 29 October 2019.[102] The report provided an update on the condition of the concrete roof. The report noted that no remedial work had

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[99] Affidavit of Wayne Howse sworn on 6 February 2020, paragraph 13; Exhibit 1, pages 710–711.
[100] See [250] above.
[101] Affidavit of Wayne Howse sworn on 23 August 2019, paragraphs 10–11.
[102] Affidavit of George Murrell sworn on 6 February 2020, paragraph 60; Exhibit 1, page 948.

been undertaken since Ms Worth's 4 July 2019 report, but additional propping had been installed in order to assist with reducing the impact of development works on the roof structure. The report reiterated that the exact condition of the slab and extent of corrosion was unknown, such that the slab posed an "unnecessary risk" to those underneath the concrete slab.

258 In cross-examination, Mr Walford explained the sense in which he used the term *"unnecessary risk"* in this report and in his expert report prepared for these proceedings dated 24 January 2020. Mr Walford explained that, ordinarily, the integrity of the concrete roof would be fully investigated and any necessary repairs undertaken before development works were carried out underneath the roof. In this case, those investigative and repair works had not been undertaken, and the roof had instead been supporting by propping so that people could work underneath it for the purpose of the development. Whilst this reduced the risk to a sufficient level to permit people to work under the roof, it still involved a higher level of risk than would exist in the ordinary situation where investigative and remedial work was undertaken on the roof prior to work commencing under the roof. In that sense, the risk was *"unnecessary"*. The propping appeared to be adequate, but he had limited data and information about the roof and *"we don't know what we don't know"*.

259 Mr Walford's report dated 29 October 2019 repeated the recommendation in Ms Worth's 4 July 2019 report that works be undertaken urgently to confirm the extent of the corrosion and adequacy of the slab. As I understand it, the works recommended are substantially the same investigative and repair works recommended in Ms Worth's report, with the extent of the repair work being dependent on the outcome of the investigative work. Mr Walford reiterated the statement in Ms Worth's report that these works were critical to the structural integrity of the roof and that should be undertaken as soon as possible to avoid further loss of integrity and associated increase in remediation costs.

260 On 8 November 2019, Mr Christopher Ters of Hones Lawyers wrote to Mr Comino enclosing a copy of Mr Walford's report dated 29 October 2019 and

a complete copy of the CDC.[103] The letter stated that a copy of Ms Worth's report dated 4 July 2019 had previously been provided to Mr Comino. The letter requested the Owners Corporation's consent for the Murrells' contractors and consultants to enter the Airspace for the purpose of carrying out the urgent investigative and repair works recommended in the Partridge Structural reports dated 4 July and 29 October 2019 (without admitting that such consent was necessary). The letter stated:

> "As is manifest from the Partridge reports, there is a real and ongoing risk to the safety of persons on our clients property as a result of the current condition of the concrete roof slab, and the nature of that risk – including the grave consequences that would flow if that risk were to materialise – means that the proposed repair works must be carried out without further delay. In particular, it is clear that the proposed works cannot await the hearing of the proceedings in April 2020 and the delivery of judgment in the matter at some subsequent date.
>
> We note that the Owners Corporation has expressly identified that it does *not* oppose access to the airspace above RL 26 for the purpose of carrying out emergency works. The words recommended by Partridge clearly fall within that description. Our clients are prepared to agree to reasonable conditions on access, including designated hours and such other conditions as might reasonably be required, whilst allowing for the repair works to proceed in a manner that is efficient, necessary (having regard to the condition of the roof) and appropriate (having regard to the risk posed by the roof in its current condition)."

261 The letter requested confirmation with 14 days that the Owners Corporation consented to access to the Airspace for the purpose of those repair works. The letter concluded that, if such consent was not forthcoming, Hones Lawyers anticipated being instructed to file an interlocutory application for urgent orders to facilitate the early performance of those works.

262 I interpolate to note that Mr Ters' letter of 8 November 2019 represents the first occasion since they purchased 97 Wentworth Road in November 2018 on which the Murrells had sought the consent of the Owners Corporation before accessing the Airspace. It is clear from Professor Murrell's affidavit sworn on 7 April 2020 that he was well aware that, on the previous occasions when his contractors had accessed the concrete roof and entered into the Airspace, they had done so without the permission of the Owners Corporation.[104]

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[103] Affidavit of Wayne Howse sworn on 6 February 2020, paragraph 14; affidavit of George Murrell sworn on 6 February 2020, paragraph 61; Exhibit 1, pages 952–954.
[104] Affidavit of George Murrell sworn on 7 April 2020, paragraph 10.

263 On 21 November 2019, Mr Comino replied to Mr Ters' letter of 8 November 2019, strenuously denying that the Owners Corporation was responsible for any risk to the safety of persons undertaking development work on Lot 21 and maintaining that, if the contentions in the Partridge Structural reports had any substance, then it was the Murrells who were placing the safety of those persons at risk by allowing work to proceed on the site under the allegedly unsafe concrete roof, including the use of jackhammers.[105] The letter stated that it had always been the Owners Corporation's position that it did not oppose access for the purpose of carrying out emergency works, and continued:

> "On behalf of the Owners Corporation, we are instructed to advise that they agree to consent to the performance of the investigatory and repair works of an emergency nature subject to the following conditions:
>
> 1. Access is granted to the area above the existing roof only;
>
> 2. This access is to be used to undertake necessary repairs to the existing roof only and not to facilitate construction to any other area of the site;
>
> 3. Your client immediately prevent access to all workmen to any area of the site that you or your client claim could pose a risk if any of the consequences outlined in the Partridge report were to materialise.
>
> 4. The days and hours during which work is to be carried out are to be determined in consultation with Peter Bakaric, Wayne Howse and Hanoch Neishlos of the Owner's Corporation.
>
> 5. Other relevant conditions as are negotiated between our client Owner's Corporation and your clients."

264 On 26 November 2019, Mr Ters replied to Mr Comino's letter of 21 November 2019,[106] advising that the Murrells accepted conditions 1, 2 and 4 in the 24 November 2019 letter and requesting details of the further conditions proposed by the Owners Corporation in relation to condition 5. In relation to condition 3, Mr Ters' letter stated that the works currently being undertaken at 97 Wentworth Road were in accordance with various approvals obtained by the Murrells and *"are being undertaken under the supervision and direction of engineers"*. In other words, the Murrells did not agree to the Owners Corporation's condition 3, which would have required them to prevent workmen

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[105] Affidavit of Wayne Hose sworn on 6 February 2020, paragraph 15; affidavit of George Murrell sworn on 6 February 2020, paragraph 64; Exhibit 1, pages 990–992.

[106] Affidavit of Wayne Howse sworn on 6 February 2020, paragraph 18; affidavit of George Murrell sworn on 6 February 2020, paragraph 65; Exhibit 1, page 997.

from accessing some areas of the construction site on Lot 21 pending completion of the work recommended by the Partridge Structural reports.

265 On 27 November 2019, Mr Comino replied to Mr Ters' letter of 26 November 2019, stating:[107]

> "Your recent correspondence avoids the reference to the investigatory and repair works being 'of an emergency nature'. Access is conditional on those works being referable to their being necessitated by reference to being of an emergency nature. You will recollect that we have not, nor has our client's advisor who is an engineer, accepted the claims as to risks raised in the Partridge Report.
>
> As you will know, our client has not withheld access for this purpose and it is not a matter of 'simply waiting for your client to provide its consent to facilitate this'. Because of the many acts of trespass and carrying out of works within our client's air space without being given prior notice or obtaining consent from our client over an extended period of time, this is why the question of access must be subject to conditions as to times, dates, hours and nature of those works. …
>
> We will respond to you with the conditions and other matters raised in your letter of 26 November shortly on receipt of our client's instructions."

266 On 29 November 2019, Mr Comino sent a further letter to Mr Ters concerning conditions of access to the Airspace.[108] The letter stated:

> "We repeat that our clients have always been prepared for your clients to access and repair the existing concrete roof of no. 97.
>
> Our client Strata Scheme has asked on numerous occasions what these works would entail and for Murrell to provide an undertaking that no 'improvements' or structures will be placed into our client's airspace on a permanent basis.
>
> Your clients have not complied with this request and have sought to extend the Works well beyond the scope of remediation and repairs.
>
> On behalf of our clients we reiterate their willingness to allow your clients access to repair the 'existing' roof so as to avoid the alleged danger and emergency under which your clients purport to put us on notice of a potential damages claim if and when this roof might collapse or otherwise cause injury as a consequence of the matters alleged in the Partridge Report and in correspondence with your Firm."

267 The letter then set out the following terms and conditions of the Owners Corporation's consent to the Murrells accessing the Airspace (in addition to conditions 1 to 4 set out in Mr Comino's letter of 21 November 2019, which are reproduced [263] above):

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[107] Affidavit of Wayne Howse sworn on 6 February 2020, paragraph 19; affidavit of George Murrell sworn on 6 February 2020, paragraph 66; Exhibit 1, pages 999–1000.

[108] Affidavit of Wayne Howse sworn on 6 February 2020, paragraph 20; affidavit of George Murrell sworn on 6 February 2020, paragraph 67; Exhibit 1, pages 1001–1003.

> "1. Works to be limited to repair works only;
>
> 2. The carrying out of those works should be completed within a maximum time limit of two months;
>
> 3. No permanent structures or planting that have the potential of breaching or intruding into our client's airspace are to be installed as part of the repair work and this also applies to any electrical or plumbing works;
>
> 4. Work not to commence until 9am;
>
> 5. Preservation of views from Unit 1 in the Strata Scheme which may require moderate structural redesign;
>
> 6. The electrical cable which has been upgraded by your client's contractors has created an additional obstruction to the views from Unit 1 in the Strata Scheme. That cable should be connected to one of the poles across number 97 Wentworth Road and not across the outlook from or over any part of the Owner's Corporation's property."

268 I note that the 29 November 2019 letter does not suggest that the matters referred to in conditions 5 and 6 above are necessary to cease or avoid intrusion into the Airspace, and there is no evidence to suggest that this was the case. The Owners Corporation was endeavouring to use the negotiation concerning access to the roof for investigatory and repair work in order to obtain changes to the approved development works being conducted on Lot 21 for the benefit of the Owners Corporation or the owner of Unit 1.

269 Mr Ters sent an email to Mr Comino on 29 November 2019 asking for clarification of the structural redesign requested in condition 5.[109] Mr Comino replied on 2 December 2019, stating that the "*request was to modify the construction so as to preserve some view from unit 1 in our Client's Strata Scheme"*.[110] Mr Ters replied on the same day, asking: *"are we to assume that if condition 5 is not accepted by our Clients, namely that our Clients do not agree to redesign their development, that access to the roof space to undertake repairs will not be granted by your client?"*[111] Mr Comino replied later that day, stating: *"No, that condition will not prevent access to undertake repairs to the roof although the impact will be significant on unit 1."*[112]

270 On 3 December 2019, Mr Ters wrote to Mr Comino in the following terms:[113]

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[109] Affidavit of George Murrell sworn on 6 February 2020, paragraph 68; Exhibit 1, pages 1004–1005.
[110] Affidavit of George Murrell sworn on 6 February 2020, paragraph 69; Exhibit 1, pages 1006–1007.
[111] Affidavit of George Murrell sworn on 6 February 2020, paragraph 70; Exhibit 1, pages 1008–1010.
[112] Affidavit of George Murrell sworn on 6 February 2020, paragraphs 71–74; Exhibit 1, pages 1015–1017.
[113] Affidavit of George Murrell sworn on 6 February 2020, paragraph 75; Exhibit 1, pages 1022–1023.

> "By registration of Deposited Plan 871094, the area above RL 26 over part (approximately 537.94 sqm) of No. 97 (**Airspace**) was transferred to 95 Wentworth Avenue, Vaucluse (**No. 95**) with the area below RL 26 continuing to form part of No. 97. There is a concrete flat roof (**Concrete Roof**) directly below RL 26 belonging to the dwelling on No. 97.
>
> As you are also aware, our Clients require an easement directly above the Concrete Roof limited in stratum to between RL 26 and RL 28 for access and repair (**Easement**). We attach a marked up copy of a spatial image that depicts (in yellow) the area of the Easement.
>
> The purpose of the Easement will be for our Clients (and anyone instructed by them) to undertake necessary works in accordance with the Complying Development Certificate issued on 4 August 2019 and for our Clients (and any successors in title) to undertake present and future repairs and maintenance to the Concrete Roof.
>
> **Offer for Easement**
>
> In accordance with s 88K of the *Conveyancing Act 1919* (NSW), our Clients are willing to offer your client the sum of $10,000.00 for the grant of the Easement, together with the reasonable legal costs incurred by your client concerning the negotiation and the grant of the Easement."

271 The area of the proposed easement marked on the attachment to the letter dated 3 December 2019 is the whole of the area of the concrete roof.

272 Mr Ters' letter of 3 December 2019 was the first occasion on which the Murrells requested an easement to permit them to enter into the Airspace, although they had sought to enter into an agreement with the Owners Corporation in May and June 2019 to permit them to access the Airspace for the purpose of repairs, maintenance *"and the like"*, and they had also requested consent to enter the Airspace on 8 November 2019 as referred to above.

273 On 6 December 2019, Mr Ters wrote a further letter to Mr Comino enclosing a site inspection certificate issued by Partridge Structural on 4 December 2019 which stated, *inter alia*, that:[114]

> "The temporary bracing and propping of the existing RC slab have also been reviewed in light of the progressed construction works and we deem the number, location and type of props etc. to be appropriate for this stage of construction."

274 Mr Ters' letter also stated that the Master Builders Association had also inspected, and been satisfied with, the construction site.

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[114] Affidavit of Wayne Howse sworn 6 February 2020, paragraph 22; affidavit of George Murrell sworn 6 February 2020, paragraph 76; Exhibit 1, pages 1025–1026.

275 On 12 December 2019, Mr Ters sent an email to Mr Comino requesting confirmation that the entirety of the conditions that the Owners Corporation seeks in order to permit the Murrells to access the Airspace are conditions 1 to 4 in Mr Comino's letter of 29 November 2019 and conditions 1 to 4 in his letter dated 21 November 2019.[115] Mr Ters sent a further email on 17 December 2019 requesting a response to his email of 12 December 2019.[116]

276 On 18 December 2019, Mr Ters sent a further email to Mr Comino advising that the Murrells' engineers required access to the Airspace during the first week of January 2020 for the purpose of exploratory work such as half-cell testing of the concrete slab (being work recommended in the Partridge Structural reports of 4 July and 29 October 2019). The precise date and time proposed for the work was to be advised shortly. Mr Ters asked whether, in light of Mr Comino's correspondence of 26 and 29 November 2019, the Owners Corporation agreed to permit this access to the Airspace.[117]

277 Despite a follow up email on 13 January 2020, Mr Comino did not respond to Mr Ters' emails of 12, 17 and 18 December 2019, or to the Murrells' offer concerning the proposed easement on 3 December 2019.[118] In cross-examination, Mr Howse said that, in December 2019, the Owners Corporation was not prepared to grant the Murrells an easement *on any terms*.[119]

278 Mr Walford prepared an expert report dated 24 January 2020, which was annexed to his affidavit sworn for the purpose of these proceedings on 7 February 2020. I assume that it was served on the Owners Corporation on or about 7 February 2020. The expert report states that it is to be read together with the reports prepared by Ms Worth and Mr Walford on 4 July 2019 and 29 October 2019, which had previously been provided to the Owners Corporation as referred to above.

279 In his expert report, Mr Walford recorded that he had been informed that the neighbours of 97 Wentworth Road had not permitted access to the concrete

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[115] Affidavit of Wayne Howse sworn on 6 February 2020, paragraph 23; affidavit of George Murrell sworn on 6 February 2020, paragraph 77; Exhibit 1, page 1027.
[116] Affidavit of George Murrell sworn on 6 February 2020, paragraph 78; Exhibit 1, page 1029.
[117] Affidavit of George Murrell sworn on 6 February 2020, paragraph 79; Exhibit 1, pages 1035–1037.
[118] Affidavit of George Murrell sworn on 6 February 2020, paragraph 80.
[119] Transcript, page 207 (lines 14–19).

roof, and that the work recommended in his 28 October 2019 report had therefore not been carried out. He stated that the visible condition of the roof did not appear to have worsened since his inspection on 12 April 2019, but emphasised that he could not give an accurate or definitive assessment of the state of the roof without the recommended investigation works to determine the actual extent of the corrosion damage. He stated that persons below the roof in its present condition were at unnecessary risk (in the sense explained during cross-examination, as referred to above) and that numerous precautions, including propping, had therefore been taken to support the roof during development works until the slab condition can be assessed and any necessary repairs made.

280 Mr Walford's report continued:[120]

> "In order to bring the concrete roof back into a satisfactory state of repair I am of the opinion that we first need to establish the extent of corrosion so that we can determine whether it is economically feasible to repair the slabs OR whether reconstruction (wholly or in part) may be the best option. My assessment in this regard would be reliant on the extent of the corrosion, the likely life of any patch repairs and/or the accessibility of any areas directly adjacent to these repairs (the likely location of future corrosion activity).
>
> In order to assess the extent of repairs required in accordance with the above, I have previously recommended that a non-destructive half-cell potential survey/investigation be conducted to highlight areas of corrosion activity…
>
> Once this has been conducted, and on the assumption that repairs are viable, conventional concrete repairs would need to be carried out from both above and below the slab. The concrete repair methodology that I recommend for this purpose is set out in my report at Appendix B. [Again, this is a reference to Mr Walford's report dated 29 October 2019.]
>
> …
>
> Based upon the cracks identified in the top surface of the slab, the observed instances of corrosion and the expected extent of concealed spalling, I am certain that access to the roof above RL26 is required in order to repair the slabs economically i.e. without having to demolish entire sections of slab from below in order to just replace them anyway."

281 Mr Walford's expert report also referred to the likely need to access the concrete roof to carry out repairs in the future due to the possibility that sections not presently in need of repair may suffer corrosion in the future.

282 Mr Walford's expertise was not in dispute. It was not put to him in cross-examination that the condition and structural integrity of the concrete roof could

[120] Affidavit of Tadd Walford sworn on 7 February 2020, Annexure "A" (page 5).

be assessed or the extent of necessary remedial works determined without the investigative works that he and Ms Worth had recommended. Nor was it put to him that such investigative works were unlikely to reveal further corrosion or a requirement for remedial works. Nor was it put to him that that propping was unnecessary for the safety persons under the roof, pending those investigative works being carried out and any necessary remedial works being undertaken. Nor was any challenge raised to Mr Walford's concrete repair methodology, or to his evidence that repair works would need to be carried out from both above and below the concrete slab and that access to the concrete roof above RL 26.00 AHD would be required.

283 The Owners Corporation did not adduce any expert evidence contradicting Mr Walford's evidence.

284 I accept Mr Walford's evidence.

285 In closing submissions, the Owners Corporation sought to characterise Mr Walford's evidence about *"unnecessary risk"* as referring to more risk than was *ideal* because work that would *eliminate* the risk had not been undertaken. I reject this characterisation of Mr Walford's evidence. The submission downplays the risk in a manner that does not fairly and accurately reflect the substance of Mr Walford's evidence as a whole. Mr Walford described the approach that would *ordinarily* be adopted of investigating the structural integrity of the roof and carrying out any necessary remedial work before allowing people to work underneath it, rather than the approach adopted on Lot 21 of allowing them to work under the roof with propping and without investigation or remediation. He referred to the latter approach as involving a higher level of risk than the ordinary situation and therefore *unnecessary* risk.

286 The Owners Corporation submitted that:

> "The evidence of the Murrells' engineer, Mr Walford, shows nothing more than the fact that he did not know the current state of the roof and, ideally, he would like to have performed further investigations. … it appears that these investigations were for the purpose of determining whether the structural integrity of the roof was adequate to support the proposed redevelopment as opposed to out of any concern that it was imminently to collapse."

287 I reject these submissions.

288 Mr Walford's evidence showed that there is visible evidence of corrosion and that it is important to undertake further investigations in order to ascertain the extent of the corrosion, the structural integrity of the roof and whether there was a risk of collapse.

289 The evidence does not support the Owners Corporation's contention that the risk of collapse arose only in connection with the development work. On the contrary, Ms Worth's report stated that it was *to be expected that there is further corrosion* not yet visible, having regard to the visual signs of corrosion, the age of the slab and insufficient cover to the reinforcing bars (as identified in the Slab Scan investigation). It is in the context of the expected existence of that further corrosion that Ms Worth referred to the risk of brittle failure of the slab due to corrosion, resulting in a sudden collapse of the roof into areas below.

290 In his expert report, Mr Walford expressed the opinion that *"any persons below the roof in its current condition are subject to unnecessary risk"*. Propping had been installed for the protection of persons present underneath the roof for the purpose of the development works. In circumstances where no one is living in underneath the roof whilst the development is progressing,[121] it is unsurprising that the safety of workers was the immediate concern and is specifically referred in the reports. However, there is no evidentiary basis for the Owners Corporation's submission that, but for the development works, persons present underneath the roof would not be at unnecessary risk due to the unknown extent of corrosion.

291 The Owners Corporation's submissions emphasised that Mr Walford said in cross-examination that any risks that were present were adequately addressed by the propping up of the roof. Mr Alford did say that the present status quo (i.e. the propping of the roof) was adequate, but the Owners' Corporation's submission ignores the qualification that immediately followed that answer:[122]

> "Based upon data we have, which is limited … with the data that we know based upon the existing structure and what we can see, it appears to be

[121] This is clear from the photographic evidence in Exhibit 2.
[122] Transcript, page 177 (lines 43–50).

> adequate but, as I said, it's because we don't know what we don't know… That's the biggest risk with this whole – whole scenario."

292 As is clear from Mr Walford's expert report, and his earlier report of 29 October 2019 and report of Ms Worth dated 4 July 2019 referred to in his expert report, *"what we don't know"* is the condition of reinforcing bars that are concealed within the concrete slab.

293 The Owners Corporation's submissions also pointed to Mr Walford's evidence that there had been no visible change in the condition of the concrete roof between his first inspection on April 2019 and his report dated 23 January 2020. However, this sheds no light on the condition of the reinforcing bars which cannot be seen, and which are the basis for the further investigatory work recommended by Partridge Structural since July 2019.

294 In his affidavit sworn on 6 February 2020, Mr Howse deposed:[123]

> "At all times the [Owners Corporation] has been ready, willing and able to grant reasonable access to its airspace to allow the [Murrells] to maintain and repair as necessary their structures being the roof on 97 Wentworth Road. The [Owners Corporation] has not sought to prevent access to the airspace above the roof of number 97 Wentworth Road provided appropriate arrangements for access are put in place."

295 I reject Mr Howse's characterisation of the Owners Corporation's conduct. As the chronological account above reveals, by early May 2019, the Owners Corporation was making demands for information in a level of detail and specificity that was plainly unrealistic having regard to the nature of the work involved. The Owners Corporation was insisting that those demands be met before it would even consider permitting the Murrells' to enter the Airspace for the purpose of undertaking any repair work on their concrete roof. The Owners Corporation maintained this stance, notwithstanding the Murrells' efforts to provide information and their explanation of the reasons why certain additional information could not be provided. This continued even after the Owners Corporation acknowledged that some of the works that the Murrells wanted to undertake were repairs to the roof. Offers made by Professor Murrell for meetings, including an offer to meet and show the Owners Corporation the options under consideration for the final surface treatment of the roof overlooked by the Unit Owners, were not taken up. As Mr Howse said in cross-

[123] Affidavit of Wayne Howse sworn on 6 February 2020, paragraph 6.

examination, the Owners Corporation was not willing to grant an easement to the Murrells on any terms.

296 As the continuing chronology below reveals, the arrangements that the Owners Corporation considered to be *"appropriate"* for the Murrells to have access to their roof put very tight constraints on that access that were likely to prove highly problematic over the course of time, and possibly even in the short term future.

297 On 25 March 2020, Mr Comino wrote to Mr Hones offering to settle the Owners Corporation proceeding on terms that would permit the Murrells to access the Airspace directly over the concrete roof between RL 26.00 AHD and RL 28.00 AHD for the purpose of the Murrells undertaking *"necessary works in accordance with the complying development certificate issued on 4 December 2019 … and for your clients and any successors in title to undertake present and future repairs and maintenance of the concrete roof of no. 97 Wentworth Road, Vaucluse"* on seventeen terms and conditions to be recorded in a deed, including:[124]

> "7. The repair and maintenance works proposed, insofar as they relate to the roof garden ("the works"), are to be performed no more and no less frequently than every three months and only when necessary;
>
> …
>
> 12. The duration of any period where persons are on the roof for such works shall not exceed one hour in any day;
>
> …
>
> 15. All proceedings between Murrell and SP 85044 be dismissed/ discontinued;
>
> …
>
> 17. Your clients will not pursue the granting of a permanent easement into the airspace of SP 85044 for any purpose."

298 In my opinion, these conditions would have been of concern to any reasonable owner of Lot 21, particularly having regard to the Owners Corporation's attitude that it had maintained throughout the history of discussions since November 2018. The internal inconsistency within the terms of proposed condition 7 created a fertile ground for dispute about whether repairs and maintenance that

[124] Affidavit of John Comino sworn on 27 April 2020 (containing nine paragraphs), Annexure "B".

were necessary could be undertaken if previous repair and maintenance work had been undertaken less than three months previously. When condition 7 is read together with condition 12, it becomes readily foreseeable that one hour of repair and maintenance work no more frequently than once every three months may very well prove inadequate for a concrete roof constructed in 1960. This is particularly so, bearing in mind the investigative work recommended by Partridge Structural in July and October 2019, which is yet to be undertaken and may identify the need for extensive remedial work to ensure the ongoing structural integrity of the roof. It appears from condition 17 that the Owners Corporation was maintaining the stance it had taken when the Murrells first sought an easement in December 2019, namely that the Owners Corporation would not grant an easement *on any terms.*

299 If the Murrells had accepted the Owners' Corporation's offer, they would not only have had to accept the risk of the limited rights to access for repairs and maintenance under conditions 7 and 12 proving inadequate, but would also have been promising not to make any future application for an easement under s 88K *for any purpose* including any extensive repairs that may prove to be necessary or for the purpose any improvements to the concrete roof.

300 On 24 April 2020, Mr Ters wrote to Mr Comino stating:[125]

> "We refer to previous correspondence sent by our clients endeavouring to resolve the dispute between the parties, including the letters dated 9 May 2019, 27 May 2019, 5 June 2019 from Prof. Murrell to your client's solicitor Mr Comino, as well as the letter dated 3 December 2019 from Hones Lawyers to Mr Comino (copy enclosed).
>
> In accordance with section 88K of the *Conveyancing Act 1919* (NSW), our clients are willing to reopen their offer of $10,000 made to your client on 3 December 2019 for the grant of the Proposed Easement, together with the reasonable legal costs incurred by your client concerning the negotiation and the grant of the Proposed Easement.
>
> We set out below the additional details in relation to the Proposed Easement.
>
> On the applicable RP form:
>
> (a) The transferor will be the Owners Corporation and the transferee will be Deirdre Frances Murrell and George Anthony Calvert Murrell.
>
> (b) The servient tenement will be Part Lot 22 DP 871094 (now known as SP 85044/CP DP 85044) and the dominant tenement will be Part Lot 21 DP 871094 (now known as Part Lot 1 DP 1254483).

[125] Affidavit of John Comino sworn on 27 April 2020 (containing nine paragraphs), Annexure "C".

> (c) The easement will be described in an easement for access to the airspace above the horizontal plane at RL 26 AHD on the terms set out in Annexure A.
>
> Annexure A will be as follows:
>
> (a) The owner for the time being of the dominant tenement is permitted to access the airspace of the servient tenement above the horizontal plan at RL 26AHD as reasonably necessary and on a temporary basis, for the purpose of repairing, maintaining and/or improving any structure on the dominant tenement that exists below that height.
>
> The terms of the Proposed Easement sought are substantially the same as sought in our clients' Summons filed in the Supreme Court on 25 September 2019. However, we have included some further words by way of clarification in order to address the issue raised in your clients' submissions served on 23 April 2020 at [43], so as to make it abundantly clear that access is only sought 'on a temporary basis'.
>
> …
>
> Please note that if there are any aspects in relation to the form of the Proposed Easement that you see appropriate to modify, then we are instructed by our clients to accommodate those modifications as much as possible."

301 Mr Comino replied to this offer on behalf of the Owners Corporation by letter dated 27 April 2020.[126] The letter stated that neither the 3 December 2019 or 24 April 2020 offers constituted reasonable attempts by the Murrells to obtain an easement for the purpose of s 88K(2)(c) of the *Conveyancing Act* because:

(1) the offers were made after the proceedings were commenced;

(2) the offers did not include withdrawal of the Murrells' alternative claims for relief in the proceedings (namely, the declarations concerning the proper construction of the Restriction and the claim for relief under s 89 of the *Conveyancing Act*);

(3) the quantum offered did not include a component for legal costs (including the costs of the proceedings); and

(4) the compensation offered of $10,000 offered was inadequate because the loss of amenity suffered by Unit Owners (as opposed to the Owners Corporation) was *"relevant and indeed central for the purposes of the word 'compensation' in s 88K(2)(d) and s 88(4)"*.

302 The hearing of these proceedings was conducted on 28, 29 and 30 April and 14 May 2020.

303 On 29 April 2020, the Murrells made a further offer to the Owners Corporation by letter from Mr Ters to Mr Comino. The offer was in the same terms as the

[126] Affidavit of John Comino sworn on 27 April 2020 (containing nine paragraphs), Annexure "D".

offer made on 24 April 2020, save that the compensation offered was increased to $20,000 and the offer to pay the Owners Corporation's reasonable legal costs expressly included its costs incurred in connection with the application under s 88K in these proceedings.[127]

Consideration and determination: cause of action in trespass

304 It is not in dispute that, during the period relevant to the claim in trespass (November 2018 to June 2019), the Owners Corporation was in exclusive possession of the Airspace. Nor is it in dispute that the Murrells, or contractors acting as their servants or agents, entered the Airspace on multiple occasions during that period without the Owners' Consent and that these were voluntary acts. Accordingly, the three elements of a cause of action in trespass are established.[128]

305 The issues raised by the Murrells' defence of the claim in trespass are:[129]

(1) whether the Murrells' entries into the Airspace were permitted under the terms of the Restriction, properly construed, and therefore did not constitute trespass;

(2) alternatively, whether the Murrells' entries into the Airspace were permitted by an implied easement of necessity, and therefore did not constitute trespass; and

(3) alternatively, whether the Murrells' entries into the Airspace were reasonably necessary for the purpose of performing emergency remedial works to the flat concrete roof of 97 Wentworth Road to avoid an imminent danger to persons or property.

306 For the reasons explained under Issue 1 above, the Restriction, properly construed, did not include a covenant permitting the Murrells to enter the Airspace on a temporary or transitory basis in order to repair, maintain and/or improve the roof. (This assumes, in favour of the Murrells, that Owners Corporation's title to the Airspace remains subject to the Restriction, as to which see Issue 2 above.) The Murrells have therefore failed to establish the first basis of their defence to the claim in trespass.

307 The Murrells have also failed to establish the second basis of their defence to the claim in trespass. For the reasons explained under Issue 4 above, the

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[127] Exhibit 4.

[128] See [142] above.

[129] See [33]–[41] above; Murrells' closing written submissions dated 13 May 2020, paragraphs 160–164.

Murrells do not have the benefit of an implied easement of necessity that is enforceable against the Owners Corporation.

308 It remains to consider the third basis of the defence: namely, the defence of necessity.

309 The Murrells have a defence of necessity to the claim in trespass in respect of their entries into the Airspace only if and to the extent that they entered into the Airspace for the purpose of taking steps that were *reasonably necessary* to address a situation of *immediate* danger or *imminent* peril, and provided that the situation had not arisen as a result of their own negligence.[130]

310 It is convenient to set out in full what was said by Leeming JA (with the concurrence of Macfarlan JA and Sackville AJA) in *Simon v Condran* (*supra*) at [33]–[34]:

> "33. It was common ground that the common law recognised a defence of necessity to conduct which otherwise would amount to trespass to land: *Proudman v Allen* [1954] SASR 336, *Esso Petroleum Co Ltd v Southport Corporation* [1956] AC 218 and *Rigby v Chief Constable of Northamptonshire* [1985] 2 All ER 985. In *Rigby*, Taylor J held that a "defence of necessity is available in the absence of negligence on the part of the defendant creating or contributing to the necessity" (at 995). His Lordship quoted *Winfield and Jolowicz on Tort*, 12th ed (1984) at 722:
>
> > "Necessity negatives liability in tort provided, of course, that the occasion of necessity does not arise from the defendants own negligence, though the authority on it is scanty."
>
> and Salmond and Heuston on the Law of Torts, 18th ed (1981) at 465:
>
> > "In any case, the defence [of necessity] is hardly available if the predicament in which the defendant found himself was brought about by his own negligence."
>
> (Those passages appear, essentially unchanged, in the most recent editions of both texts: see WVH Rogers, *Winfield and Jolowicz on Tort*, 18th ed (2010) Sweet & Maxwell at 1168 and RFV Heuston and RA Buckley, *Salmond and Heuston on the Law of Torts*, 21st ed (1996) Sweet & Maxwell at 469. There is no occasion, given the parties' approach, to take the matter any further.)
>
> 34. In that way, the principal issue at trial and on the appeal was whether Ms Simon was "negligent". But that issue as framed needs to be understood in a particular way: was Ms Simon negligent so that it could be said that her negligence created the occasion for her needing to travel onto her neighbour's land, thereby denying to her what would have been a defence of necessity? It was not an issue which attracted the *Civil Liability Act* (because Ms Simon's underlying claim was one for statutory liability not based on a failure to take

[130] See the authorities cited in [132(2)] above.

reasonable care). It was not necessary for there to be a finding of duty, or of loss."

311 In my opinion, it is clear from the evidence summarised in [186]–[303] above that the circumstances in which the Murrells (or their consultants and contractors) entered the Airspace during the period from November 2018 to June 2019 did not involve immediate danger or imminent peril to property or persons in the period until about 3 May 2019. On the contrary, the evidence reveals that entries into the Airspace during that period were for the purpose of:

(1) removal of the waterproof membrane from the roof on 9 April 2019 for the purpose of investigating the state of the roof in order to:

(a) determine its adequacy for a proposed redevelopment of Lot 21, including the potential creation of a green roof on the flat concrete roof; and

(b) determine its adequacy more generally, in light of the Murrells' concerns about the age of the dwelling, water pooling on the roof and potential collection of water between the surface of the roof and the existing membrane; and

(2) initial inspection by engineers Partridge Structural on 12 April 2019 following the removal of the waterproof membrane for the purpose of discussing the design for the proposed development and advising on the structural adequacy of the roof more generally and any necessary repairs (which Partridge Structural subsequently did in their reports dated 4 July 2019 and 29 October 2019); and

(3) possibly (the evidence is not clear about this) ongoing investigations for the purpose of the proposed re-surfacing of the concrete roof (in respect of which the Murrells had decided by at least the end of July 2019 would be a green roof).

312 In relation to the Murrells' general concerns about the adequacy of the concrete roof to which I have referred above, there is no evidence that any of these concerns were indicative of immediate danger or imminent peril, as opposed to matters that reasonably required investigation in a timely and orderly manner. I note that Professor Murrell says that he had held these concerns since the Murrells purchased Lot 21 in November 2018. However, the first evidence of steps being taken to investigate those concerns is the inspection undertaken by Partridge Structural on 12 April 2019. The five month delay confirms, in my opinion, that these concerns did not indicate any immediate danger or imminent peril of the kind that would give rise to a defence of necessity to the Owners Corporation's claim in trespass.

313 However, from about 6 May 2019, there had been damage to a ceiling within the dwelling on Lot 21 as a result of water penetrating the concrete roof and there was an imminent risk of further damage in the event of further wet weather, noting that the timing of wet weather is inherently unpredictable even with the benefit of forecasts. Further damage did in fact occur on or about 17 May 2019.

314 Contractors or consultants engaged on behalf of the Murrells accessed the concrete roof and entered the Airspace on six occasions after 6 May 2019: on 28, 29 and 30 May and on 11, 13 and 27 June 2019. The evidence does not reveal the purpose for which they accessed the roof on each of those occasions, but I infer that it is likely that at least some of those entries were for the purpose of repairing cracks that were believed to have caused the water damage to the ceiling.

315 In my opinion, from 6 May 2019, it was reasonably necessary for the Murrells to enter into the Airspace for the purpose of accessing their concrete roof and repairing cracks that were causing water ingress and resulting damage to the interior of their property, having regard to the following matters:

(1) I infer that access to the exterior (top side) of the concrete roof was required in order to effectively repair cracks that were permitting water ingress during wet weather;

(2) the Murrells had no means of accessing the exterior of the concrete roof without entering into the Airspace;

(3) entry into the Airspace did not cause any damage to property of the Owners Corporation; and

(4) there was no impact of entry into the Airspace on the Owners Corporation and, on the basis of the evidence and findings in [165]–[185] above, the impact on Unit Owners was limited to some reduction in privacy for Unit 2 (affecting some areas of Unit 2 only), potentially some noise disturbance for Unit 2 (depending on the nature of work and number of workmen on the roof), and some interference with (but not obstruction of) views from Unit 2, for the duration of the presence of persons on the concrete roof.

316 It was put to Professor Murrell in cross-examination that, as at May 2019, the proposed development of Lot 21 involved stripping out the interior of the dwelling and he was therefore unconcerned about any water damage to the ceiling emanating from the concrete roof and the purpose of his contractors

accessing the roof in May and June 2019 therefore had nothing to do with repair of cracks. Professor Murrell denied this. I accept his denial. Amongst other things, the Murrells did not have the CDC for the development of Lot 21 until 4 August 2019. They could not have safely assumed in May 2019 that they would be able to proceed with the proposed development (irrespective of whether it was then envisaged to involve the extensive stripping out that has turned out to be the case).

317 The Owners Corporation submitted that there was *"a strong inference"* available that the need for repair works to prevent water ingress from 6 May 2019 had been necessitated by the removal of the waterproof membrane covering the roof on 9 April 2019, which had been done without the Owners Corporation's consent for the Murrells to enter into the Airspace for that purpose. It was submitted that: *"There might be a question as to whether work to repair damage caused by the unauthorised works is itself the type of emergency which would be permitted by an application of the doctrine of necessity."*[131] This possible question was not addressed further in submissions, and so it is not necessary to address it in these reasons.

318 For completeness, I note that the reports prepared by Partridge Structural on 4 July 2019 and 29 October 2019 identified risk of damage to the roof and injury to persons if further investigative work was not undertaken to determine the extent of the corrosion of the reinforcement bars within the roof and to identify the necessary remedial work, followed by completion of that remedial work. However, this risk was identified only after the end of the period in which the Murrells' entries into the Airspace are the subject of the Owners Corporation's claim in trespass in these proceedings. Accordingly, that risk is not relevant to the Murrells' defence of necessity.

319 For those reasons, I find that:

(1) each occasion on which the Murrells (or their consultants and contractors) entered the Airspace during the period from November 2018 to 3 May 2019 constituted a trespass on the property of the Owners Corporation;

[131] Owners Corporation's closing written submissions dated 13 May 2020, paragraph 53.

(2) to the extent that the Murrells' entries into the Airspace during the period from 6 May 2019 until 27 June 2019 was for the purpose of repairing cracks to the concrete roof so as to mitigate the risk of water damage to the dwelling on Lot 21 in wet weather, those entries into the Airspace did not constitute trespass by reason of the defence of necessity; and

(3) to the extent that the Murrells' entries into the Airspace during the period from 6 May 2019 until 27 June 2019 were not for the purpose referred to immediately above, the Murrells have not established a defence of necessity.

320 As will become apparent, it is not material for the purpose of determining the Owners Corporations' claims for damages, including aggravated and exemplary damages, that the evidence does not enable findings to be made about precisely how many of the six proven entries into the Airspace during the period from 6 May 2019 to 27 June 2019 constituted trespass: see Issue 6 and Issue 7 below.

Consideration and determination: cause of action in nuisance

321 For the reasons in [144]–[164] above, I have concluded that the Owners Corporation does not have standing to prosecute the claim in nuisance insofar as it relates to entries into the Airspace. However, in case of any appeal, I now explain the findings that I would have made concerning the claim in nuisance if the Owners Corporation had been found to have standing to prosecute that claim.

322 Assuming (in favour of the Murrells) that Owners Corporation's title to the Airspace remains subject to the Restriction (as to which see Issue 2 above), the Restriction did not operate to permit the Murrells to enter the Airspace on a temporary or transitory basis in order to repair, maintain and/or improve the roof, for the reasons explained under Issue 1 above.

323 As I have referred to above, the remaining issue in dispute between the parties in relation to the cause of action in nuisance is whether or not the Murrells' entries into the Airspace constituted a substantial and unreasonable interference with property rights. Because the alleged interference comprised loss of privacy and loss of amenity of Unit Owners, the relevant property rights

are the rights of each Unit Owner to enjoy their Unit together with the Airspace in which they have a beneficial interest.[132]

324 The High Court held in *Elston v Dore* (1982) 149 CLR 480 at 488 that the proper test to apply in most cases of private nuisance is that stated by Lord Wright in *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 at 903:

> "A balance has to be maintained between the right of the occupier to do what he likes with his own, and the right of his neighbour not to be interfered with. It is impossible to give any precise or universal formula, but it may broadly be said that a useful test is perhaps what is reasonable according to the ordinary usages of mankind living in society, or more correctly in a particular society."

325 Ordinarily, it would be a reasonable and convenient use of a person's land for that person to periodically enter onto the roof of a dwelling constructed on their land in order to repair, maintain and even improve that roof. However, subject to one qualification, the conduct of the Murrells was unreasonable because it involved repeated entries not only onto the roof on land owned by the Murrells but also into Airspace owned by the Owners Corporation without seeking or obtaining the consent of the Owners Corporation. As I have found in [229]–[233] above, the Murrells were not labouring under any erroneous assumption that they had a legal right to behave as they did. Rather, they were acting on the basis that they considered the Owners Corporation's attitude to be unreasonable. In my view, the Owners Corporation's attitude was indeed unreasonable by May 2019, for the reasons I have explained in [213]–[223], [239] above. However, that does not make the Murrells' conduct reasonable.

326 Whilst a balance must be struck between a land owner's right to do what it likes with its land and a neighbour's right not to be interfered with, I do not consider that the balance should be struck in favour of sanctioning as reasonable a land owner using his or her land in a manner that involves repeated entries onto the neighbour's land without seeking or obtaining the neighbour's consent.

327 The qualification mentioned above is that, to the extent that the Murrells' entries onto the concrete roof between 6 May and 27 June 2019 were for the purpose of repairing cracks in the roof which had caused water leakage and

[132] See [144]–[164] above.

damage to the dwelling on Lot 21, the Murrells' conduct was not unreasonable for the reasons already addressed in [313] to [317] above.

328 The question is whether the Murrells' unreasonable conduct harmed the Unit Owners' enjoyment of their property rights to a substantial degree.[133]

329 In *Hill v Higgins* [2012] NSWSC 270, cited by the Owners Corporation, Harrison J said:

> "48. Comment *j* to the Restatement of the Law of Torts, § 822, says this:
>
> > 'Life in an organised society and especially in populous communities involves an unavoidable clash of individual interests. Practically all human activities, unless carried on in a wilderness, interfere to some extent with others or involve some risk of interference, and these interferences range from trifling annoyances to serious harms. It is an obvious truth that each individual in a community must put up with a certain amount of annoyance, inconvenience and interference, and must take a certain amount of risk in order that all may get on together. The very existence of organised society depends on the principle of 'give and take, live and let live', so that the law of torts does not attempt to impose liability or shift the loss in every case where one person's conduct has some detrimental effect on another. Liability is imposed only in those cases where the harm or risk to one is greater than he ought to be required to bear under the circumstances.'
>
> 49. To constitute a legal nuisance, the annoyance or discomfort must be substantial and unreasonable. As stated as long ago as *Walter v Selfe* (1851) 4 De G & Sm 315 at 322; 64 ER 849 at 852:
>
> > 'And both on principle and authority the important point next for decision may properly, I conceive, be thus put: ought this inconvenience to be considered in fact as more than fanciful, more than one of mere delicacy or fastidiousness, as an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English people?'
>
> 50. Similar sentiments can be found echoed in cases such as *Don Brass Foundry Pty Ltd v Stead* (1948) 48 SR (NSW) 482 at 486-487, *Haddon v Lynch* [1911] VLR 230 at 231 and *Ruthning v Ferguson* [1930] St R Qd 325 at 326."

330 I have found in [165]–[185] above that the interference with use and enjoyment of property was limited to:

(1) some incidental interference with the privacy of the occupants of Unit 2 at 95 Wentworth Road resulting from the presence of persons in the Airspace from time to time during the period from November 2018 to

[133] Jarosz v State of New South Wales (2019) 19 BPR 39407; [2019] NSWSC 62 at [43]–[45] and the authorities there cited.

June 2019 (including on the 13 occasions identified in paragraph 17 of Mr Howse's affidavit sworn on 23 August 2019), noting that the interference affected only part of the balcony of Unit 2 and potentially part of the living area of Unit 2 and that there is no evidence concerning the duration of such interference on each occasion;

(2) some temporary interference with the views of the harbour enjoyed from Unit 2 at 95 Wentworth Road resulting from the presence of persons in the Airspace from time to time during the period from November 2018 to June 2019, noting that the harbour views were not obstructed and there is no evidence concerning the duration of the temporary interference with views on each occasion; and

(3) disturbance to the occupants of Unit 2 resulting from noise created by the presence of persons in the Airspace from time to time during the period from November 2018 to June 2019 and/or works carried out by those persons, noting that there is no evidence about the extent or duration of such noise.

331 The submissions made on behalf of the Owners Corporation failed to grapple with the evidence of the impact of the entries into the Airspace on Unit Owners, on the basis of which the above findings were made, and to address why that evidence supported a finding that entries into the Airspace interfered with Unit Owners' enjoyment of their property rights to a substantial degree.

332 Whilst the Murrells' conduct was unreasonable because it involved trespass, I find that the interference it caused with Unit Owners' enjoyment of their property rights did not amount to a material interference with the ordinary comfort of human existence in a densely populated suburban area where all human activity on one parcel of land necessarily involves some risk of interference to the occupants of adjoining land and the operation of society depends on a certain level of tolerance of some interference so that all members of the society can carry on with their lives.

333 If I had found that the Owners Corporation had standing to being the claim in nuisance, I would have dismissed the claim for those reasons.

Summary of conclusions in relation to Issue 5

334 The Owners Corporation has standing to sue on the cause of action in trespass.

335 The Murrells' entries into the Airspace during the period from November 2018 to June 2019 constituted trespass, save to the extent that their entries into the

Airspace during the period from 6 May 2019 to 27 June 2019 were for the purpose of repairing cracks in the concrete roof and thereby reducing or avoiding further water damage to the dwelling on Lot 21.

336 The Owners Corporation does not have standing to sue on the cause of action in nuisance for alleged substantial and unreasonable interference with Unit Owners' enjoyment of their property rights. The claim in nuisance is therefore dismissed in so far as it is founded on the Murrells' entries into the Airspace.

337 The actions of the Murrells in entering into the Airspace did not cause a substantial interference with Unit Owners' property rights in any event, so the claim in nuisance would have failed even if the Owners Corporation had standing.

Issue 6: If the Murrells committed trespass or nuisance by entering into the Airspace during the period November 2018 to June 2019, what compensatory damages should be awarded to the Owners Corporation?

338 In light of my conclusions in relation to Issue 5, it is only necessary to determine compensatory damages for the claim in trespass.

339 As referred to at [145]–[146] above, the loss and damage particularised by the Owners Corporation as having been suffered as a result of the Murrells' trespass into the Airspace is loss of amenity and privacy to Unit Owners. The Owners Corporation's submissions made no attempt to articulate an amount said to be an appropriate quantum of damages by reference to that loss of amenity.

340 Rather, in closing submissions made on the final day of the hearing, the Owners Corporation submitted that an award of more than nominal damages was appropriate in this case to vindicate the Owners Corporation's right to exclude others from their Airspace and to reflect the deliberate invasion of their Airspace by the Murrells on multiple occasions. The Owners Corporation referred again to *Hill v Higgins* (*supra*), in which Harrison J stated (at [36]) that trespass is actionable without proof of material loss, citing *Plenty v Dillon* (1991) 171 CLR 635; [1991] HCA 5 per Gaudron and McHugh JJ.

341 In my opinion, notwithstanding that the facts in *Plenty v Dillon* (*supra*) were very different from the facts in the present case, the following passage from the

judgment of Gaudron and McHugh JJ apply equally to the question of damages for trespass to the Airspace in this case:[134]

> "… once a plaintiff obtains a verdict in an action in trespass, he or she is entitled to an award of damages. In addition, we would unhesitatingly reject the suggestion that this trespass was of a trifling nature. The first and second respondents deliberately entered the appellant's land against his express wish. True it is that the entry itself caused no damage to the appellant's land. But the purpose of an action for trespass to land is not merely to compensate the plaintiff for damage to the land. That action also serves the purpose of vindicating the plaintiff's right to the exclusive use and occupation of his or her land. Although the first and second respondents were acting honestly in the supposed execution of their duty, their entry was attended by circumstances of aggravation. They entered as police officers with all the power of the State behind them, knowing that their entry was against the wish of the appellant and in circumstances likely to cause him distress. It is not to the point that the appellant was unco-operative or even unreasonable. The first and second respondents had no right to enter his land. The appellant was entitled to resist their entry. If the occupier of property has a right not to be unlawfully invaded then, as Mr Geoffrey Samuel has pointed out in another context, the 'right must be supported by an effective sanction otherwise the term will be just meaningless rhetoric' …"

342 In this case, the loss of amenity caused by the trespasses into the Airspace was trivial, as I have found in [328]–[333] above. However, I reject the Murrells' submission that the trespass should therefore be characterised as *de minimis*.[135] The Murrells deliberately entered the Airspace, without seeking the consent of the Owners Corporation and knowing that they did not have that consent. I have found that, at the time, they did not have legal advice suggesting that they had any legal right to enter the Airspace. They entered repeatedly, and must have known that the Owners Corporation could not take physical or practical measures to prevent them from doing so. For the purpose of assessing damages for trespass, it is not to the point that they informed the Owners Corporation about what they were doing, or that the Owners Corporation was acting unreasonably.

343 In closing submissions, the Owners Corporation asked the Court to do the best it can, assessing the significance of the trespasses having regard to all the evidence. It was submitted that:[136]

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[134] (1991) 171 CLR 635 at 654–655; see also 645 per Mason CJ, Brennan and Toohey JJ.
[135] Murrells' closing written submissions dated 13 May 2020, paragraph 165.
[136] Transcript, page 280 (lines 14–24).

> "We obviously emphasise the fact that the trespasses continued in relation to the airspace over a long period of time; the trespass to the walls were - with the painting and the building work, were not de minimus, and your Honour may think that compensation for the trespass purely on that basis would be in the range of $20,000."

344 I note that the amount of $20,000 was a suggested amount of compensatory damages for trespasses to the Airspace, and also the alleged trespass related to the painting of the Boundary Wall and construction of the stud wall. I am considering here the trespasses to the Airspace only. The alleged trespasses relating to the Boundary Wall and the stud wall are considered under Issues 16 to 19 below.

345 In my opinion, taking into account all of the circumstances referred to above, and bearing in mind that the trespass is limited to those occasions on which the entries into the Airspace were not for the purpose of repairing cracks in the concrete roof and that the evidence does not clearly establish precisely which of those occasions are therefore excluded from the trespass, the appropriate award of damages to vindicate the Owners Corporation's property rights is the sum of $10,000.

Conclusions in relation to Issue 6

346 There will be an award of $10,000 in favour of the Owners Corporation for general damages for the trespasses into its Airspace during the period November 2018 to June 2019.

Issue 7: If the Murrells committed trespass or nuisance by entering into the Airspace during the period November 2018 to July 2019, should there be an award of aggravated and/or exemplary damages?

347 In light of my conclusions in relation to Issue 5, it is only necessary to determine the claims for aggravated and exemplary damages in relation to the claim in trespass.

348 The submissions on behalf of the Owners Corporation made no more than passing reference to its claims for aggravated and exemplary damages.

349 I accept the submission made on behalf of the Murrells that aggravated damages are awarded as additional compensation for injury to a plaintiff's feelings (such as insult, humiliation) caused by the wrongdoing: *Gray v Motor Accidents Commission* (1998) 196 CLR 1; [1998] HCA 70 at [6] (Gleeson CJ,

McHugh, Gummow and Hayne JJ); R P Balkin and J L R Davis, *Law of Torts* (*supra*) at [5.19].

350 In this case, the impact of the trespasses into the Airspace was felt by Unit Owners rather than the Owners Corporation, and I have found in [328]–[333] above that the impact was trivial. The Owners Corporation itself, being a corporation, did not suffer injured feelings. To the extent that injured feelings suffered by Unit Owners may be considered relevant, I find on the basis of considering as a whole the evidence summarised in [186]–[303] above, that those injured feelings had developed and become entrenched during disputes concerning the development of 40 Fitzwilliam Street, and simply continued to simmer during the dealings between the Owners Corporation and the Murrells concerning the Airspace.

351 I also accept the Murrells' submissions that exemplary damages are awarded to express the court's disapproval of, and to punish, conduct of a defendant who has been guilty of conscious wrongdoing in contumelious disregard of the plaintiff's rights, and to deter conduct of that nature. The power to award exemplary damages should be used with restraint: *Gray v Motor Accidents Commission* (*supra*) at [8]–[20], [25]–[31] (Gleeson CJ, McHugh, Gummow and Hayne JJ)

352 As I have said above, the Murrells deliberately entered the Airspace repeatedly, without seeking the consent of the Owners Corporation and knowing that they did not have that consent. They were not labouring under a misunderstanding that they had a legal right to do so. It is clear from Professor Murrell's letter of 6 May 2019 that the Murrells were aware that they would need to make an application to a court in order to obtain a right to enter into the Airspace. As I understand the Owners Corporation's very brief submissions, these are the matters on which it relies in seeking exemplary damages. All of these matters have been taken into account in arriving at the award of general damages above. In my opinion, it would be inappropriate in those circumstances to impose an additional sanction on the Murrells by awarding exemplary damages.

Conclusions in relation to Issue 7

353 There will be no award for aggravated or exemplary damages in relation to the trespasses into the Owners Corporation's Airspace during the period November 2018 to July 2019.

354 I note that the Owners Corporation's claim for injunctive relief is addressed under Issue 15 below.

Issue 8: If the Restriction continues to apply following the registration of SP 85044 but does not include the implied positive covenant or easement for which the Murrells contend, can the Restriction be modified pursuant to s 89 of the Conveyancing Act in the terms sought in prayer 3 of the statement of claim in the Murrell proceeding?

355 The terms of s 89 of the *Conveyancing Act* are set out in [54] above.

356 For the reasons explained under Issue 2 above, it is doubtful in my opinion that the Owners Corporation's registered title to the Airspace is subject to the Restriction. If it is not subject to the Restriction, then there would be no scope for the application of 89. However, for the reasons already explained under Issue 2 above, it is preferable not to decide that question. I will therefore consider the Murrells' claim for relief under s 89 of the *Conveyancing Act* on the assumption that the Owners Corporation's title to the Airspace is subject to the Restriction.

357 That assumption renders it unnecessary to address the submission made on behalf of the Murrells, rather faintly in oral closing submissions and unsupported by authority or analysis, that Lot 21 is subject to a *"restriction"* within the meaning of s 89(1) by reason of the Owners Corporation's ownership of the Airspace (relying on the words *"or otherwise"* in the chapeau to s 89(1)), and that s 89(1) therefore applies if the requirements of s 89(1)(a) or (c) are satisfied. (The Murrells did not rely on s 89(1)(b) or (b1).) A further reason for disregarding that submission is that it is irrelevant to the Murrells' pleaded claim for relief, which was for an order under s 89 modifying the registered s 88B instrument defined in the Murrells' pleading as "*the Restriction*".

358 There is another threshold issue that was not addressed by the parties. Research in the course of preparing these reasons[137] identified authority to the effect that, in its application to easements, s 89 of the *Conveyancing Act* does not confer power on the Court to modify an easement by expanding the rights conferred on the dominant tenement owner or by imposing conditions on the easement for the benefit of the dominant tenement owner: *Markos v O R Autor* (2007) 13 BPR 24,487; [2007] NSWSC 810 at [108]–[121] and the authorities there referred to.

359 As this is purely a question of statutory construction that goes to whether or not the Court has the power to grant the relief sought by the Murrells under s 89 of the *Conveyancing Act*, it is both necessary and appropriate to determine that question.

360 I respectfully agree with and adopt Austin J's analysis in *Markos v O R Autor* (*supra*) at [108]–[121]. I note that aspects his Honour's reasoning have been cited with approval and applied in previous judgments of this Court to the extent relevant to the facts of those cases: *Tanlane Pty Ltd v Moorebank Recyclers Pty Ltd* [2008] NSWSC 1341 at [69]–[87]; *Fincob Pty Ltd v Campbelltown City Council* [2010] NSWSC 349 at [50]–[60].

361 For the purpose of their claim for relief under s 89 of the *Conveyancing Act*, the Murrells seek to cast themselves as the owners of land that is burdened by the Restriction – that is, as servient tenement owners. The modification that the Murrells seek under s 89 is:

> "… an order that the Restriction and Deposited Plan 871094 be modified pursuant to s 89 of the *Conveyancing Act* 1919 (NSW) so that the owner of Part Lot 21 may enter the airspace of Part Lot 22 on a temporary or transitory basis to repair, maintain and/or improve any structures on Part Lot 21 without committing a trespass."

362 The Murrells' claim to modify the Restriction is in truth a claim for an easement. This is particularly so, given that the Restriction had no meaningful or practical work to do after the Airspace plan of subdivision was registered (see Issue 2 above). The Murrells are putative dominant tenement owners. In my opinion, the power conferred on the Court by s 89(1)(a) and s 89(1)(c) does not extend

[137] I acknowledge, with gratitude, the efforts of my Tipstaff.

to the making of orders creating easements for the same reason that Austin J held it did not extend to expanding or adding to rights conferred on dominant tenement owners by existing easements in *Markos v O R Autor* (*supra*).

363 For those reasons, it is my opinion that the relief sought by the Murrells under s 89(1) of the *Conveyancing Act* falls outside the power conferred on the Court under that section. The Murrells claim for relief under s 89(1) is therefore dismissed.

Issue 9: Amendment application concerning the s 88K claim

364 As I have already referred to earlier in these reasons, the terms of the order sought by the Murrells under s 88K in the summons and statement of claim filed on 25 September 2019 and 25 November 2019 respectively are an easement to permit:

> "the owner of Part Lot 21 to enter the airspace of Part Lot 22 as reasonably necessary to repair, maintain and/or improve any structures on Part Lot 21".

365 Late in the afternoon on the final day of the hearing, the Murrells applied for leave to amend their pleadings to seek an easement under s 88K to permit:

> "the owner of Part Lot 21 to enter the airspace of Part Lot 22 as reasonably necessary **and on a temporary basis** to repair, maintain and/or improve any structures on Part Lot 21".

366 Given the timing of the amendment application, the Murrells' submissions in support of the application and the Owners Corporation's submissions opposing the proposed amendment were made in writing following the conclusion of the hearing and the Court's decision in respect of the amendment application was reserved to be delivered at the same time as judgment in the proceedings.

367 The exercise of the discretion to grant leave falls to be exercised in a manner that gives effect to the overriding purpose of facilitating the just, quick and cheap resolution of the real issues in the proceedings and the dictates of justice: *Civil Procedure Act* 2005 (NSW), ss 56–58.

368 The Murrells accepted that the application for leave to amend was made very late and that they had simply overlooked making the amendment application

earlier. They submitted that leave to amend should be granted for two reasons.[138]

369 First, the Murrells submitted that the proposed additional words – *"on a temporary basis"* – were already implicit in the terms of the order sought in prayer 4 of the summons and statement of claim, particularly having regard to the words *"as reasonably necessary"* in the terms of that proposed order.

370 Second, the Murrells submitted that there was no demonstrable prejudice to the Owners Corporation from the addition of those words, which were merely clarifying words of limitation. In particular, the additional words could not conceivably affect the valuation evidence adduced by the parties in relation to compensation for the purpose of s 88K.

371 The Owners Corporation submitted that leave to amend should be refused for two reasons.[139]

372 First, the Murrells had taken to trial a claim for an easement under s 88K giving them *"a general right to enter the Airspace as needed for the purpose of the proposed easement"*, and the proposed amendment making it clear that the Murrells required no more than a temporary right to enter the Airspace was a material departure from the case taken to trial.

373 Second, the Owners Corporation submitted that it would be prejudiced if the Murrells were now permitted to depart from their case at trial by amending in the manner proposed. The prejudice was said to arise from the fact that the evidence of the expert valuer called by the Owners Corporation (Mr Donovan) had been based on the wording of the proposed easement in the summons and statement of claim as filed in the Murrell proceeding. It was submitted that, on the basis of that wording, Mr Donovan considered that the proposed easement gave rise to the potential for an intensification of the roof use that would, in turn, lead to a diminution in market value of the Units. It was submitted that, if leave to amend were granted, the Owners Corporation would be left with *"no evidentiary foundation"* in relation to compensation for the purpose of s 88K.

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[138] Murrells' supplementary written submissions dated 15 May 2020.
[139] Owners Corporation's supplementary written submissions dated 19 May 2020.

374 I accept the Murrells' submission that the proposed additional words – *"on a temporary basis"* – were already implicit in the terms of the order sought in prayer 4 of the summons and statement of claim filed in the Murrell proceedings. I reject the Owners Corporation's submissions that the proposed amendment materially alters the case that the Murrells took to trial.

375 It is clear from the terms of prayer 4 of the statement of claim as filed, particularly when read together with paragraph 17, that the easement is sought for the purpose of repair and maintenance of, and improvements to, structures on Lot 21 below the height of RL AHD 26.00 AHD. The need for access to the Airspace for the purpose of effecting such repairs, maintenance and improvements cannot reasonably have been understood to represent a permanent state of affairs. The terms of the proposed easement, in the form originally pleaded, do give rise to a question about how frequently it is "*reasonably necessary"* to access the Airspace for the specified purposes. The proposed amendment does not remove or alter that issue, in my opinion.

376 It is the prospect of frequent temporary access for the specified purposes that formed the basis of the opinions expressed by Mr Donovan, on which the Owners Corporation relies, as to the effect of the proposed easement on the market value of the Units. Mr Donovan's report refers to *"the potential for an intensifying use of the adjacent roof space in an uncontrolled manner for 'maintenance' and other such words"* as being *"of great concern"* due to the impact of people standing on or traversing across the roof (that is, temporary presence of persons on the roof) on views, security and privacy enjoyed from the Units, and the importance of harbour views, and security and privacy considerations to potential purchases in the market for the Units.[140]

377 For those reasons, I also reject the Owners Corporation's submission that it will be prejudiced if the proposed amendment is allowed because Mr Donovan's report will become irrelevant on the question of compensation under s 88K. As will become apparent, Mr Donovan's report is indeed irrelevant in relation to the question of compensation under s 88K, but that is for reasons unrelated to the amendment because the Owners Corporation is the only person required

[140] See in particular, affidavit of Paul Donovan sworn on 24 April 2020, Annexure "A" (paragraphs 69–79).

by s 88K(2)(b) to be adequately compensated for any loss or other disadvantage that will arise from the imposition of proposed easement (see Issue 12 below). Mr Donovan's report is limited to compensation to Unit Owners.

378 Ordinarily, delay in seeking to amend until the last day of the hearing, with no explanation other than inadvertence on the part of the party seeking to amend or its legal representatives, would be likely to count heavily against the grant of leave to amend: *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175; [2009] HCA 27 at [24] (French CJ), [97]–[98] and [102]–[103] (Gummow, Hayne, Crennan, Kiefel and Bell JJ). However, I do not consider the delay to be of material significance in circumstances where the proposed amendment is merely clarifying a matter that was already implicit in the terms of the proposed easement set out in the Murrells' pleadings and would not affect the manner in which the parties conducted the case.

379 Taking into account the delay together with all of the other factors referred to above, I consider that it is consistent with the overriding purpose and the dictates of justice to grant leave to amend in the circumstances of this case.

380 Accordingly, the Murrells are granted leave to amend prayer 4 in their summons filed on 25 September 2019 and prayer 4 in their statement of claim filed on 25 November 2019 to read:

> "… an order imposing an easement over Part Lot 22 of Deposited Plan 871094 pursuant to section 88K of the *Conveyancing Act* to permit the owner of Part Lot 21 to enter the airspace of Part Lot 22 as reasonably necessary **and on a temporary basis** to repair, maintain and/or improve any structures on Part Lot 21"

381 For all of the reasons already referred to above, it seems to me to be unlikely that this amendment will cause any costs incurred by the Owners Corporation to have been thrown away. However, there is no reason why the Owners Corporation should not have the benefit of the usual order that the Murrells pay its costs thrown away (if any) by reason of the amendment.

Issue 10: Whether the proposed easement is reasonably necessary for the effective use or development of Lot 21 (s 88K(1))

382 The terms of the proposed easement (as amended) limit the circumstances in which the owners of Part Lot 21 are permitted to enter the Airspace to when it is "*reasonably necessary*" to do so to "*repair, maintain and/or improve any structures on Part Lot 21".* It is clear from the syntax (particularly after the amendment) that the requirement for reasonable necessity applies not to the repairs, maintenance or improvement, but to the access to the Airspace for the purpose of carrying out the repairs, maintenance or improvements.

383 The terms of the proposed easement (as amended) also limit the duration of entries to the Airspace for the permitted purposes ("*on a temporary basis"*).

384 Insofar as it would permit access to the Airspace for the purpose of improvements, the proposed easement is not limited to any specific improvements and would apply to any and all future improvements, provided that it is reasonably necessary for the owners of Part Lot 21 to access the Airspace for the purpose of undertaking those improvements. The terms of the proposed easement are not even limited to lawful improvements.

385 The terms of the proposed easement plainly do not permit any improvements themselves to intrude into the Airspace.

386 The terms of the proposed easement do not provide for any tools, equipment or machinery associated with repairs, maintenance or improvements to be taken onto or remain in the Airspace, even on a temporary basis. The proposed right to access the Airspace is limited to the owners of Part Lot 21 (which would, of course, include their servants, agents and contractors). The Murrells have not expressly referred to the taking of tools, equipment or machinery into the Airspace. Nor have they employed the expression "*easement for repairs*", which would have attracted the operation of s 181(A)(2) and Part 5 of Schedule 8 of the *Conveyancing Act*.

387 However, it is absurd to think that repairs, maintenance or improvements could be carried out on structures on Part Lot 21 without the use of tools, equipment and machinery. The case was conducted on the assumption that, if the proposed easement was granted, this would permit the owners of Part Lot 21

to use tools, equipment and machinery on the concrete roof of the existing residence. The adverse impact on Unit Owners of noise emanating from the use of such tools, equipment and machinery was one of the grounds on which the Owners Corporation strenuously objected to the Murrells' application under s 88K.[141]

388 Whilst it is regrettable that the Murrells have failed to attend to this detail in drafting the proposed easement,[142] I consider that it is consistent with the manner in which the case was run by both parties at trial to proceed on the basis that the Murrells apply for an easement under s 88K in the following terms:

> "the owner of Part Lot 21 / DP 871094 (now known as Part Lot 1 DP 12534483) (the **dominant tenement**) is permitted to access Part Lot 22 DP 871094 (now being part of the land comprised in folio CP/SP85044 of the Register) (the **servient tenement**) as reasonably necessary and on a temporary basis to repair, maintain and/or improve any structure on the dominant tenement and to take onto the servient tenement on a temporary basis anything reasonably necessary for that purpose."

389 The additional words concerning taking things onto the servient tenement reflect clause 1(b) of Part 5 of Schedule 8 to the *Conveyancing Act*.

390 The question arising under s 88K(1) is whether an easement in those terms is "*reasonably necessary for the effective use or development of the dominant tenement"*.

391 There was no dispute between the parties as to the applicable principles, which are conveniently set out in *Gordon v Lever (No 2)* (2019) 101 NSWLR 427; [2019] NSWCA 275 at [35]–[42] (Bell P, Payne JA, Emmett AJA agreeing). At [38], Bell P referred to the following passage of the judgment of Bathurst CJ, Beazley and Meagher JJA in *Moorebank Recyclers Pty Ltd v Tanlane Pty Ltd* (2012) 16 BPR 31,257; [2012] NSWCA 445 at [154]:

> "The requirement that the easement be reasonably necessary for the effective use and development of the land means something more than mere desirability or preferability over the alternative means available: *Rainbowforce* supra at [76]. However, reasonable necessity does not mean absolute necessity. The correct approach to the question, in our opinion, was stated by Hodgson J (as his Honour then was) in *117 York Street* supra as follows:

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[141] See Owners Corporation opening written submissions dated 23 April 2020, paragraphs 32 and 42(d).
[142] See Gordon v Lever (2018) 97 NSWLR 90; [2018] NSWCA 43 at [124].

> ‘It is clear that '*reasonably necessary'* in s 88K(1) does not mean 'absolutely necessary', and thus that the requirement may possibly be satisfied even when the plaintiff's land could be effectively used or developed without the easement.
>
> In my opinion: (1) the proposed easement must be reasonably necessary either for *all* reasonable uses or developments of the land, or else for some one or more proposed uses or developments which are (at least) *reasonable* as compared with the possible alternative uses and developments; and (2) in order that an easement be reasonably necessary for a use or development, that use or development *with* the easement must be (at least) substantially preferable to the use or development *without* the easement. …’”

392 The President also noted (at [39]) the following observations of Darke J in *Govindan-Lee v Sawkins* (2016) 18 BPR 35,883; [2016] NSWSC 328 at [49]:

> “The plaintiff bears the onus of showing reasonable necessity and is best placed to adduce evidence about this alternative. It is unsatisfactory that the plaintiff has failed to bring forward evidence that would facilitate a more comprehensive assessment of this alternative, including of any difficulties or uncertainties involved in it.”

393 The President continued (at [40]–[42]):

> “Whether or not an easement is “reasonably necessary” is to be assessed by reference to the circumstances as they exist at the time of the hearing: *117 York Street Pty Limited v Proprietors of Strata Plan No 16123* (1998) 43 NSWLR 504 at 511; (1998) 98 LGERA 171; *Moorebank* at [96].
>
> Such a finding “involves the making of a value judgment, but not the exercise of a discretion”: *Woodland* at [19](2); see also *Moorebank* at [159] where reference was made to the evaluative nature of the exercise. It was for this reason that, although Senior Counsel for the Levers, Mr Sirtes SC, sought in his written submissions to suggest that the decision at first instance entailed an exercise of discretion to which principles associated with *House v R* (1936) 55 CLR 499; [1936] HCA 40 would apply, this submission was not pressed with any vigour in the course of the hearing, and rightly so.
>
> Consideration and assessment of the concept of reasonable necessity also requires consideration of the effect of the grant of the easement on the servient tenement: *Moorebank* at [156]. It is also relevant in this regard to consider what Rein J described as “the historical context of use of the land, both of the dominant and servient tenements”: *Owners Strata Plan 13635 v Ryan* [2006] NSWSC 221 at [67].”

394 In my opinion, the proposed easement is reasonably necessary for the effective use or development of Part Lot 21 to the extent that it permits access to the Airspace as necessary and on a temporary basis to repair and maintain structures on Part Lot 21. To the extent that the proposed easement would permit access to the Airspace for the purpose of improvements, or in circumstances where access is *“reasonably necessary”* rather than a matter of

absolute necessity, the Murrells have not established that the proposed easement is reasonably necessary for the effective use or development of Part Lot 21. My reasons for those opinions are as follows.

395 First, as submitted by the Murrells, Part Lot 21 is zoned R2 pursuant to the *Woollarah Local Environment Plan* 2014 (NSW) and the use of that land as a residential dwelling is permissible with consent in that zone.[143] There is an existing residential dwelling on Part Lot 21. That dwelling has existed on that land since approximately the 1960's, although it has recently undergone extensive renovation.

396 Second, I accept the Murrells' submission that it is not possible to carry out repairs and maintenance to the flat concrete roof of that dwelling without intruding into the Airspace, given that there is only between 11cm and 16cm between the flat concrete roof and the lower boundary of the Airspace. That is to say, access to the Airspace is absolutely necessary (not merely *"reasonably necessary"*) in order to carry out any repair or maintenance of the concrete roof. The evidence of Mr Walford provides some indication of the nature of the problems and risks that are inherently likely to arise over time if it is impossible to carry out repairs and maintenance to the concrete roof: see [245]–[247], [257]–[259], [278]–[293] above.

397 The Owners Corporation did not dispute that it was necessary for the Murrells to access the Airspace in order to repair and maintain the concrete roof. However, the Owners Corporation submitted that an easement is not reasonably necessary because the Murrells:

(1) have an existing legal right to enter the Airspace for repairs and maintenance that are necessary to avert imminent danger (availing themselves of a defence of necessity to a claim in trespass); and

(2) can apply for access to the Airspace in other circumstances under the *Access to Neighbouring Land Act*.

398 I reject these submissions.

399 As identified in the Murrells' submissions, an application under the *Access to Neighbouring Land Act* would require the Murrells to make a separate

[143] Affidavit of Jennifer Askin sworn on 6 February 2020, Annexure "A" (paragraph 9); affidavit of Andrew Darroch sworn on 31 March 2020, Annexure "A" (paragraph 2.1).

application on each occasion when they wished to carry out repair and maintenance work, giving 21 days' notice to Owners Corporation prior to lodging each such application. This is a cumbersome and inefficient regime for ongoing repair and maintenance of a residential dwelling, in my opinion. The legislation is plainly better suited to resolving an impasse between adjacent land owners relating to works of a one-off nature.

400 Even if I am wrong about the operation of the *Access to Neighbouring Land Act* and a single application could be made to cover all future repairs and maintenance work, an order imposing an easement in this proceeding is a superior option to the alternative of a further proceeding under the *Access to Neighbouring Land Act*.[144]

401 It is highly undesirable, in my opinion, that any landowner should be constrained to rely on a defence of necessity to a claim in trespass once repairs or maintenance have become necessary to avert imminent danger as because the owner has had no lawful authority to conduct ongoing maintenance repairs to the dwelling on their land in a timely manner so as to avoid the danger arising in the first place.

402 All of the evidence and both parties' submissions were directed to the impossibility of repairing and maintaining (and improving) the flat concrete roof on Part Lot 21 without entering into the Airspace in order to carry out the work, and whether this justified the conclusion that the proposed easement was reasonably necessary for the effective use or development of Part Lot 21.

403 Notwithstanding this, the proposed easement has been drafted in terms that would permit access to the Airspace that is *"reasonably necessary"* (as opposed to *"necessary"*) to repair, maintain and/or improve *"structures"* (not limited to the concrete roof) on Part Lot 21.

404 The expression *"reasonably necessary"* conveys something less than absolute necessity, and calls for an assessment of all of the circumstances relevant to the particular repairs, maintenance or improvements to be carried out against

[144] See The Owners – Strata Plan No 61233 v Arcidiacono (2019) 19 BPR 39,711; [2019] NSWSC 1307 at [589]–[595].

the criterion of reasonableness.[145] For example, it would be necessary to consider the nature of the work involved and the degree of difficulty, cost and risk of carrying out that work with or without entering the Airspace, in order to ascertain whether the proposed easement permitted access to the Airspace to undertake that particular work. Reasonable minds may differ about the outcome of such an assessment, particularly in circumstances where the dominant tenement owner approaches the assessment from the perspective of their need or desire to undertake the work and the servient tenement owner approaches the assessment from perspective of a desire to minimise entries into its Airspace. The access criterion of *"reasonable necessity"* lays the seeds for disputes between the Murrells and the Owners Corporation, or their respective successors in title, concerning the applicability of the easement in particular circumstances that arise in the future.

405 As I have said above, all the Murrells' evidence and submissions were directed to need for the easement due to the impossibility of repairing and maintaining (and improving) the flat concrete roof on Part Lot 21 without entering into the Airspace. The Murrells have failed to establish that the proposed easement is reasonably necessary for the effective use or development of Part Lot 21 to the extent that it would permit them to enter into the Airspace in circumstances where it was not absolutely necessary to do so in order to repair or maintain structures on Part Lot 21. For separate reasons that I explain below, the Murrells have also failed to establish the reasonable necessity of the proposed easement insofar as it relates to access to the Airspace for the purpose of improvements.

406 Third, the proposed easement, to the extent that it permits access necessary for repairs and maintenance, would have no impact on the Owners Corporation.

407 Assuming (without deciding) that it is relevant for the purpose of s 88K(1) to consider the impact on Unit Owners, that impact will be limited to temporary potential noise disturbance, reduction of privacy and interference with (but not

[145] ING Bank Australia Ltd v O'Shea (2010) 14 BPR 27,317; [2010] NSWCA 71 at [48]–[49] (Giles JA, Campbell JA agreeing); Moorebank Recyclers Pty Ltd v Tanlane Pty Ltd (2012) 16 BPR 31,257; [2012] NSWCA 445 at [113]–[117] (Bathurst CJ, Beazley JA, Meagher JA).

obstruction of) harbour views during repair and maintenance work. For the reasons in [330]–[332] above, I reject the Owners Corporation's submission that this constitutes a "*significant imposition*" on the privacy and amenity of Unit Owners.

408 Having regard to all of those matters, I consider that the use of Part Lot 21 for the permitted and reasonable use of a residential dwelling with an easement to access the Airspace, as necessary and on a temporary basis, to repair and maintain structures on Part Lot 21, is substantially preferable to the use of that land for that purpose without the benefit of such an easement.

409 However, the Murrells have not discharged their onus of demonstrating the reasonable necessity of the proposed easement insofar as it relates to improvements. Whether or not the test of reasonable necessity would be satisfied in relation to "*improvements*" would vary from one improvement to the next depending on the nature of the improvement, the work required to give effect to it, whether there are means of carrying out the improvement without access to the Airspace and whether the improvement was a reasonable use or development of Part Lot 21. The Murrells have chosen to make an application under s 88K for an easement granting rights of access to the Airspace as reasonably necessary and on a temporary basis for the purpose of making unspecified "*improvements*" to the structures on Part Lot 21. To that extent, the application under s 88K fails at the first hurdle of s 88K(1).

410 For all of those reasons, I have concluded that an easement in terms to the following effect is reasonably necessary for the effective use or development of Lot 21:

> "The owner of Part Lot 21 / DP 871094 (now known as Part Lot 1 DP 12534483) (the **dominant tenement**) is permitted to access Part Lot 22 DP 871094 (now being part of the land comprised in folio CP/SP85044 of the Register) (the **servient tenement**) as necessary and on a temporary basis to repair and maintain any structure on the dominant tenement and to take onto the servient tenement on a temporary basis anything reasonably necessary for that purpose."

Issue 11: Whether the use of Lot 21 with the benefit of the proposed easement would be inconsistent with the public interest (s 88K(2)(a))

411 The Owners Corporation submitted that, having regard to the loss of amenity and privacy for Unit Owners that would result from the granting of the proposed

easement, and alternative rights of entry into the Airspace (that is, rights under the *Access to Neighbouring Land Act* and/or the defence of necessity), the Murrells have failed to establish that the use of Part Lot 21 with the benefit of the proposed easement is not inconsistent with the public interest. To the extent that the proposed easement is for access to the Airspace as necessary and on a temporary basis to repair and maintain the structures on Part Lot 21, I reject that submission for all of the reasons already explained under Issue 10 above.

Issue 12: Who is to be compensated pursuant to s 88K(2)(b) of the Conveyancing Act? Can such persons be adequately compensated for any loss or other disadvantage that will arise from the imposition of the proposed easement?

Who is required to be adequately compensated for any loss or other disadvantage arising from the imposition of the proposed easement?

412 The proposed easement cannot be granted unless the Court is satisfied that:

> "the owner of the land to be burdened by the easement and each other person having an estate or interest in that land that is evidenced by an instrument registered in the General Register of Deeds or the Register kept under the *Real Property Act 1900* can be adequately compensated for any loss or other disadvantage that will arise from imposition of the easement"

413 There is no dispute that the Owners Corporation is the owner of the Airspace and that it is necessary for the Court to be satisfied that the Owners Corporation can be adequately compensated for any loss or other disadvantage that will arise from the proposed easement. The question of compensation for the Owners Corporation is addressed below.

414 As I understood the submissions made on behalf of the Murrells, they do not dispute that the Unit Owners have an estate or interest in the Airspace. In my opinion, the effect of the statutory scheme pursuant to which title to the Airspace is vested in the Owners Corporation is that the Unit Owners do have an equitable interest in the Airspace: see [151]–[154] above.

415 However, there is a dispute about whether the Unit Owners' estate or interest in the Airspace is *"evidenced by an instrument registered in the General Register of Deeds or the Register kept under the Real Property Act 1900"*. As the Court of Appeal held in *Community Association DP 270447 v ATB Morton Pty Ltd* (*supra*) (***Morton***) at [88]–[90] (Leeming JA, Bell P and Payne JA

agreeing), those words *"do real work in restricting the class of persons who are identified by the subsection"* and about whose ability to receive adequate compensation the Court must be satisfied before granting an easement under s 88K.

416 It was submitted on behalf of the Murrells that the Court of Appeal's judgment in that case was directly applicable to this case, with the result that the Unit Owners do not have a compensable interest under s 88K(2)(b).

417 In *Morton*, the main issue was the test to be applied in Land and Environment Court proceedings seeking an order imposing an easement said to be reasonably necessary for the effective use or development of the land to be benefitted, and the necessary parties to such proceedings.

418 Section 40 of the *Land and Environment Court Act 1979* (NSW) provides:

> "(1) This section applies if—
>
> (a) the Court has determined to grant or modify a development consent pursuant to proceedings on an appeal under the *Environmental Planning and Assessment Act 1979*, or
>
> (b) proceedings on an appeal under the *Environmental Planning and Assessment Act 1979* with respect to the granting or modification of a development consent are pending before the Court (whether constituted by a Judge or by one or more Commissioners).
>
> (2) The appellant may make an application to the Court for an order imposing an easement over land.
>
> (3) The parties to an application under this section include the owner of the land to be burdened by the easement, and each other person having an estate or interest in the land, as evidenced by an instrument registered in the General Register of Deeds or the Register kept under the *Real Property Act 1900*.
>
> (4) In dealing with an application under this section, the Court may exercise the jurisdiction of the Supreme Court under section 88K of the *Conveyancing Act 1919* and, in that event, section 88K of the *Conveyancing Act 1919* applies to the Court's exercise of that jurisdiction in the same way as it applies to the exercise of that jurisdiction by the Supreme Court."

419 The language describing persons other than the owner of the land in s 40(3) is the same as the language in s 88K(2)(b) of the *Conveyancing Act*. Section 40(4) picks up the whole of s 88K.

420 The respondent, ATB Morton Pty Ltd, sought an easement under s 40 over a private road on land owned by the appellant.

421 The appellant was a community association, being a corporation constituted under the *Community Land Development Act* 1989 (NSW) (the **CLD Act**) by the registration of a community plan as a deposited plan. The community association was the owner of lot 1 in the deposited plan. The members of the community association owned community development lots 2 to 6 in the deposited plan: *Morton* at [75]–[76]; see *Community Land Management Act* 1989 (NSW), s 5; CLD Act, s 25.

422 The community plan had included a schedule of unit entitlements, as required by s 5(2)(d) of the CLD Act. On registration of the deposited plan, lot 1 had vested in the community association pursuant to s 31(1) of the CLD Act. Pursuant to s 31(4) of the CLD Act, the community association's estate or interest in lot 1 was held by it *"as agent for all the members as tenants in common in the shares prescribed by s 32*". Pursuant to s 32(1), those shares reflected the proportion of the unit entitlements ascribed to each member's lot to the total unit entitlement under the community scheme. (I note the provisions of the strata legislation to the same effect concerning the vesting of common property in the owners corporation, which holds that property as agent for lot owners as tenants in common in shares proportional to the unit entitlement of the owners' lots: 2015 Act, ss 24, 28(1); 1973 Act, ss 18, 20; see [151] above.)

423 Leeming JA (with whom Bell P and Payne JA agreed) referred with approval to the line of authority which holds that the statutory "*agency*" pursuant to which an owners corporation holds the common property of a strata scheme under the *Strata Schemes Development Act 1973* is, or is analogous to, a trust and that the owners of lots in the scheme have an equitable interest in the common property and stated that this was based not only on the statutory agency but also on the express reference in s 24(2) of the 1973 Act to the "*beneficial interest*" of lot owners in common property: *Morton* at [80]–[83]; see [153] above.

424 Leeming JA then referred (at [84]–[85]) to the provisions of s 33 of the CLD Act. On the one hand, s 33(2) refers to the way in which an estate or interest in community property, held by a community association as agent for the proprietor of a community development lot, may dealt with. His Honour

considered that this suggested that a lot owner does have a beneficial estate or interest in community association property. On the other hand, s 33 did not expressly describe that estate or interest as a beneficial interest, which his Honour regarded as a striking departure in comparison to the language of s 24(2) of the 1973 Act.

425 However, Leeming JA refrained from determining whether or not the interest of community development lot owners in the community property held by the community association as agent was a beneficial interest in that community property. His Honour *assumed* (at [88]) that those interests were beneficial interests in the community property. On the basis of that assumption, Leeming JA then proceeded (at [88]–[93]) to determine whether those interests were evidenced by a registered instrument as required by s 40(3) of the *Land and Environment Court Act* and s 88K(2)(b) of the *Conveyancing Act*. His Honour concluded that those interests were not evidenced by a registered instrument. Although the community association held the community property as agent for community development lot owners as tenants in common in shares proportionate to their respective unit entitlements, and their unit entitlements were recorded on the Register, this merely identified the rights and liabilities enjoyed by lot owners as between each other in terms of voting and bearing of costs. It did not result in lot owners' estate or interest in the community property being evidenced in the Register.

426 The primary submission on behalf of the Owners Corporation was that:[146]

(1) the interest or estate of the Owners Corporation in the common property is evidenced by a registered instrument;

(2) the Unit Owners have an equitable interest in the common property;

(3) the equitable interests of the Unit Owners and the legal interest of the Owners Corporation are *"intrinsically linked"*, in the sense that the Owners Corporation's legal interest is only exercisable for the benefit of individual Unit Owners and, conversely, the Unit Owners cannot exercise their equitable interests except through the Owners Corporation; and

(4) the equitable interests of the Unit Owners are therefore evidenced by the Register by virtue of the Owners' Corporation's legal interest being recorded in the Register. It was submitted that *"evidenced"* in the

[146] Owners Corporation's closing written submissions dated 13 May 2020, paragraphs 99–103.

context of s 88K(2)(b) requires something less than a recording of the interest in the Register.

427 I accept the first element of this submission. The Owners' Corporation's legal interest in the common property, including the Airspace, is recorded in SP 85044. The second element of the submission may also be accepted: see [153]–[156] and [423] above.

428 However, the third and fourth elements of the submission are not sound. The Unit Owners' interest in the Airspace is no more *"intrinsically linked"* to the Owners' Corporation's legal interest evidenced by the registered strata plan than was the case in *Morton* for the community development lot owners' (assumed) beneficial interest in the community property and the community association's legal interest in the property which was evidenced by the community plan. The submission, in substance, invites this Court not to follow *Morton*. The Court of Appeal's decision is, of course, binding on me unless there is some relevant distinction between the legislation and facts in *Morton* and the legislation and facts in the present case. In my opinion, having regard to the assumption in *Morton* that the community development lot owners had an interest in community property equivalent to the interest that members of a strata scheme have in common property held by an owners corporation as agent, there is no relevant distinction.

429 The Owners Corporation made an alternative submission that there is a close connection between the Unit Owners' interests in the common property (including the Airspace) and their interests in their Units, and that their interests in the common property are therefore evidenced by a registered instrument by reason of their interests in the Units being evidenced by the registered strata plan and being recorded in the Register.[147]

430 This alternative submission relied on s 28(2) and s 28(3) of the 2015 Act as evidencing the close connection between the Unit Owners' interests the common property and their interests in their lots.

431 As noted in [151] above:

[147] Owners Corporation's closing written submissions dated 13 May 2020, paragraphs 104–122.

(1) s 28(2) of the 2015 Act provides that a lot owner's interest in the common property cannot be severed from, or dealt with separately from, the owner's lot: 1973 Act, s 24(2); and

(2) s 28(3) of the 2015 Act provides that a dealing or caveat relating to an owner's lot also affects the owner's interest in the common property even if the common property is not expressly referred to in the dealing or caveat: 1973 Act, s 24(1).

432 The 1973 Act and the CLD Act under consideration in *Morton* contained provisions to the same effect, save that the CLD Act does not contain a provision equivalent to s 28(2) of the 2015 Act precluding the severance of a community development lot owner's interest in community property from his or her interest in the community development lot: see 1973 Act, ss 24(1) and (2); CLD Act s 33(6)(a). That omission from the CLD Act is consistent with s 15 and Schedule 8 of the CLD Act, which provide for a community development lot to be severed from a community scheme in accordance with an order of the Court or by consent of the lot owner and the community association. There is no equivalent severance provision in the strata schemes legislation.

433 It seems to me that the inclusion of the severance provision in s 15 and Schedule 8 of the CLD Act reflects the fact that, unlike strata schemes, community schemes facilitate staged development of land and need to accommodate potential exclusions of some areas from the scheme as the development progresses: see B Edgeworth, *Butt's Land Law* (7th ed, 2017, Lawbook Co) at [13.420]–[13.450]. If a community development lot is severed from the community scheme, the total unit entitlements for the community scheme are reduced by the number of unit entitlements of the severed lot. There is no provision in the CLD Act which provides for a community development lot owner's interest in the community property to be dealt with separately from their interest in their lot, whilst their lot remains part of the community scheme. If their lot is severed from the community scheme, their unit entitlements by reason of which they have an interest in the community property are effectively cancelled.

434 For those reasons, it is my opinion that there is nothing in the 2015 Act (or its predecessor, the 1973 Act) and the CLD Act to suggest that the "*connection*" between the interest of a community development lot owner in community

property and their interest in their own lot is less "*close*" than the connection between the interests of a strata scheme member in the common property and that member's interest in their own lot. Accordingly, *Morton* is not distinguishable from the present case on the basis of a difference in the nature of the "*connection*" between the individual lot owner's interest in their lot and their proportionate interest in common property or community property. There is no reason why the conclusion in *Morton* that the community development lot owners' assumed equitable interest in the community property, held by the community association as agent for those lot owners, does not apply equally to the Unit Owners' equitable interests in the Airspace held by the Owners Corporation in this case.

435 I note for completeness that the submissions on behalf of the Owners Corporation placed heavy emphasis on the fact that members of a strata scheme have been found by the authorities referred to in [153] above to have an equitable interest in the common property, whereas the Court of Appeal in *Morton* considered that the same may not be able to said of community development lot owners' interests in community property. It was submitted that this was another basis on which *Morton* was distinguishable from the present case. However, these submissions overlook the fact that the Court of Appeal in *Morton* assumed that community development lot owners did have an equitable interest in community property, before deciding that the interest was evidenced by a registered instrument. By reason of that assumption, the Court of Appeal's reservations concerning the nature of the interests in community property had no bearing on their conclusion that those interests are not evidenced by a registered instrument.

436 For all of those reasons, whilst each of the Unit Owners has an equitable interest in the Airspace, those equitable interests are not evidenced by a registered instrument. Accordingly, s 88K(2)(b) does not require the Court to be satisfied that Unit Owners can be adequately compensated for any loss or other disadvantage that will arise from the imposition of the proposed easement. Section 88K(2)(b) requires only that the Court be satisfied that the Owners Corporation can be adequately compensated for any loss or other disadvantage that it may suffer from the imposition of the proposed easement.

What loss or other disadvantage to the Owners Corporation will arise from the imposition of the proposed easement? Can the Owners Corporation be adequately compensated for any such loss or disadvantage?

437 It follows that the questions raised by s 88K(2)(b) in this case are:[148]

(1) whether the Owners Corporation will suffer a loss or other disadvantage arising from the imposition of the proposed easement; and

(2) if so, whether the Court is satisfied that the Owners Corporation can be adequately compensated for that loss.

438 The concept of *"loss or other disadvantage"* in s 88K(2)(b) is not limited to the value of the putative servient tenement owner's proprietary right taken by the imposition of the proposed easement.

439 However, there must be a causal relationship between the *"loss or other disadvantage"* and the imposition of the proposed easement.

440 Any such loss or other disadvantage must be offset against any compensating advantage to the servient tenement owners arising from the imposition of the proposed easement when determining whether the servient tenement owners can be adequately compensated for the purpose of s 88K(2)(b) and when determining the amount of any such compensation under s 88K(4).

441 The Owners Corporation candidly acknowledges that it will not suffer any loss or other disadvantage arising from the imposition of the proposed easement. However, the Owners Corporation submits that it follows that the Owners Corporation cannot be compensated and that the Court must decline to impose the easement because s 88K(2)(b) is not satisfied.[149]

442 I reject that submission. Section 88K(2)(b) requires that *"any loss or other disadvantage"* to the Owners Corporation arising from the imposition of the proposed easement can be adequately compensated. The Owners Corporation has conceded (correctly, in my view) that there is no such loss. It follows that there is no call for compensation and that s 88K(2)(b) is satisfied.

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[148] Moorebank Recyclers Pty Ltd v Tanlane Pty Ltd (2012) 16 BPR 31,257; [2012] NSWCA 445 at [233]; Rainbowforce Pty Ltd v Skyton Holdings Pty Ltd (2010) 15 BPR 29,367; [2010] NSWLEC 2 at [105]–[116].

[149] Owners Corporation's closing written submissions dated 13 May 2020, paragraphs 123–128.

No loss or other disadvantage to Unit Owners in any event

443 In case the Unit Owners are held in any appeal to be persons with an estate or interest in the Airspace evidence by registered instrument within the meaning of s 88K(2)(b) (contrary to my conclusion above), I record here my opinion that Unit Owners will not suffer any loss or other disadvantage as a result of the imposition of the proposed easement.

444 The Owners Corporation's submissions identified the following loss or disadvantage to Unit Owners as arising from the imposition of the proposed easement:

(1) loss of views, security and privacy; and

(2) diminution in the value of Units 1 to 3.

445 The Owners Corporation submitted that loss of views, security and privacy are intangible detriments that cannot be compensated.

446 The Owners Corporation relied on *Khattar v Wiese* (2005) 12 BPR 23,235; [2005] NSWSC 1014, in which Brereton J said (my emphasis):

> "49. …Ordinarily, damages are not a sufficient remedy for a substantial interference with intangible benefits, because the loss is not one which is readily capable of being estimated in money, nor one which can be adequately compensated by a small money payment: that is why generally injunctive relief is granted to restrain breaches of restrictive covenants, rather than damages being considered sufficient, at least in most suits [cf *Shelfer v City of London Electrical Lighting Co* [1895] 1 Ch 287, 322 (A L Smith LJ, CA); *Kelsen v Imperial Tobacco Co Ltd* [1957] 2 QB 334; *Owen v O'Connor* [1964] NSWR 1312; *Wollerton & Wilson Ltd v Richard Costain Ltd* [1970] 1 All ER 483]. Views are the paradigm case of intangible benefits, and in *Post Investments Pty Ltd v Wilson* (1990) 26 NSWLR 598 Powell J (as he then was) referred to and applied *Wakeham v Wood* (1982) 43 P&CR 40, in which Waller LJ said "I find it difficult to say that where one has a view protected by covenant, the denial of that view is capable of being estimated in money terms and therefore it seems to me it cannot be adequately compensated by a small money payment'.
>
> 50. Thus in many cases, injury to intangible benefits and the imposition of intangible detriments, such as reduced amenity and enjoyment of property, and exposure to increased disruption and interference, may weigh heavily against a conclusion that the servient owner can be adequately compensated for the purposes of s.88K(2)(b). One such case, in which it was found that the servient owner could not be adequately compensated, was *Blulock* (although that case turned on the constraints which the easement would impose on future use of the servient land, rather than on intangibles). On the other hand, in *Tregoyd Gardens*, Hamilton J, at least implicitly, rejected a submission that, given the intangible benefits which the defendants in that case obtained from the presence of a palm tree, the viability of which might be jeopardised by the

> proposed easement, a sum of money in exchange for the tree could not be regarded as adequate, in circumstances where the injury was regarded as unlikely to eventuate, and would be relatively minor in the overall context if it did."

447 In the present case, the proposed easement would interfere with the views and privacy enjoyed by some Unit Owners temporarily during the carrying out of repair and maintenance work for which access to the Airspace is necessary.

448 The suggestion that the proposed easement would interfere with the security of Unit Owners is puzzling. It assumes that the owners of Part Lot 21, or their contractors, who enter onto the flat concrete roof for the purpose of carrying out work on that roof would take the opportunity to illegally access the premises of the Unit Owners.[150] It seems to me that any person wishing to illegally access those premises would not wait for an easement, or a contract to perform work on the roof of Part Lot 21, to do so.

449 In my opinion, the extent of the temporary interferences with views and privacy would be the same or similar to that occasioned by the Murrells and their contractors entering into the Airspace during the period from November 2018 to June 2019. For all the reasons addressed under Issue 5 above,[151] the extent of the temporary interferences would be limited to a minor disruption of views for some Unit Owners, some interference with the privacy enjoyed by the occupants of Unit 2 (from some parts of Unit 2 only), and some noise disturbance. These are small disadvantages of an intangible nature, which must be offset against the benefit to Unit Owners flowing from the imposition of the easement – namely, the concrete roof on Part Lot 21 will be in a better state of repair and therefore more pleasant (or at least less unpleasant) to look at from the terraces of their Units.

450 In my opinion, the advantages and disadvantages to Unit Owners in this case cancel each other out, and the impact of the proposed easement on the amenity of Unit Owners therefore does not represent any net disadvantage which must be capable of compensation under s 88K(2)(b) (assuming, contrary to my conclusion above, that Unit Owners have an estate or interest in the servient tenement evidenced by a registered instrument).

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[150] Transcript, page 231 (line 31) – page 232 (line 35).
[151] See, in particular, [165]–[185] and [330]–[332] above.

451 Even if I had been of the view that there was a loss of amenity representing a net disadvantage to Unit Owners, this would not have been a substantial intangible detriment of the kind referred to by Brereton J in *Khattar v Wiese* (*supra*) and could have been adequately compensated in monetary terms: see *Rainbowforce Pty Ltd v Skyton Holdings Pty Ltd* (2010) 15 BPR 29,637; [2010] NSWLEC 2 at [111] and [114].

452 The Owners Corporation adduced evidence from a certified practising valuer, Mr Paul Donovan.

453 In his report dated 15 April 2020, Mr Donovan expressed the opinion that Units 1, 2 and 3 would suffer a loss of value *"stemming from the reduced privacy, security and impeded views that will result from the granting of the easement"*. Mr Donovan's reasons for this opinion are that:

(1) the proposed easement gives rise to the *"potential for an intensifying use of the adjacent roof space in an uncontrolled manner for 'maintenance' and other such works"*. This is likely to be a deterrent to some potential purchasers for these units, and *"could certainly factor strongly in their purchase/value considerations"* in a market that *"highly prizes both security and privacy"*; and

(2) the proposed easement would result in "*eroded security*" because the *"breaching"* of the *"previously 'iron clad'"* height limit of RL 26.00 AHD *"provides insecurity going forward that another owner may seek to further impede into the space"*.

454 Mr Donovan did not consider that the proposed easement would have any impact on the market value of Unit 4.

455 Mr Donovan considered that the appropriate approach was to assess the current market value of Units 1, 2 and 3 (without the proposed easement) and the market value of those units if the proposed easement were imposed by the Court. Mr Alford, the valuer whose reports were tendered by the Murrells, agreed with this approach.

456 Mr Donovan formed his opinion as to the current value of Units 1, 2 and 3 having regard to recent sales of six apartments in Rose Bay, Darling Point and Double Bay. Mr Alford agreed with the current values arrived at by Mr Donovan.

457 Mr Donovan expressed the opinion that the market values of Units 1, 2 and 3 would be diminished by 4%, 5% and 2.5% (respectively) as a result of the imposition of the proposed easement.

458 This opinion was supported only by Mr Donovan's characterisation of the proposed easement as allowing access into the Airspace *"in an uncontrolled manner"*, his concern that the proposed easement gave rise to insecurity that others may seek to impede into the Airspace in the future, and his experience of the behaviour of purchasers in the market, as referred to above.

459 The proposed easement does not permit uncontrolled access into the Airspace. It permits access into the Airspace for limited purposes.

460 There is no logical basis for Mr Donovan's concern that, if the proposed easement is granted, this may encourage or facilitate other persons seeking access to the Airspace in the future.

461 As Mr Alford points out, Mr Donovan does not take into account the benefit to Unit Owners of the Murrells having the ability to repair and maintain the roof that forms part of the outlook from Units 1, 2 and 3. I reject the Owners Corporation's submission that Mr Alford's report focussed exclusively on the benefit. Mr Alford considered both the advantages and disadvantages to Unit Owners of the proposed easement and how those advantages and disadvantages might be viewed by potential purchasers of the Units. I also reject the Owners Corporation's submission that Mr Alford should have had regard to the fact that advantages of the proposed easement could be achieved without the imposition of an easement by obtaining the Owners Corporation's consent to undertake the work on the roof. I consider this submission to be disingenuous, having regard to the Owners Corporation's steadfast refusal to consent to the Murrells undertaking work on the roof, irrespective of the nature of the work and the level of information provided and offered to them, as set out in detail under Issue 5 above.

462 Mr Donovan's quantification of the diminution in value was unsupported by market evidence and appears to be inconsistent with the evidence of comparable sales on which he relied in determining the current market value of Units 1, 2 and 3.

463 Mr Donovan's "Sale 1" involved an apartment in Rose Bay with views looking across the suburb to the harbour. "Sale 2" involved the sale of an apartment directly on the beachfront at Rose Bay, with panoramic and intimate harbour and beach views. "Sale 3" and "Sale 4" involved apartments with no substantial views. "Sale 5" involved a property with partial harbour views. "Sale 6" involved an apartment with pleasant district views only (no harbour views).

464 On the basis of the photographic evidence, it is the views from "Sale 1", looking across buildings in Rose Bay to the harbour, that are most comparable to the views from Units 1, 2 and 3 of 95 Wentworth Road looking across the concrete roof of Lot 21 to the harbour.

465 As Mr Alford identified in his report dated 8 May 2020, in the view from Mr Donovan's "Sale 1" apartment, the foreground includes the flat roof of an apartment building and the harbour is in the background. Mr Alford identified the address and title of that apartment building with the flat roof. On the basis of title searches of that apartment building and the "Sale 1" property, Mr Alford ascertained that there are no restraints on the ability of the owners of the flat-roofed apartment building to enter into the airspace above their roof to carry out work on that roof (which would interfere with the harbour views from the "Sale 1" apartment in the same sense that the temporary presence of persons or equipment of the Murrells' roof would interfere with harbour views from Units 1, 2 and 3). Mr Alford also ascertained from those title searches that the owners of the apartment building in which the "Sale 1" property is situated have no proprietary rights over the airspace above the flat-roofed apartment building.

466 Despite the obvious potential for works on the roof of the flat-roofed apartment building, Mr Donovan recorded that "Sale 1" sold at a price equivalent to $38,522 per square metre, significantly greater than Mr Donovan's per square metre current (without easement) valuations ascribed to Unit 1, 2 and 3 at 95 Wentworth Road.

467 Taking into account these features of "Sale 1" and the benefits to Unit Owners of the outlook from their Units being improved by the owners of Lot 21 being able to undertake repair and maintenance of the flat concrete roof, Mr Alford

expressed the opinion that the proposed easement would not result in any diminution in the value of Units 1, 2 and 3.

468 In my opinion, Mr Alford's evidence is to be preferred to Mr Donovan's evidence. Mr Alford's opinion is informed by consideration of the disadvantages and advantages of the proposed easement and the different ways in which they may be considered by potential purchasers,[152] in addition to his assessment of the features of the "Sale 1" property and its views. By contrast, Mr Donovan has ignored the advantages and his report does not explain how his comparable sales evidence has been applied in arriving at his opinions concerning diminution in market value of Units 1, 2 and 3. Indeed, in cross-examination, Mr Donovan conceded that there was no market evidence that could be applied to determine any diminution in value. Mr Donovan claimed to have taken into account the potential for views from "Sale 1" to be disrupted by access to the flat roof in the foreground of those views, but did not explain in any coherent manner how he had done so.[153]

469 For all of those reasons, it is my opinion that, if s 88K(2)(b) requires that any loss or other disadvantage to Unit Owners can be adequately compensated (contrary to my conclusion above), the Unit Owners will not suffer any such loss or disadvantage arising from the imposition of the proposed easement.

Conclusions in relation to Issue 12

470 In summary, I have concluded for the reasons above that:

(1) s 88K(2)(b) requires that the Court be satisfied that the Owners Corporation can be adequately compensated for any loss or other disadvantage that it may suffer arising from the imposition of the proposed easement;

(2) the Owners Corporation will not suffer any loss or other disadvantage arising from the imposition of the proposed easement;

(3) there is therefore no call for the Owners Corporation to be compensated, and the requirements of s 88K(2)(b) are satisfied in this case;

(4) s 88K(2)(b) does not require the Court to be satisfied that Unit Owners can be adequately compensated for any loss or other disadvantage that

[152] Transcript, page 228 (line 50) – page 231 (line 30).
[153] Transcript, page 248 (line 25) – page 250 (line 5), page 241 (line 29) – page 244 (line 35).

they will suffer arising from from the imposition of the proposed easement; and

(5) even if s 88K(2)(b) did require the Court to be satisfied that Unit Owners can be adequately compensated, Unit Owners will not suffer any loss or other disadvantage arising from the imposition of the proposed easement once the disadvantages and advantages of the proposed easement for Unit Owners are considered.

Issue 13: Have the Murrells made all reasonable attempts to obtain an easement having the same effect as the proposed easement (s 88K(2)(c))?

471 The applicable principles were conveniently summarised by Preston CJ in *Rainbowforce* (*supra*) at [131] (citations omitted):

> "(a) the applicant for the order must make an initial attempt to obtain the easement by negotiation with the person affected and some monetary offer should be made …;
>
> (b) the applicant for the order should sufficiently inform the person affected of what is being sought and provide for the person affected an opportunity to consider his or her position and requirements in relation thereto …;
>
> (c) the applicant for the order is not required to continue to negotiate with a person affected by making more and more concessions until consensus is reached to the satisfaction of the person affected…; and
>
> (d) the whole of the circumstances are to be considered from an objective point of view; once it appears from an objective point of view that it is extremely unlikely that further negotiations will produce a consensus within the reasonably foreseeable future, it may be concluded that all reasonable attempts have been made to obtain the easement..."

472 The Murrells relied on the following offers made by them in the course of the parties communications summarised under Issue 5 above as demonstrating that they had made all reasonable attempts to obtain the easement, or an easement having the same effect:

(1) the Murrells' correspondence dated 9 May 2019: see [234] above;

(2) the Murrells' correspondence dated 27 May 2019: see [236] above;

(3) the Murrells' correspondence dated 5 June 2019: see [241] above;

(4) the Murrells' solicitor's correspondence dated 3 December 2019: see [270] above;

(5) the Murrells' solicitor's correspondence dated 24 April 2020: see [300] above; and

(6) the Murrells' solicitor's correspondence dated 29 April 2020: see [303] above.

473 I accept the Owners Corporation's submission that the Murrells' correspondence dated 9 May, 27 May and 5 June 2019 was an attempt by the Murrells to persuade the Owners Corporation to enter into an agreement that would permit the Murrells to access the Airspace and was not an attempt to obtain an easement. An easement is a proprietary, rather than a contractual, right. It would apply to successors in title to the Murrells and the Owners Corporation. What s 88K(2)(c) requires is that there have been all reasonable attempts to obtain the easement or an easement having the same effect. Attempts to obtain a contractual right do not satisfy that requirement.

474 However, the Murrells' attempts to negotiate a contractual right of access to the Airspace, together with the Owners Corporation's responses to those attempts, do form part of the context in which their later attempts to obtain an easement fall to be considered for the purpose of s 88K(2)(c).

475 The Murrells first attempted to obtain an easement on 3 December 2019, more than two months after the Murrell proceeding had been commenced.

476 The Owners Corporation submitted that this attempt, and the subsequent attempts on 24 an 29 April 2020, could not be regarded as reasonable attempts to obtain an easement having the same effect as that sought under s 88K because no attempt to obtain an easement was made prior to the commencement of the Murrell proceeding.

477 I respectfully agree with Pain J in in *Tenacity Investments v Ku-Ring-Gai Council* [2008] NSWLEC 27 at [72] that the terms of s 88K contain no indication that the Court, in applying s 88K(2), is limited to considering the state of affairs at a time earlier than the hearing of the application for an order imposing the easement.

478 Just as the question of reasonable necessity under s 88K(1) must be assessed by reference to all of the circumstances as they exist at the time of the hearing,[154] so much each of the matters in s 88K(2) be assessed at the time of the hearing. The Court must be satisfied of each of the matters in s 88K(2) before imposing an easement (assuming that s 88K(1) is also satisfied). In my

[154] Gordon v Lever (No 2) (2019) 101 NSWLR 427; [2019] NSWCA 275 at [40] (Bell P, Payne JA and Emmett AJA agreeing).

opinion, it would be absurd if the Court was required to decide whether it was satisfied of the matters in s 88K(2) at the time of the hearing by reference to some earlier point in time and was unable to take into account events in the period leading up to the hearing.

479 Ordinarily, it is to be expected that an applicant for an easement under s 88K will have at least commenced the process of making reasonable attempts to obtain the easement sought by negotiation, before commencing proceedings. It will not be uncommon that the negotiation continues after the commencement of proceedings – litigation often sharpens the focus of parties' negotiations. For the reasons above, I respectfully agree with Pain J's approach in *Tenacity Investments v Ku-Ring-Gai Council* (*supra*) (at [69]–[72]) of considering the whole of the negotiations, both before and after the commencement of the proceedings, in applying s 88K(2)(b). I respectfully decline to adopt her Honour's *obiter dicta* remark (at [195]) to the effect that failure to take steps to obtain an easement before commencing proceedings would ordinarily weigh heavily against an applicant. If s 88K(1) and all of the requirements of s 88K(2) are satisfied, then the question whether the Court should exercise its power to make an order imposing an easement will depend on all of the circumstances of the case. The whole of the course of conduct of the parties is likely to be relevant, and the significance of the applicant's failure to take steps to obtain an easement prior to commencing proceedings falls to be determined in the context of that course of conduct and all other relevant matters.

480 In this case, it was reasonably clear from the whole of the dealings between the parties as summarised under Issue 5 above that that the Owners Corporation was determined not to permit the Murrells to enter the Airspace. The Owners Corporation maintained that stance after receiving the Murrells' first correspondence seeking an easement on 3 December 2019. Mr Howse' evidence was that the Owners Corporation was not prepared to grant the Murrells' an easement *on any terms*.[155] The Owners Corporation did not even bother to respond to the Murrells' solicitor's letter of 3 December 2019, despite

[155] See [277] above.

the Murrells' solicitor sending follow up communications to the Owners Corporation's solicitor seeking a response.[156]

481 By December 2019, the Murrells had not entered the Airspace for approximately six months. I infer that any attempt to negotiate an easement with the Owners Corporation prior to December 2019 would have been met with the same stony silence, or outright refusal, from the Owners Corporation.

482 I also infer that, after the Owners Corporation's refusal to respond to the Murrells' attempt to negotiate an easement in early December 2019, the Murrells resigned themselves to the inevitability of these proceedings running their full course. Section 88K(2)(c) did not require the Murrells to continue endeavouring to negotiate with the Owners Corporation in circumstances where it was clear that those attempts would be futile.

483 It is understandable that the Murrells nevertheless made further attempts to negotiate an easement immediately prior to during the hearing of the proceedings on 24 and on 29 April 2020. It is not uncommon that the realities of contested proceedings cause parties to reassess the pros and cons of a compromise compared to a court-imposed outcome. Those attempts also failed.

484 For completeness, I note the Owners Corporation's submissions that the offers made on 3 December 2019, 24 April 2020 and 29 April 2020 were not reasonable attempts because they were predicated on Mr Donovan's methodology for assessing compensation being rejected and they did not adequately address the Owners Corporation's costs of the whole of these proceedings or explain how the Owners Corporation's costs of the s 88K element of these proceedings was to be separated from its costs of the balance of the proceedings if the offer were taken up. I do not consider that s 88K(2)(c) requires that attempts to obtain an easement resolve the entirety of a larger dispute between the parties, including resolving the question of costs of proceedings which are provided for in s 88K(5). The fact that the Owners Corporation wished to continue the proceedings and advocate for compensation in accordance with Mr Donovan's report is not relevant. The

[156] See [272]–[277] above.

question is whether the Murrells' attempts to obtain the easement were reasonable, not whether it was reasonable for the Owners Corporation to reject those attempts.

485 For all of the reasons above, I have concluded that, whilst it would have been preferable for the Murrells to seek to discuss an easement with the Owners Corporation prior to commencing proceedings, the Murrells had made all reasonable attempts to negotiate the easement by the time of the hearing of the s 88K application.

Issue 14: Whether the proposed easement should be granted and what amount of compensation should be specified

486 For the reasons explained under Issues 10 to 13 above, I have concluded that an order should be made under s 88K imposing an easement in terms to the following effect , and that no compensation is payable in the special circumstances of the case addressed under Issue 12 above:

> "The owner of Part Lot 21 / DP 871094 (now known as Part Lot 1 DP 12534483) (the **dominant tenement**) is permitted to access Part Lot 22 DP 871094 (now being part of the land comprised in folio CP/SP85044 of the Register) (the **servient tenement**) as necessary and on a temporary basis to repair and maintain any structure on the dominant tenement and to take onto the servient tenement on a temporary basis anything reasonably necessary for that purpose."

Issue 15: Should the Murrells be restrained from entering into the Airspace?

487 The Owners Corporation seeks:

> "…an order that [the Murrells], by their servants or agents, be restrained, until a land access order pursuant to the *Access to Neighbouring Land Act 2000* is made in their favour (if any) from entering into or remaining upon or causing or allowing anything (including, without limitation, scaffolding and other building materials or equipment) to enter of [sic] remain upon the [Owners Corporation's] land, being the air space comprising part of Lot 22 in Deposited Plan 87094 (save for the purposes of performing building works of an emergency nature to the dwelling located on [the Murrells'] land being Lot 21 in Deposited Plan 871904)."

488 In view of my decision to make an order under s 88K of the *Conveyancing Act*, it would not be appropriate to grant an injunction in these terms. The claim for relief in prayer 1 of the summons and prayer 5 in the amended statement of claim in the Owners Corporation proceedings is therefore dismissed.

Issue 16: Claims in trespass and nuisance relating to the stud wall

489 There is no dispute that the Murrells' contractors erected a stud wall on part of the Boundary Wall. There is a dispute about whether the Boundary Wall on which this work was done was:

(1) directly on the boundary between the Murrells' property and the Owners Corporation's property, as shown by a survey plan obtained by the Murrells on 26 November 2018;[157] or

(2) within the boundary of the Owners Corporation's property by between 55 and 80 millimetres, as shown by the Strata Plan.[158]

490 There was no expert or other evidence before the Court that would enable this discrepancy between the two plans to be resolved. As the Owners Corporation bears the onus of proving that the Murrells entered into the Owners Corporation's property, the claims in trespass and nuisance relating to the erection of the stud wall on the Boundary Wall, and the painting of the Boundary Wall, fail at this first hurdle.

Issue 17: Claims for damages and rectification orders relating to the stud wall

491 These claims of the Owners Corporation are dismissed for the reasons explained under Issue 16 above.

Issue 18: Claims in trespass and nuisance relating to the painting of the Boundary Wall

492 The Owners Corporation has failed to prove that the painting of the boundary wall constituted trespass or nuisance for the reasons explained under Issue 16 above.

Issue 19: Claims for damages and rectification orders relating to the painting of the Boundary Wall

493 These claims of the Owners Corporation are dismissed for the reasons explained under Issue 16 above.

Orders

494 My conclusions are summarised in [75] above.

495 The parties should formulate the precise terms of the orders to give effect to my reasons for judgment in relation to the Murrells' claim for an easement

[157] Exhibit 1, page 946.
[158] Exhibit 1, page 436.

under s 88K of the *Conveyancing Act* (Issues 10 to 14 above). Those orders should impose an easement in the terms of an attached s 88B instrument with accompanying plan intended to be registered to give effect to my reasons. I have set out the terms of the easement under Issue 14 above, but the parties are at liberty to amend the descriptions of the dominant and servient tenements to ensure that they are clearly described by reference to the current folio identifiers for those tenements and the plan that is to accompany the s 88B instrument to be attached to the orders.

496 Section 88K(5) of the *Conveyancing Act* provides that the costs of proceedings under s 88K are payable by the applicant for the easement, subject to any order of the Court to the contrary. I am not presently aware of any reason why the Court should order to the contrary in this case.[159] If no such reason is identified, and if costs follow the event in relation to the balance of the Murrell proceeding, this would result in the Murrells paying the Owners Corporation's costs of the Murrell proceeding. If costs follow the event in relation to the Owners Corporation proceeding, the Murrells would also pay the Owners Corporation's costs of that proceeding as the Owners Corporation has succeeded in part of its claim in trespass. That claim was the most significant issue in the Owners Corporation proceeding. This is not a case that lends itself to issues-based costs orders.

497 However, the parties asked that I hear them in relation to costs once the outcome of the proceedings is known, and there may be reasons that I am not presently aware of why the Murrells should not pay the costs of the s 88K application or why the costs of the balance of the proceedings should not follow the event. I will therefore determine the question of costs on the papers once the parties have had an opportunity to make written submissions.

498 I make the following orders and directions:

Proceeding 2019/201673

(1) Judgment for the plaintiff in the sum of $10,000 in respect of the defendant's trespasses into the Airspace comprising part of the plaintiff's property in CP/SP 8504.

[159] See Gordon v Lever (No 2) (2019) 101 NSWLR 427; [2019] NSWCA 275 at [92] (Bell P, Payne JA and Emmett AJA agreeing).

(2) Costs reserved for determination on the papers in accordance with orders 11 and 12 below.

(3) The summons and statement of claim are otherwise dismissed.

Proceeding 2019/299582

(4) Dismiss the claims for relief in prayers 1, 2 and 3 of the summons filed on 25 September 2019 and prayers 1, 2 and 3 of the statement of claim filed on 25 November 2019.

(5) Grant leave to the plaintiffs to amend prayer 4 of the summons filed on 25 September 2019 and prayer 4 of the statement of claim filed on 25 November 2019 to read:

> "… an order imposing an easement over Part Lot 22 of Deposited Plan 871094 pursuant to section 88K of the *Conveyancing Act* to permit the owner of Part Lot 21 to enter the airspace of Part Lot 22 as reasonably necessary **and on a temporary basis** to repair, maintain and/or improve any structures on Part Lot 21"

(6) Dispense with the requirement to file an amended summons and amended statement of claim.

(7) Order the plaintiff to pay the defendant's costs thrown away by the amendment (if any), as agreed or assessed.

(8) Direct the parties to send to my Associate within 14 days agreed draft orders giving effect to the reasons for judgment in relation to the plaintiffs' claim for relief in prayer 4 of the summons filed on 25 September 2019 (as amended) and prayer 4 of the statement of claim filed on 25 November 2019 (as amended).

(9) Grant liberty to the parties to apply on 3 days' notice if they are unable to reach agreement on the draft orders referred to in order 8 above.

(10) Costs reserved for determination on the papers in accordance with orders 11 and 12 below.

Proceedings 2019/201673 and 2019/299582

(11) Direct the parties to send to my Associate within 14 days:

(a) Agreed draft orders concerning the costs of the proceedings; or

(b) In the absence of agreement, a note setting out the costs orders for which each party contends, together with any supporting evidence and written submissions (not exceeding 4 pages).

(12) Order that the question of the costs of the proceedings is to be determined on the papers.

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ANNEXURE 'A'

ANNEXURE 'B'

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.