VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

OWNERS CORPORATIONS LIST **VCAT Reference: OC2705/2015**

CATCHWORDS

Agreement for owners corporation to have access to terrace for water proofing works – owners corporation's contractor does not complete the works – whether owners corporation was agent for lot owner – responsibility of the parties for delay – whether the agreement was terminated by frustration – whether cause of water entry from terrace into apartment was identified – what works are required to complete the waterproofing – relevance of conduct of the parties – liability of owners corporation for cost of making good damage caused by its contractor – *Owners Corporations Act 2006* ss 12(1)(b), 167(a).

APPLICANT:	Owners Corporation 446158A
RESPONDENT:	Garry Dunn
WHERE HELD:	55 King Street, Melbourne
BEFORE:	Senior Member A. Vassie
HEARING TYPE:	Hearing
DATE OF HEARING:	8 – 11, 14 – 16, 28 August 2017
DATE OF ORDER:	30 November 2017
DATE OF REASONS:	30 November 2017
CITATION:	Owners Corporation 446158A v Dunn (Owners Corporations) [2017] VCAT 1892

ORDERS

The Tribunal declares that the applicant owners corporation is not liable to carry out any further works to the respondent's lot 702, including any works to repair or replace the waterproofing and tiling to the terrace and works to the balustrade upstands or glass.

A. Vassie
Senior Member

APPEARANCES:

For the Applicant:	Ms. T. Acreman of Counsel
For the Respondent:	Mr. M. Settle of Counsel

REASONS FOR DECISION

Introduction

1. The Scala Apartments are built on land at 1 Roy Street, Melbourne described on plan of subdivision 446158A. Garry (or Gary) Dunn owns and occupies apartment 702, which is on level 7 of the building and is on lot 702 in the subdivision. His apartment has a large tiled terrace that has a northern outlook over Roy Street.

2. I have heard, and am now determining, two proceedings which have arisen out of the need for waterproofing repairs to Mr Dunn's terrace to prevent water entry to apartment 602, directly below Mr Dunn's apartment, and water entry to his own apartment. In proceeding OC2705/2015 Owners Corporation PS 446158A, which affects all the land in the subdivision, is the applicant and Mr Dunn is the respondent. In proceeding OC893/2017 Mr Dunn as applicant makes a cross-claim against the owners corporation as respondent. For the moment I defer an explanation of what each party claims against the other. These are reasons for decision in both proceedings.

3. In early 2013 the owners corporation commissioned a waterproofing contractor, Procon Waterproofing Pty Ltd ("Procon"), to do works which a consulting engineer had advised the owners corporation were needed to repair the terrace. The works involved demolition of the tiles and of the screed between the tiles and the concrete slab, placement of a primary waterproofing membrane over the slab, installation of a fresh screed, placement of a secondary membrane over the screed, upgrading of the drainage system, and the laying of new tiles. Procon began the works but in early 2014 went into liquidation before the works were completed.

4. The works have been left incomplete since then, because the owners corporation and Mr Dunn have not been able to agree upon what works need to be done now and how they should be done; in particular, they have not been able to agree upon how the owners corporation should gain access to the terrace for another contractor to do whatever has to be done to achieve a waterproofed terrace.

5. Because the works have been left incomplete since early 2014 the condition of the terrace has deteriorated. Achievement of a waterproofed terrace now will require much more work, and will be much more expensive, than would have been the case if completion had been achieved in early 2014. The parties, however, cannot agree on exactly how much of the additional cost, if any, the owners corporation ought to bear. The owners corporation contends that Mr Dunn should have to bear the additional cost because of his conduct which, it alleges, delayed Procon's works and created difficulties about access to the terrace for any new contractor.

6. Another dispute between the parties concerns the entry of water from the terrace to the interior of Mr Dunn's apartment. The water has damaged carpet in the lounge room of the apartment, and part of the interior surface of that room. Mr Dunn alleges that the cause of the water entry was inadequate workmanship on Procon's part for which the owners corporation is responsible, so the owners corporation ought to pay for the cost of replacing the carpet and rectifying other damage. The owners corporation alleges that Mr Dunn himself is responsible for the water entry, having caused a wall to be penetrated for the installation of a gas line and by having removed sealant.

7. When the owners corporation began its proceeding against Mr Dunn, and until the fifth day of the eight day hearing before me, the orders that the owners corporation primarily sought were an order that Mr Dunn must provide the owners corporation and its contractors with access to lot 702 for the purpose of carrying out works necessary to complete the waterproofing of the terrace and to reinstate it, and a declaration that Mr Dunn was liable for the cost of those works. The request for those orders reflected an intention of the owners corporation to continue with the task of achieving a waterproofed terrace. Mr Dunn's cross-claim was for damages for breach of an agreement, reached in February 2013, that the owners corporation should carry out the completion of the works, ensure that they were carried out with due care and skill, and make good any damage to lot 702 caused by the performance of the works; the measure of damages was said to be the cost of complete and careful waterproofing works and the cost of making good damage to lot 702. Such a cross-claim reflected an intention on Mr Dunn's part to undertake whatever works were necessary and recoup from the owners corporation the cost of the additional works and of the making good.

8. On the fifth day of the hearing the owners corporation applied for leave to amend its claim so that it no longer sought an order about access and a declaration of Mr Dunn's liability to pay for the cost of works. Instead, it sought declarations that it was not liable to carry out any further works to lot 702 or to pay for any further works. The reason for the application was, so its Counsel contended, that there was evidence that an agreement into which it and Mr Dunn had entered in February 2013, that would have enabled the completion of the works by access to Mr Dunn's terrace but not to his apartment, had become terminated by frustration once his neighbour had refused access through the neighbour's apartment.

9. I allowed the amendment. The consequence was that both parties were asking for the two proceedings to be decided on the footing that Mr Dunn would be undertaking and paying for whatever works were necessary to achieve a waterproofed and reinstated terrace and to rectify damage to the interior of his apartment. The determination of the two proceedings will be either declarations in the terms that the owners corporation sought in its amended claim or an order fixing the amount that the owners corporation is liable to pay to Mr Dunn.

10. Mr Dunn's cross-claim originally sought damages of $389,312.78. During the hearing I allowed an application to increase the amount claimed to $416,445.00.

11. In its Points of Claim in the first proceeding, in which it was the applicant, the owners corporation had made other allegations about, and had claimed orders in relation to, other alleged conduct of Mr Dunn including alleged breaches of the owners corporation's rules. At the beginning of the hearing Counsel for the parties told me that those matters had been settled and could be ignored.[1]

12. The issues that remain for determination in the two proceedings appear to be:

    (a) Is the owners corporation still bound by an agreement it made with Mr Dunn in February 2013, or has that agreement been terminated by frustration?

    (b) What is the cause of water entry from the terrace into Mr Dunn's apartment?

    (c) What works are reasonably necessary

        (i) to complete the waterproofing of the terrace so that water does not enter into lot 602;

        (ii) to reinstate the terrace;

        (iii) to prevent further water entry into Mr Dunn's apartment;

        (iv) to make good any damage done that is a consequence of Procon's work?

    (d) What is the reasonable cost of each of those works?

    (e) What part, if any, of that reasonable cost should the owners corporation bear or pay to Mr Dunn?

13. For an understanding of how the owners corporation had come to be involved at all in undertaking work on a terrace that was not common property but was part of lot 702 which Mr Dunn owns, it is necessary to outline a history of what had occurred before the owners corporation engaged Procon to do waterproofing works on the terrace.

[1] Ms Acreman of Counsel for the owners corporation told me that it no longer relied upon paragraphs 40 to 62 (inclusive) of its Points of Claim in proceeding OC2705/2015 or upon paragraphs B to K (inclusive) of the claim for relief in the Points of Claim.

Litigation Against the Builder: Access Requested

14. LU Simon Builders Pty Ltd built the Scala Apartments, completing them in 2003. By 2005 the owners corporation and various lot owners were alleging defects in the building, including defects in balconies and terraces. By 2011 there was litigation in the Tribunal's Domestic Building List (as it then was) between the owners corporation, on behalf of itself and of various lot owners, including Mr Dunn, against the builder and its insurer, Allianz Australia Insurance Ltd. The defects which the owners corporation alleged in that litigation included defective waterproofing of the terraces of apartments 701 and 702 on level 7 which resulted in water entry to apartments 601 and 602 on level 6.

15. Philip Walshe is the owner and occupier of apartment 701. It is the mirror image of Mr Dunn's apartment 702.[2] There is a terrace to apartment 701 which is the mirror image of Mr Dunn's terrace. The two terraces take up the entire north frontage of level 7 which overlooks Roy Street.

16. Glass balustrades surround the edges of the two terraces. Another glass balustrade separates the two terraces.

17. To discharge what it saw as its obligation, in the context of the proceeding against the builder and its insurer, to mitigate loss caused by water entry to apartments 601 and 602, the owners corporation's committee of management resolved[3] on 11 December 2012 to undertake waterproofing works to the terraces on lots 701 and 702. An owners corporation may, by special resolution, enter into an agreement with a contractor for the provision of services to lot owners.[4] This was apparently what the committee was intending that the owners corporation should do. Whether there was or was not a special resolution of members to that effect – there has been no evidence of one – has not been an issue in those proceedings.

18. On 15 December 2012 Procon provided a quotation[5] to the owners corporation for demolition of the existing screed and tiles on the two terraces, installation of a screed with a minimal thickness of 45 to 85 millimetres, waterproof membranes both under and over the screed, an upgrading of the drainage system, and laying of new tiles. The price quoted was $262,493.27 plus goods and services tax (GST): i.e. $288,874.26.

[2] The Tribunal Book ("TB") includes at p 689 and at p 1091 plans showing the layout of apartments 701 and 702, and at p 1046 a plan showing in more detail the layout of Mr Dunn's lot 702.
[3] TB pp 744 – 745.
[4] *Owners Corporations Act 2006* s 12(1)(b).
[5] TB p 1084.

19. On 17 December 2012 the owners corporation manager, the Knight Alliance, wrote to Mr Dunn,[6] notifying him that the owners corporation intended to carry out "essential maintenance work to fully waterproof and retile your terrace and thus prevent water from entering into the apartments below" and to evaluate quotations from three separate waterproofing companies for those works. The letter also stated that work would begin in February 2013 "and may last 4 – 6 weeks depending on weather conditions", asked Mr Dunn to give his written approval by 21 December 2012 to the owners corporation's undertaking of the proposed works, and informed him that Mr Walshe had given permission for entry through apartment 701.

20. When Mr Dunn did not respond to the letter, the owners corporation sent to Mr Dunn another letter dated 24 December 2012 which enclosed a notice[7] requiring him to agree within 28 days that he would allow access to apartment 702 by mid February 2013. On 11 February 2013 he responded to the notice, not complying with it but instead asking for documented evidence of works for which the access was necessary.[8]

Agreement for Access to the Terrace

21. The owner of lot 602, directly below Mr Dunn's apartment, was Robert Bontschek. In February 2013 Mr Bontschek began a proceeding in the Owners Corporations List (number OC57/2013) naming Mr Dunn and the owners corporation as respondents and seeking injunctive orders for rectification of Mr Dunn's terrace.

22. On 19 February 2013 the application for an interlocutory injunction came on for hearing. The parties sought a consent order. By the first two paragraphs of the consent order[9], Mr Bontschek was authorised to prosecute the proceeding on behalf of the owners corporation[10], which was removed as a party. Paragraphs 3 and 4 of the consent order recorded an agreement between the owners corporation and Mr Dunn in the following terms:

> 3. By consent, the respondent Gary Dunn shall give the owners corporation access to the terrace of his property being apartment 702 at 1 Roy Street, Melbourne from outside his apartment (but he is not required to provide access to or through his apartment) to carry out works to repair and replace the waterproofing and tiling on the terrace of his property ("the works").

[6] TB pp 747 – 748.
[7] TB pp 750 -753.
[8] TB p 796.
[9] TB p 1087.
[10] Section 165(1)(ab) of the *Owners Corporations Act 2006* empowers the Tribunal to make such an order.

4. The Tribunal notes that the respondent and the owners corporation agree that:

   (a) the works will be carried out with due care and skill;

   (b) the owners corporation shall make good any damage to the respondent's property consequent to the performance of the works; and

   (c) the respondent's property will be left in a neat and tidy condition upon the completion of the works.

Underlying the agreement was the fact, known to both parties, that Mr Walshe had agreed to allow access through his apartment to his terrace so that works could be performed to both terraces, which was why Mr Dunn was not required to allow access through his apartment but to give access to his terrace only.

23. Except for Mr Dunn's allegation that there was an implied term of the agreement, and except for debate about the legal effect of the agreement, the evidence on both sides[11] demonstrated that there was no dispute about the substance of the agreement. It was that:

   (a) the owners corporation would carry out works to repair and replace the waterproofing and tiling on the terrace of lot 702;

   (b) the owners corporation would have the works carried out with due care and skill;

   (c) Mr Dunn would give the owners corporation access to the terrace so that the works could be carried out;

   (d) Mr Dunn was not required to allow access to or through his apartment; and

   (e) the owners corporation would make good any damage to Mr Dunn's property consequent upon the performance of the works and would have his property left in a neat and tidy condition upon the completion of the works.

24. Mr Dunn alleged in his cross-claim that there was implied term of the agreement that the works would be completed within 4 to 6 weeks of their commencement; alternatively, that he was induced to enter into the agreement by the owners corporation's representation to him that the works would be completed within 4 to 6 weeks[12]. The owners corporation has denied that there was any such implied term or that it made any such representation. It has contended that Mr Dunn was given no more than an estimate of the period required for completion, with

[11] For the owners corporation, the affidavit of Michael Patrick O'Neill sworn on 13 November 2015, paragraph 9 (TP p 679); for Mr Dunn, paragraph 6 of his first Witness Statement (TB p 739).
[12] Paragraphs 6 and 64 of his Defence and Counterclaim in the first proceeding: TB pp 67 – 68.

qualifications about weather conditions. In the end, the allegation fell away, because Mr Dunn conceded in cross-examination that the letter dated 17 December 2012 to him, stating that work would begin in February 2013 "and may last 4-6 weeks depending on weather conditions" had been an estimate only. Nevertheless, in view of the access that Mr Dunn was agreeing to give to part of his lot 702, I consider that there was an implied obligation upon the owners corporation to have the works to Mr Dunn's terrace completed within a reasonable time.

25. The contention about the legal effect of the agreement, made by Mr Settle of Counsel for Mr Dunn in his final address, was that the owners corporation was Mr Dunn's "agent" for the carrying out of the works identified in the agreement. I do not accept that contention.

26. For an agency relationship to exist, there must be a person (the principal) who expressly or impliedly manifests assent that another person should act on his behalf so as to affect his relations with third parties, and that other person (the agent) who similarly manifests assent so to act, or does act, in that way.[13] Control by the principal is common, but not always, a defining characteristic of agency; if the principal gives up all control of his supposed agency it is doubtful that the relationship is one of agency at all.[14]

27. The words of the consent order, and the circumstances surrounding the giving of the consent, tell against the contention that Mr Dunn was a principal, and the owners corporation his agent, for the purposes of the carrying out of the works referred to in the consent order. The words of the order, that Mr Dunn was giving access to the terrace "to carry out works", demonstrated that it was the owners corporation's not Mr Dunn's task to have the works carried out. The promises that the owners corporation made in paragraph 4 of the order were of the kind that one independent contractor would make to another. Nothing in the terms of the order suggested that Mr Dunn should or could have any control over what works were to be performed or how they were to be performed; his role was only to allow access to the terrace so that they could be performed. True it was that he was the owner of the land on which the works were to be performed, but they were to be performed in the context of litigation against the builder in which the owners corporation was providing a service to him, not acting as agent for him as principal. He had no more right than any other lot owner to give instructions about the conduct of that litigation; only a majority of lot owners, in their capacity as members of the owners corporation, could decide upon its conduct. The works identified in the consent order about which the owners corporation made promises as to quality were works which the owners corporation was to undertake in its own right, as principal, and for which it was to engage tradespersons accordingly.

[13] *Bowstead and Reynolds on Agency*, 20th edition (2014), paragraph 1 – 001.
[14] *Op. cit,* paragraph 1 – 017.

The Works are Delayed and Not Completed

28. Access to both terraces having been achieved, the owners corporation engaged Procon to perform the works identified in its quotation, engaged an engineer to provide advice before and during the performance of the works, and engaged a project manager. The works began on or about 25 March 2013.[15]

29. The works were not completed quickly or at all. By the end of 2013 they were still in progress. Before Procon went into liquidation on 21 February 2014[16] they barely had been resumed in 2014.

30. In the meantime the litigation with the builder and its insurer was settled. The owners corporation received a settlement sum of $1 million. Ms Acreman of Counsel for the owners corporation told me from the Bar table that the entire settlement sum has been expended without any provision having been made for the cost of completing the works which Procon had begun but not completed.

31. The owners corporation alleges that Mr Dunn caused, or at least contributed towards, the delay in the progress of the works to the point where they remained incomplete at the time that Procon went into liquidation.

32. I have concluded that conduct of Mr Dunn contributed significantly to the delay, although it was not the sole cause of the delay. In the next few paragraphs I explain why.

Gas pipe

33. By the beginning of May 2013 Procon had demolished most of the existing tiles and screed on Mr Dunn's terrace. In the course of the demolition, Procon discovered that a gas line ran from beneath the tiled surface and through the concrete hob beneath the north-facing window in two places, one of which was near the north-west corner of the apartment. The builder's drawings for apartment 702 had not shown such a gas line. Its presence made it impracticable to demolish the tiles and screed around it, so a small area of tiling near the line was left intact, pending removal of the gas pipe, whereupon the demolition and reconstitution work could proceed and the gas line could be reinstated upon completion.

34. On 3 May 2013 the owners corporation's manager wrote to Mr Dunn[17], notifying him that Procon wished the gas line to be removed and reinstated later upon completion of the works. The manager sought Mr Dunn's agreement either for a gas fitter engaged by Procon to attend to the isolation of the pipe or for Mr Dunn

[15] That was Mr Dunn's evidence: paragraph 10 of his first witness statement (TP p 740).
[16] TB p 561 is a copy of the winding up order made upon the application of the Deputy Commissioner of Taxation.
[17] TB pp 808 – 809.

himself to engage a gas fitter to attend to it and provide a certificate of compliance. Further letters between the manager and Mr Dunn did not achieve an appointment for the attendance of a gas fitter that would suit Mr Dunn's convenience. Eventually Mr Dunn wrote to the manager of 15 July 2013 saying that he would attend to the matter himself.[18]

35. In the meantime. Procon had laid a primary waterproofing membrane onto the terrace's concrete slab and had run the membrane up the outside of the hob so that could form a seal between the hob and the screed below the titles.

36. Very soon after his letter of 15 July 2013 – perhaps on the same day[19] - a plumber whom Mr Dunn engaged and whom in his evidence he identified as Ted Fowler replaced the gas line with a larger pipe, creating a large hole at the western end of the hob in order to fit it to reach the interior of the apartment. By so doing, the plumber pierced the primary membrane. In cross-examination Mr Dunn admitted that he had known that the penetration of the hob with the larger pipe would cause a penetration of the primary membrane. The fact is of significance because the owners corporation alleges not only that the primary membrane was compromised in that way but also that the penetration of the hob was a cause of water entry into the north-west corner of Mr Dunn's apartment and of damage to the carpet there.

37. On 29 August 2013 Procon alleged in writing[20] to the owners corporation's manager that the presence of the pipe, and the absence of a certificate of compliance from the plumber who had attended to it, had been the major cause of the delay to that date in completion of its works. Whether or not that was so, I am satisfied that it was a cause for which Mr Dunn was responsible. Eventually he obtained a certificate of compliance but not until 2016; I was not told why it took so long to obtain the certificate. When asked why he did not seek the owners corporation's approval before altering the pipe and the hob, he said in his evidence that the terrace and the apartment were his property and that he was entitled to do what he did.

38. In the end, the issue was resolved when the supervising engineer gave direction to a plumber how to insulate the gas pipe satisfactorily and affix it to the slab. Procon repaired the membrane after that was done.

[18] TB p 815.
[19] On the next day, 16 July 2013, the owners corporation's manager wrote to Mr Dunn about the matter: TB p 820.
[20] TB p 825.

Gutter and drains

39. Both the terrace to lot 702 and the terrace to lot 701 had been built with a view to water collected on the terrace being drained to two discharge points, dropper drains set into the terrace. The owners corporation regarded that drainage system as inadequate, because of the fall of each terrace; water was not being captured on the terrace and sent to the drainage points but tended to run off over the edge of the terrace. The supervising engineer required the installation on each terrace of a gutter, laid within the screed and bisecting the length of the terrace, with grated drains at the two existing discharge points. New tiles, once laid, were to abut the edges of the gutter. For that type of drainage installation the screed needed to be thicker than the demolished screed had been. Procon proceeded to install the gutter and drains on lot 701 first.

40. Mr Dunn objected to the installation on his terrace of the gutter and new drains. He wanted the terrace reinstated with a drainage system as it had been before the demolition. He disputed that that drainage system had been inadequate. On 28 May 2013 he made an application to the Tribunal for an injunction restraining the owners corporation from installing the proposed gutter and drains. The Tribunal heard the application for an injunction on 30 May 2013 and dismissed it.[21]

41. Later in 2013 Mr Dunn made a complaint to the Victorian Building Authority about the works on his terrace. The evidence did not reveal the exact nature of the complaint. It may have been that the position of the gutter did not correspond with the line of the balcony's edge on level 8 which overhung his terrace; that was a complaint which he mentioned during the hearing. At all events, the owners corporation's manager notified him by letter dated 6 November 2013[22] that it had instructed Procon not to proceed with the installation of the drainage system pending the outcome of his complaint to the Victorian Building Authority.

42. Although I was not told exactly what happened about the complaint to the Victorian Building Authority, evidently Mr Dunn did not proceed with it, because despite the earlier instruction Procon proceeded to install the gutter and drains. On the terrace of Mr Dunn's lot 702 it did not complete the task, however. The gutter was laid within the new screed but the tiles were not laid to the edges of the gutter. The consequence was that the secondary membrane, laid on top of the screed, was left exposed between the edges of the gutter and the edges of the tiled surface so far as the tiles went, which was to about a tile's width from the gutter.

[21] The application was made in proceeding OC1477/2013. The Tribunal's order is at TB p 828.
[22] TB p 830.

43. The manufacturer of the gutter and drainage system was Stormtech Pty Ltd. One of the claims that Mr Dunn has made in these proceedings is that the installation was not done in accordance with the manufacturer's guidelines and is defective. I shall deal with that claim below.

44. I am satisfied that Mr Dunn's actions in applying for the injunction and making the complaint to the Victorian Building Authority were a cause of delay in the installation of the gutter and drains. As with Mr Dunn's actions in relation to the gas line, his actions in relation to the drain showed that he ignored the fact that, although he was the owner of the terrace, he had yielded to the owners corporation control of performance of works on it and was not entitled to interfere with those works.

Screed reinforcement

45. The supervising engineer had not required the new screed to be reinforced. Mr Dunn demanded that it be reinforced, although he was not entitled to. After some negotiation between the parties the owners corporation agreed to the demand and the screed was reinforced with steel mesh. That meant that Procon's contract price was increased and the laying of the screed took longer than originally planned. I accept that Mr Dunn's conduct in relation to the mesh was another cause of delay, although it seems to me that, in view of the fact that deflection of the slab was discovered during demolition, the reinforcement of the screed was probably a reasonable thing for him to have requested.

Other conduct of Mr Dunn

46. There was a good deal of evidence, some of it particularised and some not, about confrontations between Mr Dunn and Procon's workmen, the owners corporation chairman Mr O'Neill, the owners corporation manager and the neighbour Mr Walshe.[23] It always takes two to make a quarrel, and it is understandable that Mr Dunn would be annoyed at the slow progress of the works on his terrace as they stretched to the end of 2013. Nevertheless, I find that Mr Dunn's attitude to those other persons throughout 2013 was hostile at most and unco-operative at best. In particular, his apparent instance that all communications with him on the subject of the works on the terrace be in writing did nothing to expedite those works.

Procon's delay

47. But the contribution of Mr Dunn's conduct to the delay in the progress of the works throughout 2013 is by no means a complete explanation for the delay. Wet weather cannot account for works which had been estimated to take 4 to 6 weeks not having been completed after nine months. Procon's inefficiency and sporadic attendance at the site accounted for much of the delay.

[23] For example, the witness statements of Anthony Overell, paragraphs 22 – 27 (TB pp 683 – 684) of Michael Patrick O'Neill paragraphs 10 – 13 (TB p 334) and of Philip John Walshe paragraphs 4 -6 (TB pp 735 – 736).

Access is Withdrawn

48. Procon went into liquidation on 21 February 2014 without having completed its works on the two terraces. According to the evidence of the owners corporation chairperson Mr O'Neill, which was not contradicted or challenged, the works by that time were 95% complete.

49. The owners corporation engaged Lewton Trading Services Pty Ltd, which traded under the name Lewton Construction ("Lewton"), to complete the works on the two terraces. Lewton prepared a list of the works that it considered were required to complete the reinstatement of the two terraces and took photographs of the state of the works as Procon had left them.[24]

50. In March 2014, once Lewton had completed the reinstatement of the terrace of lot 701, its owner Mr Walshe decided that he would no longer allow access to workmen through his apartment to his terrace and to Mr Dunn's terrace. In paragraph 8 of his witness statement, in which he referred to each terrace as a "balcony" and to Mr Dunn as "Gary", Mr Walshe explained his decision:

> The trades accessed the balcony of 701 and 702 through my apartment from the start of the works until the completion of works to my balcony in about March 2014. At that time, I decided that I had granted access long enough and it was time for Gary to let them have access through his apartment to finish the works to his balcony. So, the glass partition was put back up between my balcony and Gary's balcony. By that stage, the majority of the works to Gary's balcony were also complete. From what I could see, only a row of tiles on either side of the drain needed laying.

51. On 13 April 2014 Mr Dunn sent to the owners corporation's manager a list[25] of 22 items of what he said were incomplete or defective works on his terrace, and asked what action the owners corporation's committee was taking to expedite the completion of the works. On 21 May 2014 the manager commented in writing[26] to Mr Dunn upon each of the 22 items and stated:

> We look forward to joint cooperation to enable the terrace to be completed. Once agreement is achieved each of the trades will be contacted to enable a schedule of works to be planned and access requirements advised. Every effort will be made to achieve coordination specific trades on a same day basis to minimise intrusion but cannot be guaranteed. Access will be required between 8.30am and 4.00pm.

[24] The list is TB pp 857 – 860. The photographs are TB pp 832 – 856.
[25] TB pp 908 – 909.
[26] TB pp 910 – 911.

The access contemplated was through Mr Dunn's apartment, but Mr Dunn would not permit it. In cross-examination he said: "If I had control over contractors I would have had confidence in allowing tradesmen through the apartment"; but, as he appeared to have acknowledged by giving that evidence, he did not have control over the contractors that the owners corporation had engaged for the purpose of carrying out works on his terrace.

52. At a meeting between Mr Dunn and the owners corporation's committee on 12 June 2014 Mr Dunn offered to complete all remaining works if the owners corporation was prepared to pay him for the cost involved.[27] On 25 June 2014 the owners corporation, by letter from its manager to Mr Dunn[28], agreed in principle to his offer, subject to numerous conditions and to the appointment of an independent expert to oversee the contractors whom Mr Dunn engaged. Eventually on 22 September 2014 Mr Dunn replied[29] to say that he had been unable to find a contractor who would agree to the owners corporation's conditions.

53. On 23 September 2014 Robert Simpson of Building Check Pty Ltd, a building consultant engaged by the owners corporation, inspected the site in the company of Mr Dunn, for the purpose of evaluating each of Mr Dunn's 22 items. Mr Simpson inspected again on 2 December 2014. He reported in writing to the owners corporation on 10 December 2014.[30] The report was that some of the 22 items required attention but others did not. He assessed the cost of rectification of defects and completion of work at $6,681.66.

54. Mr Dunn was not content with the report. On 18 December 2014 he and the committee met again. According to minutes of the meeting[31], the divide between what the owners corporation was willing to do and pay for and what Mr Dunn wanted it to do, was to great "and may need an external arbiter (i.e VCAT)".

55. Throughout 2015 there was no progress. The owners corporation was expressing its preparedness to complete the works on Mr Dunn's terrace and was asking him to agree upon times for access for its contractors.[32] On numerous occasions[33] Mr Dunn repeated in writing that he would not grant access through his apartment. On 16 November 2015 the owners corporation filed its application in the first proceeding, OC2705/2015, asking, amongst other things, for an order requiring Mr Dunn to give access.

[27] Minutes of the meeting are at TB pp 912 – 914.
[28] TB pp 917 – 918.
[29] TB p 920.
[30] TB pp 922 – 962. The costing is at TB pp 959 – 962.
[31] TB pp 964 – 965.
[32] For example email of 27 February 2015 which is at TB p 968.
[33] On 19 March 2015 (TB p 974), 1 April 2015 (TB p 976). 11 June 2015 (TB p 977).

56. So it has come about that no work has been done on Mr Dunn's terrace since March 2014. The incompletely tiled terrace has remained with a section of the screed on each side of the gutter, and with some of the membrane laid on top of the screed, exposed to the elements and to human contact.

The Present Status of the Agreement

57. The agreement into which the owners corporation and Mr Dunn had entered on 19 February 2013, as recorded in the consent order, was predicated upon the owners corporation being able to gain access to Mr Dunn's terrace through Mr Walshe's apartment, as Mr Walshe had said it could. Once Mr Walshe withdrew his permission for access through his apartment the agreement became unworkable in its terms. A variation to the agreement so that access could be gained through Mr Dunn's apartment would have made it workable, but that was something to which he would not consent.

58. Although the agreement is unworkable in its terms, is it still on foot or is it at an end?

59. Mr Dunn had made a claim for damages for breach of the agreement, the alleged breaches being of the owners corporation's obligations to have the works on his terrace carried out with due care and skill and to make good any damage to his property consequent to the performance of the works. For that purpose he has not needed to state formally, and he has not stated formally, whether he claims that the agreement has come to an end or is still on foot. The damages that he claims, however, include the cost of completing the works by demolishing the existing works and doing them again, which he maintains is going to be necessary. If he is awarded compensation measured in that way he will have the means to engage contractors of his own to complete the works and cannot compel the owners corporation to complete them. So it seems to me that his claim is consistent only with a position that the part of the agreement that obliged the owners corporation to perform works is no longer on foot.

60. Ever since Mr Walshe withdrew his permission for access through his apartment, and until the fifth day of the hearing, the owners corporation had expressed itself to be ready and willing to complete the works if Mr Dunn would give it access through his apartment instead. It sought an order requiring him to give such access. Thereby it was asserting that the agreement was still on foot. On the fifth day, however, I allowed an amendment to the owners corporation's application so that instead of claiming an order for access it claimed:

> A declaration that the applicant owners corporation is not liable:
>
> (i) to carry out any works to Lot 702, including any works to repair or replace the waterproofing and tiling to the terrace and works to the balustrade upstands or glass; or

(ii) to pay for any such works.

When making the application for leave to amend (which I allowed), and in her final address, Ms Acreman argued that the agreement had been terminated by frustration and so the owners corporation had no further liability to perform it or under it.

61. Arguably the event which made the agreement unworkable – Mr Walshe's withdrawal of permission for access through his apartment – was a frustrating event. Nevertheless, I do not accept the submission that the agreement was terminated by frustration.

62. Frustration of a contract occurs when, without fault of either party, and without the contract having made a provision for it, an event occurs which so significantly changes the nature of the outstanding rights or obligation from what the parties could reasonably have contemplated at the time of the making of the contract that it would be unjust to hold them to the new circumstances. In such a case the law regards both parties as being discharged from any further performance of the contract.[34]

63. The principle of frustration cannot operate to terminate only part of a contract.[35] The discharge that frustration effects is of all further obligations under the contract.

64. Additional hardship or inconvenience is not enough to amount to frustration.[36] No doubt reaching Mr Dunn's terrace by the use of scaffolding or machinery would cause considerable extra expense and inconvenience to the owners corporation and to its members, but there has been no evidence that it is impossible, or so onerous as to be practically impossible, to gain access in that way. The present case has similarities to one of the "Suez Canal cases"[37] which arose when the canal was temporarily closed in time of war. Sellers of foods had

[34] *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696 at pp 728 – 729, per Lord Radcliffe, approved in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 at pp 378 – 379, per Aickin J.
[35] *Halsbury's Laws of Australia, volume 6, paragraph 110 -9875.*
[36] *Halsbury's Laws of Australia*, volume 6, paragraph 110 – 9715; *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696 at 729, approved by Stephen J in *Brisbane City Council v Group Projects Pty Ltd* (1979) CLR 143 at 161.
[37] *Tsakiroglou & Co Ltd v Noblee Thorl G.m.b.H* [1962] AC 93, referred to by Aickin J in the *Codelfa Construction* case (1982) 149 CLR 337 at 381.

agreed to ship the goods from Sudan to Hamburg, intending to have them shipped through the canal. As in the present case, there was no time fixed for completion of the contract. An argument that the contract had become terminated by frustration, upon the closing of the canal, failed. Shipping the goods around the Cape of Good Hope was twice as long and more expensive. Although that would involve a change in the manner of performance it was not such a fundamental change as to amount to frustration of the contract.

65. Regarding the agreement in the present case as having been terminated by frustration would have the potential to result in injustice. Frustration discharges the parties from all future obligations under the contract. It is one thing to conclude that the owners corporation is no longer obliged to perform works or make good damage. It is quite another thing to conclude that the owners corporation is no longer liable for the consequence of works not having been performed with due care and skill or no longer liable to pay the cost of making good damage, if it should be the case that Procon did fail to perform with due care and skill or did cause damage.

66. By the end of the hearing both parties, I consider, had adopted the stance that the owners corporation was no longer expected to do works or physically to make good damage, and that the issues between the parties were primarily what reasonably has to be done to make the terrace waterproof and to reinstate it and to make good any damage done by Procon, and how much of the cost of doing so each party has to bear. I propose to decide the case accordingly, without deciding whether and how the agreement, or any part of it, has been terminated. If there must be a conceptual basis for the decisions the parties are asking me to make, I would say that it is whether restitution[38] to Mr Dunn is required for the consequences of the owners corporation, by its contractor Procon, having begun alterations to his terrace but not having completed them.

The Hearing

67. The parties tendered a Tribunal Book of 3 volumes and agreed upon which documents in it could be taken as having been received into evidence.[39] The Tribunal Book included witness statements or affidavits which the lay witnesses verified and reports by the two expert witnesses Mr Simpson and Mr Leitner.

68. The owners corporation witnesses were:

    (i) Michael O'Neill, its chairperson, who verified two affidavits[40], and gave additional oral evidence;

[38] *Pavey v Matthews Pty Ltd v Paul* (1987) 162 CLR 221 at p 256, per Deane J.
[39] The Tribunal Book ("TB") is exhibit A. Excluded from evidence were the paragraphs from Mr Overell's affidavit identified in footnote 41 below and the items in the Tribunal Book numbered 23, 24, 32, 33, 35 and 37.
[40] TB items 16 and 19.

(ii) Anthony Overell of the owners corporation's manager the Knight Alliance, who verified an affidavit (except for some paragraphs which had become irrelevant following the settlement of some of the owners corporation's claims)[41];

(iii) Philip Walshe, the owner of lot 701, who gave evidence by telephone and verified a witness statement[42]; and

(iv) Robert Simpson, who verified three written reports[43] and gave additional oral evidence.

69. Mr Dunn verified two witness statements[44] and gave additional evidence. His expert witness Peter Leitner verified three written reports[45] and gave additional oral evidence.

70. Each witness was cross-examined extensively.

71. As well as the Tribunal Book, the parties tendered numerous other documents and photographs, plus a sample removed from the screed.[46]

72. Mr Simpson is a registered building practitioner and a director of Building Check Pty Ltd. He had been a builder for many years before becoming a building consultant in his capacity as a director of that company. Before the commencement of the hearing he had inspected Mr Dunn's terrace on 23 September 2014 and 2 December 2014, then on 28 January 2016, 22 March 2016, and 20 September 2016 and 16 December 2016. His first two inspections in 2014 were for the purpose of evaluating the items of complaint that Mr Dunn had made about the incomplete works and assessing the cost of rectification and completion.[47] His four inspections in 2016 were for the purpose of giving evidence in these proceedings.

73. Mr Leitner is a director of Dual Plumbing and Roofing (Aust) Pty Ltd. Before he became a plumbing, roofing and drainage consultant in his capacity as a director of that company he had had many years in that industry, including having been a self-employed plumber and drainer. Before the commencement of the hearing he had inspected Mr Dunn's terrace on 4 February 2016 and on 16 February 2017 for the purpose of giving evidence in these proceedings.

[41] TB item 15. The excluded paragraphs were 27 to 49 (inclusive).
[42] TB item 17.
[43] TB items 10, 12 and 13.
[44] TB items 18 and 20.
[45] TB items 9, 11 and 14.
[46] Exhibits B to G (inclusive) for the owners corporation, and exhibits 1 to 5 inclusive) for Mr Dunn.
[47] See paragraph 53 above.

74. On 6 July 2017, while a compulsory conference was occurring in the two proceedings, Mr Simpson and Mr Leitner conducted a joint inspection.

75. At the end of the fourth day of the hearing which was a Friday, Mr Simpson was giving evidence. Mr Settle's cross-examination of him had not finished. Over the weekend Mr Leitner inspected the site again, in Mr Simpson's presence, took some photographs and performed tests some of which were of a minor destructive nature. On the Monday, the fifth day of the hearing, after I had allowed the amendment for which Ms Acreman applied for leave to make[48], the cross-examination of Mr Simpson was resumed.

76. Each witness's expertise was conceded. Both were impressive witnesses. Mr Simpson had the advantages of having inspected Mr Dunn's terrace in 2014 and of having been able to compare its condition at that time with its condition at the beginning and end of 2016 and with its condition now. On the subject of the gutter and the drains Mr Leitner's more particular experience as a plumber gave him an advantage.

77. The last day of the hearing, 28 August 2017, was twelve days after the evidence had been completed. Each Counsel made a final address by speaking to written submissions which were very detailed and have given me great assistance.

Major Points Where Expert Evidence Has Conflicted

78. Mr Leitner's estimate of the cost of effecting a proper waterproofing of Mr Dunn's terrace, and of making good damage caused to the terrace and to apartment 702, is $416,445.00.[49] That includes the cost of demolishing all of Procon's works on the terrace and doing them again and better. Mr Leitner's opinion is that that is what is necessary. The figure which Mr Leitner has calculated is the amount which Mr Dunn claims in the second proceeding in which he is the applicant, I having allowed him to amend his claim so that it was for that figure.

79. Mr Simpson's estimate of the cost of rectifying and completing the works, and of making good any damage, is $44,560.99.[50] That figure does not include any amount for replacing any of the glass panels in the balustrade that borders Mr Dunn's terrace; he considers that no such replacement is needed.

80. Both experts agree that the tiles on the terrace must be demolished and that the secondary membrane, laid between the tiles and the screed below the tiles, must be removed and replaced. Mr Simpson's view is that no more demolition and replacement than that is required. Mr Leitner's view is that everything – tiles, secondary membrane, gutter and drains, screed, and primary membrane below the screed and covering the slab – needs to be demolished and done anew.

[48] See paragraph 60 above.
[49] Exhibit 1 sets out Mr Leitner's calculations.
[50] TB pp 226 – 228 set out Mr Simpson's calculations.

81. The major points on which the evidence of the two experts has conflicted, and which account for much of the great difference in their estimates of the cost of what is required, are these:

(i) The screed: does it need to be removed and replaced?

(ii) The primary membrane: does it need to be removed and replaced?

(iii) The concrete hob between the bottom of the windows and the top of the tiles: does the height of the hob above the tiles need to be increased, and the windows removed while that work is done?

(iv) The gutter and drains: do they need to be removed and replaced?

(v) The balustrade: do any of the glass panels, and the upstands supporting them, need to be replaced or rectified?

(vi) The tiling costs: what is the reasonable cost of re-tiling the terrace?

(vii) Conveying of materials: what is the reasonable means of conveying to and from the site demolished materials and the materials for the new works, and which is the reasonable cost of using those means?

(viii) Contingencies and builder's margin: what allowances should be included for those?

Screed

82. Because areas of the screed where the gutter was placed in the terrace have not been tiled and are open to the weather, the screed has become saturated. Water has migrated through the screed into the terrace of lot 701, resulting in drumminess to some of the tiles on that terrace as well as affecting tiles on Mr Dunn's terrace.

83. The owners corporation has alleged that Mr Dunn has used a hose to wash down the terrace and so has contributed to the saturation of the screed. Mr Dunn admitted to having hosed down the terrace occasionally in 2014 but never while Procon's works were still proceeding. Hosing down the terrace while part of the screed was exposed was unwise conduct but I think it unlikely to have contributed much to the saturation.

84. Mr Simpson's remedy for the saturation was to allow the sun to dry out the screed before re-tiling occurs. He said that 7 days' continuous hot weather would do that. Mr Leitner said that that would take 100 days. His evidence about that was hearsay, not based upon his own experience, and so unreliable. Nevertheless I think it likely that the screed would have to be exposed to

sunshine for quite some time for it to dry out and the procedure might have to be interrupted because of weather changes. I was not satisfied that Mr Simpson's remedy was a realistic one. I prefer Mr Leitner's remedy, which is for the demolition and removal of the entire screed and its replacement with fresh screed. It is a more expensive solution, but would be safer and quicker and, in my view, reasonable in the circumstances.

85. There is a steel reinforcing mesh in the screed. Expansion joints have been cut through the tiles and into the screed but, according to Mr Leitner's evidence, not through the screed entirely. Mr Simpson's view is that expansion joints in screed are not required and are not necessary. Mr Leitner's view is that they are required by Australian Standard 3958.1:2007,[51] are particularly needed on Mr Dunn's terrace which has a deflecting slab, and have not complied with the standard because they have not been cut through the screed completely. Mr Leitner put forward that view in support of his opinion that it was necessary to demolish the existing screed and replace it with screed that had proper expansion joints in it. There was much evidence about whether that Australian Standard was applicable to a reinforced screed and whether there was utility in cutting expansion joints through reinforced screed. I do not propose to express any conclusion about those matters, as I have concluded that the saturation of the screed is alone a good reason for demolishing it and replacing it with fresh screed.

86. Mr Leitner's evidence was that the cost of demolition of tiles, secondary membrane, drainage system and primary membrane was $19,500.00[52] plus goods and services tax ("GST"), i.e. $21,450.00, and that the cost of supplying and installing new screed with stainless steel reinforcement was $23,450.00 plus GST.[53] Mr Simpson's estimate of the cost of demolition was $11,115.38 including GST. Mr Simpson did not allow for the cost of demolishing the screed, which he said was unnecessary. I have found otherwise. Mr Leitner allowed for the removal and replacement of the primary membrane which, for reasons I give below, has not been proved to be reasonably necessary. So I conclude that the reasonable cost of demolition is closer to, but lower than, Mr Leitner's figure of $21,450.00. I allow $16,000.00 plus GST. I accept and allow Mr Leitner's estimate of $23,450.00 plus GST for the new screed.

Primary membrane

87. The condition of the primary membrane between the slab and the screed is not known, and will not be known until the existing screed is removed. Yet Mr Leitner has recommended that the primary membrane be replaced and has prepared his cost estimate accordingly. So far as I can tell from his evidence, the potential fault in the primary membrane that he has detected is that he believes it

[51] A copy of the standard is at TB pp 326 – 327.
[52] Item 35 in exhibit 1.
[53] Item 39 A and B in exhibit 1.

has not been laid up the concrete hob far enough above the finished floor level of the apartment to meet the secondary membrane and to form a seal with it. He and Mr Simpson differed in their evidence about their observations of where the primary membrane terminates. Mr Simpson said that the primary membrane extended to the sub-sill flashing. Mr Leitner said that it did not. I have not been able to decide which of the two observations is correct.

88. There would be a potential for damage to the primary membrane if expansion joints had been cut right through the screed, but, as I understood Mr Leitner's evidence, it was that expansion joints had not been cut right through the screed but only partially through it. No doubt the very removal of the screed could possibly result in damage to the primary membrane if it were left in place, but Mr Leitner did not give any evidence that it was inevitable, or probable, that that would happen.

89. I have not been persuaded, on the balance of probabilities, that removal of the primary membrane and replacement of it is needed, and so I have not been persuaded that the reasonable cost of rectifying and reinstating Mr Dunn's terrace would include the cost of removing and replacing the primary membrane.

Concrete hob

90. There was a defect in the design of the concrete hob on which the glass doors and windows of Mr Dunn's apartment sit. The architectural drawing which the builder LU Simon Builders Pty Ltd followed when constructing the Scala Apartments did not allow for sufficient distance between the top of the tiles and the bottom of the sills to comply with Australian Standard 4654.2-2012.[54] This was the state of the site which Procon inherited when it did its waterproofing work: the distance between the top of the existing tiles and the bottom of the sills was too short. To accommodate the gutter and drains recommended by the consulting engineer the screed that Procon laid was thicker than the existing screed and so when tiles were laid over it the distance between the top of the tiles and the bottom of the sills was even shorter. Mr Simpson agreed with Mr Leitner's opinion about non-compliance with the standard and the consequence of the screed being thicker. He disagreed, however, with Mr Leitner's opinion that to achieve effective waterproofing of the terrace it was necessary to raise the height of the hob and thus comply with the standard.

91. Mr Leitner recommended the heightening of the hob not only because it would achieve compliance with the standard but also because, in his view, the primary cause of water entry into Mr Dunn's living room was the closeness of the tiles to the sills and resultant failure to run the primary membrane up the hob sufficiently

[54] A copy of the standard is at TB p 177.

to form an effective seal with the secondary membrane. Mr Simpson disagreed that that was a cause of the water entry. He suggested other causes which I shall mention below. He acknowledged the non-compliance with the standard but said that it was sufficient if Procon's works had achieved an effective waterproofing at the hob, as he said it had.

92. This is an important point of dispute, because, if Mr Leitner's opinion is accepted the work that would be needed to implement his solution is expensive and disruptive. It would not only involve the raising of the height of the hob, which Mr Leitner costed at $4,800.00[55] plus GST; it would also involve removing glass from the aluminium framing of the doors and windows, removing the framing and storing the glass, which he costed at $2,820.00[56] plus GST, and would involve the cost of replacing aluminium frames and sills, cut down by 100 millimetres because of the increased height of the hob, and of replacing the glass, all of which he costed at $25,400.00[57] plus GST. The work would be disruptive because Mr Dunn would either have to live in his apartment with a temporary barrier instead of the doors and windows while the work was being done, or move out of the apartment while the work was being done.

93. Mr Leitner supported his opinion about the inadequate height of the hob and inadequate seal at the hob being the primary cause of water entry by pointing to corrosion of the aluminium sill. Mr Simpson had another explanation for the corrosion: the effect of the aluminium's contact with other metals. I did not think that that explanation was convincing.

94. Nevertheless, I have concluded that Mr Dunn has not proved, on the balance of probabilities, that the primary cause of water entry into his apartment is the one that Mr Leitner identified. The reasons for that conclusion are as follows:

    (a) Accepting Mr Leitner's opinion depends upon accepting the accuracy of his observations about the primary membrane at the hob and reflecting Mr Simpson's observations. I have said that I have not been able to decide between the two expert witness's evidence of their observations.

    (b) Mr Simpson put forward other explanations for the entry of water into the living room where it has damaged the carpet. One explanation, which I think in the end he favoured, was that the penetration of the hob, which was widened from the insertion of a gas pipe while Procon's works were being done, was the likely cause. That penetration occurred near the north-west corner of the hob. The carpet damage, and the wetness of the hob and

[55] Item 36 in exhibit 1.
[56] Item 37 in exhibit 1.
[57] Item 7 B and C in exhibit 1 ($52,700.00 minus $27,300.00 for other glass panels as per item 7A).

medium density fibre which Mr Leitner observed, were also at the north-west corner. That is likely to be more than a coincidence, it seems to me. Another explanation, which Mr Simpson put forward in one of his earlier reports, was that sealant had been removed from beneath the sill near the north-west corner. Mr Dunn admitted having removed some sealant. Those explanations are just as plausible as Mr Leitner's.

(c) Mr Walshe's apartment 701 next door is a mirror image of Mr Dunn's apartment 702. The terraces are mirror images of each other. The design fault that Mr Leitner had identified in the hob on Mr Dunn's lot must exist too in the hob on Mr Walshe's lot. If Mr Leitner's identification of the cause of water entry into Mr Dunn's apartment is correct one would expect Mr Walshe to be experiencing the same problem. But, according to his evidence, he is not; no water is now coming into his apartment since the works on his terrace have been completed, he said.

95. I accept Ms Acreman's submission that it is not possible, on the evidence, to say what has been the cause of water entry into Mr Dunn's apartment. It follows that he has not established, on the balance of probabilities, that the cause is something that Procon did wrongly or failed to do. So I do not allow to Mr Dunn anything for the cost of raising the height of the hob and of altering the doors and windows accordingly. It also follows that the damage to the carpet and interior for water entry is not something for which, under the terms of the agreement between them which was reflected in the consent order made on 19 February 2013, the owners corporation is obliged to make good to Mr Dunn; it has not proved to have been "damage…. consequent to the performance of the works", within the terms of the agreement.

96. There is another reason why, even if Mr Leitner is correct about the cause of the water entry, the owners corporation is not responsible for the cost of rectifying it. Procon and the owners corporation entered into a contract for the performance of works of a scope which the nature of the terraces, as built, demanded. Raising the height of the hob, and altering and replacing the doors and windows, would involve works of a quite different character, not waterproofing works at all. For it to be said that Procon had not carried out its works with due care and still in that respect, it would have to be said that Procon had an obligation not to complete the works until the owners corporation had done those works of a different character. I think it highly unlikely that Procon had any such obligation.

Gutters and drains

97. The manufacturer of the gutters and drains, Stormtech Pty Ltd, has published instructions for their installation.[58] The instructions include: "allow for expansion of 1 mm per metre gap where two channels join". Mr Leitner's evidence was that the gutter on Mr Dunn's terrace is 14.3 metres long, that to comply with the instructions there should have been a 2 millimetre expansion joint every 2 metres, but there is not. The consequence, he has said, is that the joints between sections are leaking and the gutters are loose. Moreover, he has said, the screed has not been taken up to the edges of the gutters, as it should have been but resin has been applied instead at the edges of the drain. It is necessary, according to Mr Leitner to replace the existing gutters entirely, and he estimates the cost to be $8,160.00[59] plus GST.

98. These alleged defects in the drainage system were mentioned only in Mr Leitner's final report, given following his inspection on 1 August 2017,[60] eight days before the hearing commenced. He produced the Stormtech installation instructions only during the hearing. Those circumstances caused me to view with a sceptical eye what seemed to be a rather belated evidence about the gutters. Nevertheless, Mr Simpson's evidence did not really meet the allegation, except that he said that if there were insufficient expansion joints they could be provided without there being any need to discard the existing gutters. Moreover, installation of gutters is part of Mr Leitner's particular expertise, but not part of any particular expertise of Mr Simpson.

99. Therefore, after some hesitation, I have decide to accept Mr Leitner's evidence that the drainage system needs to be replaced, and to allow $8,160.00 plus GST as the cost of doing that.

Balustrades

100. Before Procon's works began, a balustrade consisting of 35 glass panels, each set within balusters or upstands, bordered Mr Dunn's terrace. So that works on the terrace could begin, the panels and upstands were dismantled. According to Mr Dunn's evidence, which I accept, Procon stacked the glass panels and left them on the terrace without cushioning or wrapping them. The consequence, according to Mr Dunn, is that all of the panels have been scratched and need to be replaced.

101. Mr Simpson and Mr Leitner have each viewed the 35 panels in the way that is set out in the Building Commission Guide to Standards and Tolerances, which describes a normal viewing position as at a distance of no less than 1.5 metres in light that strikes the surface of the viewed object as diffused and is not glancing or parallel to the surface. The Guide states that scratches or other blemishes on

[58] Exhibit 5.
[59] Item 29 in exhibit 1.
[60] The report is TB pp 304 – 332.

glazing are defects if they can be seen from the normal viewing position. Mr Leitner's evidence was that 32 of the 35 panels had scratches which he saw from that normal viewing position. Mr Simpson's evidence was that from that position he saw no scratches or other imperfections. The conflict of evidence demonstrates how subjective the test is.

102. A complication, according to Mr Leitner's evidence which I accept on the point, is that since the Scala Apartments were built the regulations about glass borders have changed so that toughened glass now has to be used. So if some of the panels were replaced now they would need to be of toughened glass. There is no noticeable difference in appearance, according to Mr Leitner, of toughened glass panels from the original glass panels on the terrace. Nevertheless, if some but not all of the panels were replaced now, there would be variation in the characteristics of the panels. At one time the owners corporation, without admitting any liability to do so, offered to replace 18 of the 35 panels, but Mr Dunn refused the offer.

103. To my mind the balustrade is an important aesthetic feature of Mr Dunn's residence. Whether or not they are defects within the description in the Guide, I accept that there were scratches on the panels and find that the scratches occurred in the course of Procon's handling of the panels. There was no evidence that the scratches could be satisfactorily remedied by polishing them out or otherwise. I do not think that Mr Dunn should be required to end up with a hybrid balustrade in which some panels consist of toughened glass and others consist of the original glass. I conclude that the owners corporation is obliged, under the 2013 agreement, to compensate Mr Dunn for the cost of replacing all panels in the balustrade. Mr Leitner's estimate of the cost, which I accept as it was based upon glaziers' quotations, is $27,300.00[61] plus GST.

104. The upstands are in poor condition. There was no contest about that. The cost of removing and replacing them, however, is in contest. Mr Leitner's estimate is $4,590.00[62] plus GST. Mr Simpson's estimate is $810.91, which does not allow for the cost of replacing them but does allow for the cost of cleaning them and making them good. There are numerous photographs of the upstands in the Tribunal Book. In my opinion the photographs show them to be of such poor condition that they should be replaced. I accept Mr Leitner's estimate of $4,590.00 plus GST.

105. The cost of replacing the panels and the cost of replacing the upstands have to be treated differently. The cost of replacing the panels is an item of making good damage caused by Procon, for which under the 2013 agreement the owners

[61] Item 7A in exhibit 1.
[62] Item 22 in exhibit 1.

corporation is wholly liable. The cost of replacing the upstands is the cost of rectification of damage that has resulted from delay in completion of works on the terrace: delay for which both the owners corporation and Mr Dunn are partly responsible.

106. Related to the balustrade is an item that Mr Leitner has included for the cost of completing capping to glass on the boundary between lot 702 and lot 703 because some of the capping has delaminated. The evidence on this matter was brief. Mr Leitner allowed $520.00,[63] plus GST, in his estimate. I am prepared to allow it. If there is delamination, delay in completion would be a cause.

Tiling costs

107. Mr Leitner's evidence ended up being that the cost of obtaining and installing new ceramic tiles, with all necessary expansion joints, grouting and sealant, was $24,000.00[64] plus GST. He made that estimate from a measurement of 155 square metres of tiles. An earlier estimate that he had made, in a report, was $19,600.00[65] plus GST. He did not explain why he had revised his estimate. Mr Simpson's estimate, based upon a rate given in Rawlinson's Guide of $105.00 per square metre, was $14,805.00. He made that estimate from a measurement of 141 square metres of tiles. The discrepancy between the two measurements was not explained by either expert.

108. Mr Simpson's evidence was that even $19,600.00 was an excessive estimate, let alone $24,000.00. Mr Leitner partly explained his estimate by saying that he had included a high labour rate because skilled labourers would be required. All in all, on the basis of the evidence I have mentioned, I conclude that Mr Leitner's original figure of $19,600.00 plus GST is probably reasonable. I allow the cost of tiling in that amount.

109. Mr Leitner included in his costings another item related to tiling. It was $3,055.60,[66] plus GST, for the cost of replacing tiling that went down the vertical face of the terrace, which he said was out of alignment. Initially Mr Simpson in one of his reports allowed $1,100.00 for this item, but in his oral evidence said that, in view of the facts that all tiling was to be replaced and that the cost of that was otherwise being allowed for, this item was duplication and nothing should be allowed for it. I am left with a doubt whether this item is an additional item or a duplication. I am not satisfied that it has been proved.

[63] Item 21 in exhibit 1.
[64] Item 40 in exhibit 1.
[65] TB p 215.
[66] Item 26 in exhibit 1.

Conveying of materials

110. Mr Leitner has included in his costings an allowance of $33,550.00[67] plus GST for crane and skip hire, traffic control and handrails, and $17,250.00[68] plus GST for hiring an access tower, installing it and fastening it to a face of the Scala Apartments, and dismantling it when the works have finished. His evidence was that the use of a crane and an access tower are the only practicable ways of conveying to and from ground level and Mr Dunn's terrace the demolished material and the materials for the new works. He estimated the weight of the saturated screed, which would have to be carried down to ground level, to be 10 tonnes.

111. Mr Simpson's evidence was that those expenses were unnecessary because materials could be carried up and down in the Scala Apartments lifts. There are two difficulties about that view of the matter. The first is that Mr Simpson was expressing it in the context of his opinion that the saturated screed did not need to be demolished and removed from the terrace. I have found otherwise. The second is that, according to correspondence from the owners corporation's manager to Mr Dunn[69] before Procon's works began, the owners corporation's requirements for its contractor were that no material or waste would be brought to the site via the lifts; all would have to be moved by a crane or similar device. I think it quite unlikely that the owners corporation would change its collective mind now. Mr O'Neill, the chairperson, gave evidence that he would not be happy for the lifts to be used in that way.

112. So I accept Mr Leitner's evidence that the use of a crane and access tower is necessary. I allow the two amounts that he has estimated.

Contingencies and builder's margin

113. On top of the total of his cost estimates, both for completing the works on the terrace and for making good any damage, Mr Leitner has allowed 10% of the total for "contingencies" and another 30% again for "builder's margin". He explained "contingencies" by giving an example: the slab may be discovered to have deflected more than anyone presently is aware. Mr Simpson's evidence was that in his own costings he had allowed 5% for preliminaries and 30% for a builder's margin although he regarded 30% as a high margin to allow.

114. I consider Mr Leitner's approach to be over-cautious. He has not justified an allowance for contingencies. I do allow a builder's margin of 30% because both experts have regarded it as appropriate.

[67] Item 26 in exhibit 1.
[68] TB pp 747 – 748.
[69] *Owners Corporations Act 2006* s 167(a).

Making Good the Damage

115. The major item where making good damage consequent upon Procon's works is required is the replacement of glass panels in the balustrade. I have dealt with that item in paragraphs 100 - 103 above, and have allowed for it $27,300.00 plus GST.

116. There are several other items which, Mr Dunn claims, are of damage to his property consequent upon Procon's conduct and for which, under the 2013 agreement, the owners corporation is liable for the cost of making good. All but one are, in my view, justified. I propose to deal with them in the order in which they appear in exhibit 1, Mr Leitner's list of costings. I give to each item the number that Mr Leitner gave it in his list of costs. When attributing a cost to each item I do so without including GST. I take account of GST at the end of the exercise.

117. Item (8): replacement of a bedroom window. Mr Dunn claims that the window was scratched in the course of the works; there had been no scratch in the window before the works had begun. Mr Leitner observed the scratch. Mr Simpson could not see one. I accept Mr Dunn's evidence on the matter. He is entitled to the reasonable cost of replacing the window glass. The evidence about replacement cost was not precise. Mr Leitner gave a "contingency" cost of $2,000.00. Mr Simpson did not contradict it. I allow for $2,000.00.

118. Item (10): window frame. Mr Dunn gave evidence that window frame was damaged when furniture on the terrace of lot 701 had been blown across onto his terrace (the glass partition between the two terraces not being in place) into the frame. I accept his evidence. I find there was damage to the frame caused by failure of Procon to secure the furniture properly. Mr Leitner estimated $320.00 as the cost of replacing the frame.

119. Item (11): drain slurry. Mr Dunn claims $240.00 as the cost of removing slurry from the drain. There is slurry there, but I have allowed a claim for the cost of removal and replacement of the drainage system. So this claim is a duplication. I do not allow it.

120. Item (12): repairing a gas outlet. Mr Dunn gave evidence that Procon bent the gas pipe by resting material against it. I accept his evidence about that. Mr Leitner's cost estimate was $790.00. Mr Simpson's was $412.91. Again, I think the more generous estimate is appropriate. I allow $790.00.

121. Item (13): gas and electrical power outlet. The evidence was that Procon removed it to do its works but did not reinstate it. Mr Leitner's estimate of cost was $820.00. Mr Simpson's was slightly more. I allow $820.00.

122. Item (19): rendering of a wall. Mr Simpson agreed that the item required making good. Mr Leitner estimated the cost at $520.00. At first Mr Simpson agreed with that figure but later in his evidence said that the item was already covered in the cost of demolition and rectification of the terrace. I doubt that that was so. It seems to me to be a distinct item. I allow the claim at $520.00.

Cost of Completion: Summary

123. The following table sets out the items and amounts that I have allowed for the cost of demolishing the existing tiling, secondary membrane, drains and screed, replacing them, and rectifying things that have deteriorated because of the delay in completing the works. In the table, the heading "Item" is the number of the item in exhibit 1, Mr Leitner's list of costings, the heading "paragraphs" are the applicable paragraphs in these reasons, and the amounts do not include GST. I allow for GST at the end of the table.

Item		Paragraphs	Amount
35	Demolition works	82 – 86	$ 16,000.00
39	Screed and waterproofing	82-86	$ 23,450.00
38 A & B	Primary membrane	87 – 89	$ 0
36 – 37	Concrete hob	90 – 96	$ 0
29	Gutters and drains	97 – 99	$ 8,160.00
22	Upstands for balustrade	104	$ 4,590.00
21	Capping: boundary glass	106	$ 520.00
40	Tiling	107 – 108	$ 19,600.00
26	Tiling: outer boundary	109	$ 0
34	Crane hire etc.	110 – 112	$ 33,550.00
41	Access tower etc	110 – 112	$ 17,250.00
			$123,120.00
-	Builder's margin 30%		$ 36,936.00
			$160,056.00
-	Plus GST 10%		$ 16,006.00
			$176,062.00

124. When deciding an owners corporation dispute, which is what is reflected in these two proceedings, the Tribunal must consider "the conduct of the parties", but may make any order it considers fair,[70] so long as it is made according to law. Completion of the waterproofing of Mr Dunn's terrace involves the costs identified in the previous paragraph because the secondary membrane deteriorated and the screed became saturated. Delay both during Procon's works and after Procon ceased them has meant exposure of the secondary membrane and the screed to the weather. I have found that Mr Dunn contributed to the

[70] *Owners Corporations Act 2006* s 165(1).

delay in the ways I have described above. The owners corporation, through its contractor Procon, also contributed to the delay because Procon did not complete its works within a reasonable time. The conduct of both parties has contributed to delay, and so to exposure of unfinished works to the weather, and so in turn to the incurring of the costs identified in the previous paragraphs. Considering that conduct, I conclude that they contributed equally to it. Attempting to apportion responsibility in any other way would be artificial. So I consider it fair that each party should bear one-half of the cost.

125. The amount that the owners corporation must pay to Mr Dunn by way of a share of these costs is one half of $176,062.00, which is $88,031.00. Mr Dunn will have to bear the other half himself.

Cost of Making Good the Damage:

126. The following table sets out the amounts that I have allowed for making good damage to Mr Dunn's property that was consequent upon Procon's works. The explanation for the headings is the same as I gave in paragraph 23:

Item		Paragraphs	Amount
7	Balustrade glass	100 – 103	$27,300.00
31	Carpet	90 – 96	$ 0
32	Internal living room	90 – 96	$ 0
8	Bedroom window	117	$ 2,000.00
10	Window frame	118	$ 320.00
11	Slurry in drain	119	$ 0
12	Gas outlet	120	$ 790.00
13	Gas & electricity outlet	121	$ 810.00
19	Rendering of wall	122	$ 590.00
			$31,810.00
-	Builder's margin 30%		$ 9,543.00
			$41,353.00
-	Plus GST 10%		$ 4,135.00
			$45,488.00

Conclusion

127. The total amount which the owners corporation must pay to Mr Dunn is $88,031.00 plus $45,488.00, a total of $133,519.00. In proceeding OC893/2017, in which Mr Dunn is applicant, I shall order the owners corporation to pay to him $133,519.00. In proceeding OC2705/2015 I shall make the first declaration sought - that the owners corporation is not liable to carry out any further works on lot 702 – but not the second.

A. Vassie
Senior Member

30 November 2017