Civil and Administrative Tribunal

New South Wales

Case Name:	Thadani v Owners Corporation Strata Plan 46619
Medium Neutral Citation:	[2015] NSWCATCD 153
Hearing Date(s):	2 October 2015
Decision Date:	10 December 2015
Jurisdiction:	Consumer and Commercial Division
Before:	Senior Member Meadows
Decision:	1. The respondent is to pay a pecuniary penalty of $5,500.00 to: Department of Finance & Services, c/- Specialist Services,NSW Fair Trading, P O Box 4004, Penrith Plaza NSW 2750 no later than 28 days after the date of these orders. 2 The parties are to provide written submissions in relation to whether it is appropriate to make an order for costs pursuant to s 204 of the SSM Act no later than 14 days after the date of these orders. Any written submissions in reply should be provided no later than 28 days after the date of these orders. The decision on costs will be made on the papers.
Legislation Cited:	Civil and Administrative Tribunal Act 2013 Consumer Trader and Tenancy Tribunal Act 2001 Strata Plan Management Act 1996
Category:	Principal judgment
Parties:	Aparna and Dinesh Thadani—applicants; Owners Corporation Strata Plan 46619—respondent
File Number(s):	SCS 14/48763
Publication Restriction:	Nil

REASONS FOR DECISION

Application

1 This is an application for the imposition of a civil penalty in which the applicants, owners and residents in the subject strata scheme, allege the respondent Owners Corporation failed to comply with orders in relation to rectification works on or in common property affecting the applicants' premises.

2 This dispute between these parties, involving a number of Tribunal proceedings, has continued since 2010. In this decision, although it will be necessary to refer to some elements of the ongoing dispute, I am limited to a consideration of the application for the imposition of a civil penalty pursuant to s 202 of the Strata Schemes Management Act 1996 (SSM Act) and for a costs order pursuant to s 204 of that Act.

3 The applicants have lived in Lot 3 in the scheme since about March 2010. In May 2010 the applicants became aware of severe water ingress affecting their living room carpet adjacent to the sliding doors leading onto their balcony. They reported this problem to the then strata manager. Although initially there were other suggested causes of the water ingress, it has subsequently become clear, and was accepted by both parties, that the water was entering through the external wall between the applicants' living room and their balcony, involving also the double set of sliding doors set in aluminium frames. It is also accepted by both parties that the wall, the doors and the tiled floor of the balcony are all common property. The Owners Corporation is therefore responsible for repairs and maintenance of those items—that is also accepted by both parties.

4 There then followed a lengthy sequence of events in which the Owners Corporation, at first rejecting the applicants' explanation for the water ingress and even after further investigations were performed also apparently refusing to accept various quotations for possible repair of the defective water proofing, refused to accept they were responsible for the necessary repairs to common property.

5 However, in about December 2011 the Owners Corporation resolved to employ RHM Consultants to conduct an investigation, apparently intended to be the basis for obtaining further quotations. The RHM report was received in or about January 2012 and opined that the source of the water ingress was in relation to deficiencies in the sill flashing to the aluminium frames of the sliding doors and the cavity flashings along the base of the external masonry wall in which those frames were set, that is, the wall between the applicants' living room and their balcony. However, no work was actually done to rectify the problem.

6 Finally, in about May 2012, the applicants filed an application for Adjudicator's Orders seeking, inter alia, that the Owners Corporation effect repairs to common property in accordance with one of the two quotations received previously by the Owners Corporation.

7 On 21 September 2012, Adjudicator Howe ordered, inter alia, that:

> "2. The Owners Corporation is to immediately carry out repairs to the common property on the balcony of Lot 3 in order to prevent water ingress into that Lot."

8 The applicants filed an Appeal against the Adjudicator's orders or some of them, and in about May 2013 (before the Appeal was heard) the parties reached an agreement that further quotations would be obtained by each party, the "middle" one of those quotations would be accepted and once the original Adjudication orders were complied with in relation to the repairs, the applicants (then the appellants) would withdraw their appeal.

9 The agreement referred to in the previous paragraph was reflected in orders made by Senior Member Thode on 01 May 2013 in the appeal proceedings, SCS 12/51639. Those orders provided, in accordance with the agreement, for the procedure for obtaining and selecting a contractor and for the scope of the works or at least the nature of the works to be agreed by adopting the RHM Building Diagnostic report (that is, the first RHM report, not, obviously, the report of February 2014).

10 It appears then that rectification works were performed by BR Building Services. The applicants assert the repairs were not successful. They also assert that the Owners Corporation, through the Secretary of the executive committee Mr Jimmy Feng, then purported to commence or to propose to commence, legal proceedings seeking to recover the costs of those repairs from the applicants, in the amount of $12,780.00.

11 It appears that the next development was that in February 2014 the applicants were advised that BR Building Services were intending to remove the sliding door frames in order to investigate the source of the water ingress. The applicants then requested that RHM Consultants take advantage of that work to conduct a further inspection and provide a report of the leak problem. In the RHM report of 28 February 2014, Mr Peter Le, a senior engineer and consultant employed by RHM Building Diagnostic Services, stated that deficiencies in the cavity flashing is the primary source of the water ingress and that BR Building Services did not perform the recommended scope of the works in its quotation.

12 The applicants corresponded further with the Owners Corporation through the strata manager, but, as they assert, received no or no satisfactory response. The applicants claim the water ingress continues.

13 This application was then filed on 29 September 2014.

The Orders Sought

14 At the time the application was filed, it appears the applicants were legally represented, the application, submissions and attachments being over the signature of Messrs BW Law.

15 The application sought the following orders:

No.	Section (SSMA)	Terms of the Orders
1.	202	The OC be ordered to pay a pecuniary penalty for contravention of Order 2 of the Adjudicator's Orders dated 21 September 2012 (CTTT file number SCS 12/29194)
2.	138	The Owners Corporation SP46619 (**OC**) to effect all repairs to common property necessary to prevent water ingress from balcony into living room of Lot 3 in accordance with the specifications in the RHM Report dated 28 February 2014
3.	162	Mr Douglas McArthur, of Raine & Horne Strata Sydney, to oversee the repairs and ensure compliance with the recommendations of the aforementioned RHM Report
4.	153	The OC paper executive meeting resolution on 31 Oct 13 roo recover $12,870 (or any other amount) as a debt against Lot 3 under SSMA s 63 is invalid
5.	204	An order that the OC pay the Applicant's costs in these proceedings

(1) As will be discussed further below, the application as filed was misconceived, but by request of the applicants and by unfolding events, the Tribunal does not have to consider that issue further.

Relevant Legislation

16 Orders 1 and 5 of the application are made pursuant to ss 202 and 204 of the SSM Act. Those sections are found in Part 6 of Chapter 4 of the SSM Act: "Enforcement of orders of Adjudicators and Tribunal and certain notices" as follows:

202 Civil penalties for contravention of orders under this Chapter

(1) The Tribunal may, by order, require a person to pay a pecuniary penalty of an amount of up to 50 penalty units for contravention of an order under this Chapter (the original order).

(2) An application for an order under subsection (1) may be made:

(a) in any case, by the applicant for the original order, or

(b) if the original order relates to a parcel that is not a stratum parcel, by the Owners Corporation for the parcel, or

(c) if the order relates to a stratum parcel, by each Owners Corporation for a stratum parcel including part of the building, the lessor of the strata scheme (in the case of a leasehold strata scheme) or by any person in whom is vested an estate in fee simple (or in the case of a leasehold strata scheme, a leasehold estate) in a part of the building that is not included in a stratum parcel, or

(d) in the case of an order that gives effect to any agreement or arrangement arising out of a mediation session, by either party to the mediation.

…

204 Order as to costs

(1) The Tribunal may also make an order for the payment of costs when making an order requiring the payment of a pecuniary penalty under this Part.

(2) Any costs awarded against a person on an application for an order under section 202 include the amount of the fee paid when the application for the original order was made.

17 In the submissions attached to the application, the applicants sought the imposition of the maximum penalty of 50 penalty units, equivalent to $5,500.00.

18 Section 172 of the SSM Act is also relevant:

172 Duration of order by Adjudicator

Except to the extent that the order otherwise provides, an order made by an Adjudicator under this Part (other than an interim order) ceases to have any force or effect on the expiration of the period of 2 years that commences on the making of the order.

19 On the basis of that section, there was an issue as to jurisdiction of the Tribunal to hear and determine this penalty application.

Case Management

20 A penalty application is usually dealt with expeditiously by the Tribunal, but that was obviously not the case in these proceedings. Some explanation is required, not only to explain the delay since the application was filed, but also to explain the determination I have made.

21 The matter was listed for hearing before me on 12 November 2014. The parties were represented respectively by Ms Hazard (the principal of BW Law) and Mr

Korakis as agent for Alex Ilkin & Co. Although it was listed for hearing, it was agreed on that day that the hearing was not ready to proceed. (It is not unusual for the initial listing of a penalty application to be treated as a directions hearing, enabling the parties to obtain evidence and prepare for a formal hearing.) Among other issues, it was agreed to be necessary to obtain the original adjudication file from the Registry.

22 In addition, it was asserted by the respondent that the Tribunal did not have jurisdiction to hear and determine the claim, pursuant to s 172 of the SSM Act.

23 On 12 November 2014, orders were made for the service of evidence and for the parties to advise of their unavailable dates for a hearing. It was intended that the matter was to be adjourned for formal hearing at a later date.

24 There were other issues arising from the orders made on 12 November 2014, including a requirement to amend one of the orders, and for an extension of time requested by the parties. It is not necessary to describe those issues further, except to note an extension of time to comply with the orders was granted.

25 By letter dated 19 January 2015, the Tribunal was advised that Messrs Makinson d'Apice Lawyers were now instructed on behalf of the applicants. The applicants, through their new solicitors, noted the number of relevant files and the complex history of this and the associated matters, and requested another extension of time to comply with the previous orders in relation to service of documents. This request was also granted.

26 By letter dated 27 January 2015, the applicants' solicitors made a number of submissions in relation to curing the mistakes in the current application. In my opinion, the letter is in some respects misconceived and indeed bears signs that the writer was still coming to terms with some of the factual and historical complexities in this and the associated proceedings. In any event, by a further letter dated 03 February 2015, the applicants' solicitors suggested these proceedings be listed urgently for directions, with a view to splitting the original application into a continuing application for orders pursuant to ss 202 and 204 of the SSM Act, and making a further application for an Adjudicator's orders in relation to the other orders sought in the original application in these proceedings.

27 Following the letter of 03 February 2015 from the applicants' solicitors, I made orders that the hearing set down for 17 March 2015 be vacated and the matter instead be set down for a directions hearing. That was done, the date being 17 March 2015 again.

28 On that date, matters took a surprising direction. The applicants' solicitors provided a draft of proposed directions, essentially providing for the removal of the orders

sought in relation to ss 138, 153 and 162 of the SSM Act (which would instead be the subject of a fresh application for Adjudicator's orders) and leaving the application for a penalty for contravention of Order 2 of the original Adjudicator's orders of 21 September 2012 and also for contravention of the orders of 01 May 2013 (that is, the orders referred to above in paragraph 9 in relation to the appeal proceedings).

29 In my opinion, those proposed directions continued to demonstrate misconceptions in relation to these proceedings. The appeal itself was withdrawn. The applicants appear to have been submitting at one stage that the respondent had somehow improperly withdrawn the appeal or had improperly persuaded or tricked the applicants into withdrawing the appeal, but even if that is a correct understanding of the applicants' position (or perhaps only the view of their solicitors), that issue was not pursued further.

30 In any case, as just mentioned, a somewhat surprising turn of events followed from a remark made by me at the directions hearing of 17 March 2015. After a discussions in relation to orders for the service of any further evidence, the matter to be adjourned for formal hearing, I said to the parties that it appeared from the voluminous documentation provided that what both parties wanted was simply to have the repairs successfully completed and all these proceedings concluded. The parties agreed and also agreed that it would be appropriate to adjourn the proceedings with orders in relation to further rectification works following which the RHM consultant, Mr Peter Le, would conduct an inspection to ensure compliance with the scope of works in Mr Le's second report (of February 2014).

31 Those orders were in fact consent orders, although that was not noted in the written orders posted to the parties. The proceedings were to be listed for further directions in due course, expected to be following the completion of the rectification works.

32 It then appears from the documents provided by the parties, that by a "Notice to Confirm Access for Building Warranty Repair Service" dated 30 March 2015 was sent to the applicants. This Notice is in two sections. The first, "Confirmation of Access for Building Warranty Repair Service" appears to embody the agreement reached between the parties at the directions hearing on 17 March 2015 although some matters are mentioned which were not discussed at that hearing. Also, the first section commences with the words: "[r]efer to the Mediator's letter of 09/03/2015, you have agreed to give access …". It is not indicated which mediator is being referred to or what the contents of any such letter were. In any case, the second section of the Notice is headed: "Common Property Repair Cost". In this section, the respondent, over the signature of Jimmy Feng, Secretary of the Executive Committee, refers to the Owners Corporation's apparent view that the

applicants caused the damage to the subject common property and that the Owners Corporation would be taking Local Court action to recover the costs of repairs to that alleged damage, apparently the sum referred to above in paragraph 10.

33 The Tribunal then received a copy of an email, dated 09 April 2015, sent by Mr Feng to "Colin" of BR Building Services Pty Ltd, to the effect that because of an alleged conflict of interest, the Owners Corporation intended to refuse permission for Mr Peter Le to conduct the inspection of the rectified works, and had instead engaged an alternate "independent civil engineer".

34 At the directions hearing on 29 April 2015, the Tribunal was advised that the works the subject of the agreement reached at the hearing on 17 March 2015 and embodied in the orders made on that date were either not completed or not completed successfully. The applicants also advised that a fresh application for an Adjudicator's orders had been filed and it was requested these proceedings be adjourned in order to see if the fresh application was to be transferred to the Tribunal to be heard concurrently with these proceedings, as had been requested by the applicants. Further, the applicants advised that they declined to permit further access to their premises by the builder appointed by the Owners Corporation in order to undertake water testing and possible further rectification. These proceedings were then adjourned for further directions, set down for 09 June 2015.

35 On 09 June 2015, orders were made for the service of evidence in relation to the application for orders pursuant to ss 202 and 204 of the SSM Act, and for written submissions in relation to the penalty application. The matter was listed for hearing on 18 August 2015 and Notices of Hearing were posted to the parties on 25 June 2015.

36 On16 July 2015, Mr Feng sent an email to the applicants' solicitors and the Tribunal. This letter was in reply to a letter from the applicants' solicitors dated 16 July 2015 On 03 July 2015, the applicants' solicitors sent an email to Mr Feng apparently containing a letter of offer. A further email was sent to Mr Feng on 16 July 2015, copied to the strata manager and the Tribunal, seeking a response to the email of 03 July 2015 in relation to "whether or not the Owners Corporation agrees to hold an EGM to vote on the motion that we have proposed in paragraph 44 of our attached letter" by 5:00pm on 16 July 2015.

37 Mr Feng's email contained the following:

> "As you know your client's applications for money order and new Adjudication are currently in processing with the Tribunal and Adjudicator. As a legal practitioner, you should do anything under the direction orders, not approach all individual

residents privately by sending canvassing letters accompanied with legal threat/pressure wordings.

"You have wrongly sent those canvassing letters with your legal threat/pressure wordings to all residents under your client's instructions. As a result, the owner of Lot 5 Mrs Eleanor May Hansen (aged 81) had received and read your canvassing letter and immediately had heart attack. She was sent to Hospital and died in Hospital after some rescue hours.

"Her family and all our neighbours are very sad against your wrong doing. After funeral ceremony, the family will look at the matters seriously.

"Regards!"

38 The letter of 03 July 2015 had been provided to the Tribunal on that date. It was under cover of another letter of the same date, addressed to the Tribunal, seeking an extension of time in relation to orders 2 and 5 made on 09 July 2015 and an adjournment of the hearing set down for 18 August 2015 to a date in September 2015 in order to permit a consequential extension of time to the respondent, should the applicants' request be granted.

39 The letter of offer, or rather the letter attempting to "resolve all issues" addressed to "the Secretary and all Lot Owners" of 03 July 2015, referred to the difficulties caused, or alleged to have been caused, by Mr Feng and the respondent's former solicitor Mr Alex Ilkin, the "illegal and invalid levy" issued upon Lot 3 (referring to the alleged debt noted in paragraph 10 above arising from the initial repair attempts made by BR Building Services), the continuing problem of water ingress and the alleged unreasonable and unfair treatment of the applicants by the Owners Corporation.

40 The letter had attached to it numerous annexures, including previous correspondence between the parties extending back to at least 2011, portions at least of Mr Le's reports, a transcript of part of the directions hearing of 29 April 2015 and a draft and very detailed Deed of Settlement.

41 On 20 July 2015, Mr Feng sent another email to the applicants' solicitors and to the Tribunal. This email was in reply to an email from the applicants' solicitors to Mr Feng and the Tribunal on the same date.

42 The applicants' solicitors email was as follows:

> We are sad to hear that Mrs Hansen has passed away. However, nothing that our firm or our clients have done have caused Mrs Hansen's medical condition or her death. All action taken by us in this matter has been entirely reasonable and appropriate in the circumstances. Attempting to lay blame upon us or our clients for Mrs Hansen's death is irresponsible and unacceptable.
>
> Your conduct with respect to Dr and Mrs Thadani as the "purported" representative of the Owners Corporation has been both distressing to them and disappointing (to say the least) from our perspective. You should have chosen a cooperative approach toward the Owners Corporation's statutory obligations to repair and maintain the common property causing water penetration into Lot 3. You chose to

> do the opposite. Rather than blaming others in respect of Mrs Hansen's death, we suggest that you carefully review your own conduct in this matter that has led to the position the parties now find themselves in.
>
> Our clients have requested that an EGM be held to vote on the resolution of this matter once and for all. Your refusal to call that EGM, coupled with your response below, are further examples of the dysfunctionality that exists within this scheme and the unreasonable and uncooperative attitude the Owners Corporation has towards our clients.
>
> Both we and our clients require a written retraction of your inaccurate and inappropriate statements in your email below regarding Mrs Hansen's death, along with a written apology. We look forward to receiving both.
>
> Both we and our clients reserve all rights in relation to any further action that is required to be taken against you in relation to your statements below, or any other matter that bears upon the obvious dysfunction of this strata scheme.

43 In reply, Mr Feng sent the following email:

> The OC does not accept your accuse by your canvassing latter or your email below. Your canvassing letter (some 70 pages) is outside of the direction orders made by NCAT. You should do anything under the NCAT direction orders only.
>
> Your client filed 4 applications against the OC within 48 months. Up to today, the OC has not filed a single application against your client. Your client continually employs 3 solicitors within 30 months for the proceedings. The OC only engaged Mr Alex likin for 2 hearings during 4 months.
>
> If you are a good solicitor, you should honestly tell your client. His applications for a penalty and new adjudication are too hard to be successful, as they have no legal base to standing. Noon of them deals with or relate to the access for the current warranty repair services. By actions, to stop the current warranty repair services and allow Mr Le to breach the NCAT's direction orders (doing something without completion of warranty repair) is a big mistake.
>
> Longer you drag the proceedings for your client and cost your client more. The OC stops using solicitor is for save time and cost.
>
> In regards to the EGM, you should explain to your client about meeting procedures and requirements under the Strata Schemes Management Act 1996 and its Regulations.

44 It does not appear from the Tribunal's file that the respondent replied to the Registry's invitation posted on 20 July 2015 to advise whether the respondent consented or not to the applicants' application for the hearing on 18 August 2015 to be adjourned. In any case, by 27 July 2015 I was no longer available on that date.

45 By letter dated 28 July 2015, the Registry advised the parties that the timetable made on 09 June 2015 was extended and a new hearing date would be set. By Notice of Hearing posted on 06 August 2015, the parties were advised of the new hearing date, being 02 October 2015.

46 On 17 August 2015 the respondent, through Mr Feng, advised the applicants (copied to the Tribunal) that the Owners Corporation would "soon" serve the applicants with a 72 hours repair notice seeking access.

47 This lead to another flurry of emails between the parties, as follows:

> Sent: Monday, 31 August 2015 12:10 AM
>
> Dear Mr Feng and the Owners Corporation SP46619
>
> I acknowledge your request to re-attempt repairs to defective common property in unit 3, which has originated from deterioration and deficiencies with the cavity flashing within the common property wall, as outlined in the first report by Mr Peter Le of RHM Building Consultants (dated 13 Jan 2012). RHM Consultants was chosen by the executive committee and paid by the Owners Corporation SP 46619 for its 13 Jan 2012 report. There never has been any damage done to common property directly, or indirectly, knowingly or unknowingly by us, the owners of unit 3 and you have yet to provide any evidence to prove otherwise.
>
> The repairs by BR Building, completed on the 15th April 2015, are again inadequate and there continues to be water penetration with rain and windy conditions.
>
> All attempts at common property repairs have been conducted through the Owners Corporation SP 46619.
>
> This will be the fifth attempt by the Owners Corporation SP 46619 to fix the same common property in my unit. Previous attempts by tradespersons paid for by the Owners Corporation include:
>
> 2010 — Simon Garay (Northshore & Eastern Suburbs Bricklaying)
>
> 2013 Sep/Oct — Colin Yao (BR Building)
>
> 2015 7-8 April — Colin Yao (BR Building)
>
> 2015 9-15 April — Colin Yao (BR Building)
>
> This is on a background of numerous other occasions when we have provided access to the Owners Corporation to obtain quotes or do water tests (such as the one done by Wayne Spiteri of Danrae Remedial Services in 2011).
>
> In accordance with the Adjudicator orders by Senior Member Kim Rosser on 30/07/2015, and your request for access from Wednesday 2nd September to Friday 41h September 2015, between the hours of 0800 to 1600, we the owners of unit 3 again grant reasonable access to common property in our unit for you to re-attempt repairs.
>
> Regards
>
> Dr Dinesh Thadani

****

> Sent: Monday, 31 August 2015 9:54 AM
>
> Dear Mr Thadani,
>
> Refer to your email below, the Owners Corporation ("OC") confirms the access booked.
>
> The OC further confirms that Mr Le is not allowed to enter our common property again and interfere our common property repair.
>
> Mr Le has already made enough confusion to the OC and the builders. If Mr Le comes again without a written authority of the OC, the OC will obtain legal advice against him.
>
> Regards!

Jimmy Feng—secretary

BCC all owners

****

Sent: Monday, 31 August 2015 10:44 AM

To: Jimmy

Dear Mr Feng,

Dr Thadani can have anyone he so desires attend at his premises at any time.

You have no authority to prevent Mr Le from attending at Lot 3 if Dr Thadani invites him to attend.

It is you and the contractor selected by the Owners Corporation who have caused the problems, not Mr Le or our clients. There would be no requirement for access in 2015 if the contractor had properly repaired the deft common property in 2013.

Please refrain from making any further comments regarding Mr Le attending at Lot 3.

Kind Regards

Jessica Bates

Senior Associate I Makinson d'Apice Lawyers

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Sent: Monday, 31 August 2015 12:09 PM

Dear Ms Bates

The OC confirms with Mr Thadani that the OC fives no permission to give Mr Le to enter our common property and do anything to our common property.

Please do not reply this email.

Regards!

Jimmy Feng - secretary

****

Sent: Monday, 31 August 2015 12:28 PM

Dear Mr Feng,

Please provide us in writing with the name of the suitably qualified and experienced building consultant, with expertise in water ingress, who will be attending at Lot 3 to supervise and certify the works in accordance with order 3 of the Adjudicator's orders made on 30 July 2015.

Regards

Jessica Bates

Senior Associate I Makinson d'Apice Lawyers

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Sent: Monday, 31 August 2015 3:00 PM

Dear Ms Bates,

The Adjudicator Kim Rosser has not ordered that the OC to provide to Mr Thadani with the name of the suitably qualified and experienced building consultant, with expertise in water ingress, who will be attending at Lot 3 to supervise and certify the works.

You should carefully read through the Adjudicator's orders.

If Mr Thadani is not happy with the Orders, an appeal can be filed to challenge the Adjudicator's order.

Please do not reply this email.

Regards!

Jimmy Feng — secretary

BCC all owners

****

Monday, 31 August 2015 3:13 PM

Dear Mr Feng,

Our clients are entitled to know who will be coming inside their premises. There does not need to be an order in place for the Owners Corporation to provide this information. I do not understand why you are unwilling to provide the details. The identity of the expert is certainly not a secret. If someone was coming into your wife's unit, she would be entitled to know the identity of that person before they walk inside. I have no doubt that you and your wife would demand this information if you were in our clients' position.

Our clients are entitled to the information and the Owners Corporation should provide it without further delay.

Your continued failure to be reasonable and provide the details of the expert to us will be communicated to the Tribunal at the appropriate time.

Regards

Jessica Bates

Senior Associate I Makinson d'Apice Lawyers

48 Finally, the applicants' solicitors wrote to the Tribunal on 10 September 2015, seeking another adjournment of the hearing on the basis that Mr Le was not available on 02 October 2015. This application was refused on the bases that:

(1) the parties were requested to provide unavailable dates previously;

(2) the consent of the respondent was not obtained; and

(3) a further adjournment is not consistent with the "guiding principle" set out in s 36(1) of the CAT Act.

The Hearing

49 At the hearing, the parties were represented by Dr Thadani and Mr Feng respectively. Mr Peter Le was present also with Dr Thadani but was not called upon, or rather, was not permitted to be called.

50 Dr Thadani also provided a large bundle of documents, including an affidavit by him, and a further report or reports of Mr Le. It appeared that these related to the further attempt to rectify the defects following the orders of Adjudicator Rosser in about July this year, the result of the fresh application filed by the applicants and referred to above. This evidence was referred to by the applicants but was not accepted and I did not read that evidence, on the basis that it was not relevant to penalty application before me today.

51 The hearing proceeded by both parties making submissions from the bar table, in a fairly unstructured fashion. This was to permit and encourage Dr Thadani and Mr Feng to raise all issues of concern, although much of the ground covered was not strictly relevant to or limited to the penalty application. To aid in this process, I asked many questions of the parties seeking to ensure the issues were fully covered and particularly that issues in dispute, including factual issues, were explored by both parties. Dr Thadani was forthright and vigorous in his submissions but at times became emotional when discussing some of the effect of the proceedings on his personal life. I am comfortably satisfied this did not interfere at all with his exposition of his position. Mr Feng was equally able to present the respondent's case although, in my opinion and with the greatest respect to Mr Feng, he required some additional guidance in staying relevant to the issues in this hearing.

52 One issue sought to be argued by the applicants, indeed sought most earnestly to be argued, related to the nebulous but persistent theme raised by the respondent over the past several years (and referred to above) in relation to possible Local Court proceedings—see paragraph 10 above. This claim relates to the opinion or belief of the respondent, or at least of Mr Feng, that the applicants themselves caused the damage to the common wall resulting in the water ingress. The applicants assert strongly that this accusation is incorrect and results from some comments made by Adjudicator Howe in the original adjudication decision giving rise to these proceedings.

53 The applicants state that this accusation was made by the respondent based on two short "Youtube" videos uploaded to YouTube by the applicants. As I understand the applicants' position, the videos show them, or someone, using a hose to pour water into the subject wall as a kind of test. Adjudicator Howe may or may not have viewed those videos but the applicants state that it is clear from the submissions and photographs provided by the respondent that the source of the accusation was the videos. The applicants repeatedly requested that I view those videos today. I declined to do so on the basis that they and indeed the actual issue is not relevant to the penalty application.

54 Finally the applicants submitted that the respondent has failed to comply with the Adjudicator's orders or one or more of them, and that the respondent has treated the applicants unfairly and discriminated against them. The respondent submits in reply that they believe they are "innocent" and have done nothing wrong. They will consider they have been wrongly treated if a penalty application is made.

Consideration and Determination

55 I had initially intended to complete this decision shortly after the hearing. It proved to be necessary to review a great deal of material provided by the parties in order to reach an understanding of the issues raised and to make an informed decision. I also listened to the recording of the hearing in its entirety before making the decision and completing these reasons.

56 I deal first with the issue first raised by the respondent's former solicitor, Mr Alex Ilkin, prior to the hearing in March 2015. The applicants' solicitors also appeared to accept that the application may be out of jurisdiction on the same basis, that is, s 172 of the SSM Act extracted above.

57 As can be seen from the section itself, it states no more than that an Adjudicator's order is effective for a period of two years unless the order itself provides otherwise. Somehow, by reasoning which escapes me, the respondent's former solicitor considered that because this application for a penalty was filed outside that two year period, it was out of time and therefore the Tribunal did not have jurisdiction to hear and determine this application.

58 The issue was not the subject of further submissions and was not raised in this hearing until Mr Feng referred to it at the end of his submissions. He apologised for not having documents ready to hand but suggested he had referred to other decisions of this Tribunal (or its predecessor) supporting his submission. Dr Thadani made no submission on this issue and was not requested to do so at the hearing. I am aware of no such decision of the Tribunal and indeed it is misconceived, in my opinion.

59 It is not possible for anyone to know if an Adjudicator's order has been complied with in the two year period during which it is effective, until the two years has elapsed. Otherwise, prior to the end of the two year period, it is still possible that the party liable to perform work (or whatever the order may be) can still comply.

60 Section 202 of the SSM Act itself contains no time limitation. Mr Feng could not take me to any relevant section of the SSM Act in that regard.

61 There is otherwise no issue between the parties that the applicants have standing to bring this application pursuant to the terms of s 202 or that Mr Feng has standing to represent the respondent.

62 I find this is a valid application for the imposition of a pecuniary penalty and the Tribunal has jurisdiction to hear and determine the claim.

63 I have set out above in paragraphs 30ff some of the correspondence between the parties. That material was provided as noted, to the Tribunal by the parties. Some of the material, it should be noted, is in my opinion unwarranted, unsupported by evidence and misconceived, including opinions provided by a person who has no training or experience entitling the offering of those opinions, particularly in relation to the death of Mrs Hansen. However, it is necessary to point out that strictly speaking, I find that evidence is not relevant to these proceedings.

64 There has been considerable confusion on the part of the parties and indeed on the part of their legal representatives from time to time, as to the issues in these particular proceedings and in relation to the evidence relevant to these proceedings or other proceedings, especially the appeal proceedings (SCS 13/51639) and the fresh application for Adjudicator's orders (SCS 15/). I have relied on evidence relating to the period between 21 September 2012 and 21 September 2014 in coming to a decision as to whether the respondent failed to comply with an Adjudicator's orders and whether a pecuniary penalty should be imposed and in what amount.

65 Given all that has been written above, it will be useful to recall the nature of this application.

66 It is an application for a civil penalty for contravention of an order made by an Adjudicator. The order required, in summary, that the respondent undertake works on common property so as to prevent the ingress of water from the applicants' balcony into their living room. The floor of the balcony and the wall between the balcony and the living room are all common property. That is not disputed.

67 The relevant section, s 202, says only that the order was "contravened": it does not contain a form of words such as "must take all reasonable steps" to comply with the order. However, in my opinion in the interests of justice the Tribunal on a penalty application must take into account such issues as whether it is possible to comply with the order, or that the person liable to comply has made every reasonable effort to do so.

68 In this case there is no doubt that the respondent has made a number of attempts to rectify the common property so as to ensure there is no water ingress.

69 I note also that, the balcony and wall being common property, the respondent has a mandatory duty to do so pursuant to s 62 of the SSM Act, whether or not there is a valid Adjudication order to do so.

70 I am also satisfied that the respondent did contravene the order of 21 September 2012 in that any works conducted or ordered by the respondent did not succeed in preventing water ingress and that the reasons for that failure was that the respondent, or the builder selected by the respondent, failed or refused to follow the reasonable scope of works suggested by the independent expert. Mr Le.

71 I have come to that conclusion first because I accept the evidence of the applicants that water ingress continued after 29 September 2014, being the date to which the Adjudicator's orders remained effective.

72 Secondly, I accept the evidence of Mr Le in his two first reports in relation to the cause of the water ingress and the recommended method of rectification, comparing those to the scopes of work provided by BR Builders.

73 It is obvious from the evidence presented by both parties, that the respondent, or those acting on their behalf from time to time, have resisted the attempts of the applicants to have the defective common property repaired so as to prevent water ingress. It is obvious from the contents in particular of much of the email correspondence between the parties and between Mr Feng and other residents of the strata scheme. Mr Feng in particular has been extremely active in these proceedings in relation to obtaining and then rejecting quotations from builders, in retaining RHM consultants and then deciding that Mr Le has a conflict of interest and in engaging in legal disputes with the applicants' solicitors as to their legal responsibilities. I am satisfied that Mr Feng sincerely believes he is acting in the best interests of the Owners Corporation but in fact there is no doubt that he has often been the cause of complication and exacerbating the dispute between the parties.

74 For example, the issue of the proposed Local Court debt recovery proceedings appears to be based on a misconception of the legal duties of the Owners Corporation, and is persisted in despite, as conceded by Mr Feng at the hearing, a lack of actual evidence that the applicants' themselves caused any relevant damage to the subject common property.

75 In my opinion, the respondent has not acted reasonably in relation to a simple issue. I note that Mr Le was initially at least the respondent's own choice of an independent engineering expert. It would have been reasonable to retain Mr Le, as requested by the applicants, to conduct an inspection both during and after the rectification works, to ensure the works were effective.

76 I accept the submissions of the applicants, based on the documentary evidence provided of the nature of the works carried out by BR Building Enterprises, that the scope of works conducted by BR were not effective because the works

recommended by Mr Le were not done. This was obvious from the date of Mr Le's first report and was only emphasised by Mr Le's second report. In addition, this is another example of the interference of the Owners Corporation, through Mr Feng, in his unwarranted and misguided attempts to prevent Mr Le attending the site at all, and in his belief that Mr Le was not independent. I note that Mr Le's opinions as to the cause and appropriate rectification of the leak did not essentially change from his first involvement.

77 I note also that following the inspection of the common property in February 2014, no further work was done to rectify the fault before the expiry of the effective date of the orders, being 21 September 2014. During the hearing, Mr Feng attempted at length to assert that work had been done but finally was unable to do so. He did submit that this did not mean nothing was happening and that there were discussions between the parties and with the builder. The fact remains that the work was not done, despite the passing of a full seven months.

78 For those reasons I am satisfied it is appropriate that I exercise my discretion pursuant to s 202 of the SSM Act to impose a pecuniary penalty for contravention of the Adjudicator's order.

79 Turning to consider the amount of the penalty, I find it is appropriate to order the maximum penalty of 50 penalty units. I do so because of the relatively minor and restricted nature of the original defect, the fact that the applicants were complaining of the defect from mid-2010 until 21 September 2014 (and of course until the present) and the fact that the works relate to the mandatory duty of the Owners Corporation to maintain the common property pursuant to s 62 of the SSM Act. In addition, I find that it is appropriate to impose the maximum penalty because of the attitude and behaviour of the respondent in the way they have dealt with the applicants from the beginning of this complaint.

80 Turning to the issue of costs pursuant to s 204 of the SSM Act, I note that this was not the subject of adequate submissions during the hearing nor in the parties' documentary submissions from time to time.

81 I therefore require the parties to provide written submissions in relation to whether it is appropriate to make an order for costs pursuant to s 204 of the SSM Act no later than 14 days after the date of these orders. Any written submissions in reply should be provided no later than 28 days after the date of these orders. The decision on costs will be made on the papers.

82 The parties should be vigilant to ensure that the submissions do not seek to review all the facts and issues in the dispute between the parties, but relate only to the issue of costs in relation to these particular proceedings.

G Meadows

Senior Member

Civil and Administrative Tribunal of NSW

10 December 2015

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I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.
Registrar