JURISDICTION	:	STATE ADMINISTRATIVE TRIBUNAL
CITATION	:	ROGERS and THE OWNERS OF THE LINX AT NEXUS STRATA PLAN 47739 [2021] WASAT 70
MEMBER	:	PRESIDENT PRITCHARD
HEARD	:	ON THE PAPERS
DELIVERED	:	14 MAY 2021
FILE NO/S	:	CC 658 of 2018
BETWEEN	:	GARY ROGERS First Applicant MANGLES SMSF PTY LTD Second Applicant LEANNE SHAW Third Applicant JOHN FRANCIS MOONEY Fourth Applicant TAMMY CARMEN PERRY JOSE ANTONIO CANHA PERRY Fifth Applicants MARK DAVID ELLIS Sixth Applicant ROBERT GIARDINI Eighth Applicant DIANNE ERICA HEALY COLIN PATRICK HEALY Seventh Applicants YOKE WAH LEONG

TIAN Y AM LEONG
Ninth Applicants

DEBORAH JUNE FORTINI
LORENZO FORTINI
Tenth Applicants

SASHA LINFOOT
Eleventh Applicant

AND

THE OWNERS OF THE LINX AT NEXUS STRATA PLAN 47739
Respondent

Catchwords:

Statutory interpretation - *State Administrative Tribunal Act 2004* (WA) s 86 - Application for certificate of enforcement of non-monetary order - Proper construction of s 86(2)(c) - When an order is appropriate for filing in the Supreme Court

Enforcement - Whether order is appropriate for filing in the Supreme Court - Whether evidence of non-compliance - Whether order clear and unambiguous - Whether parties reached agreement as to alternative resolution of dispute - Whether alternative means to resolve dispute - Turns on own facts

Practice and procedure - Application for certificate of appropriateness for filing in Supreme Court - What must be shown - Factors for consideration

Legislation:

Building Services (Complaint Resolution and Administration) Act 2011 (WA), s 36(1)(a), s 41(2)(a)
Civil Judgments Enforcement Act 2004 (WA), div 2 pt 5, s 97, s 99(2), s 99(6)
Justice Legislation Amendment (Access to Justice) Act 2018 (Vic), s 67, s 69
Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 132(4), s 133

State Administrative Tribunal Act 2004 (WA), s 3, s 29(5), s 73, s 83, s 85(1), s 86
Strata Titles Act 1985 (WA), s 90, s 91, s 102(1)(e), s 197
Victorian Civil and Administrative Tribunal Act 1998 (Vic), s 120A, s 122

Result:

Application dismissed

Category: A

Representation:

Counsel:

First Applicant	:	No Appearance
Second Applicant	:	No Appearance
Third Applicant	:	No Appearance
Fourth Applicant	:	No Appearance
Fifth Applicants	:	No Appearance
Sixth Applicant	:	No Appearance
Eighth Applicant	:	No Appearance
Seventh Applicants	:	No Appearance
Ninth Applicants	:	No Appearance
Tenth Applicants	:	No Appearance
Eleventh Applicant	:	No Appearance
Respondent	:	No Appearance

Solicitors:

First Applicant	:	N/A
Second Applicant	:	In Person
Third Applicant	:	N/A
Fourth Applicant	:	N/A
Fifth Applicants	:	N/A
Sixth Applicant	:	N/A
Eighth Applicant	:	N/A
Seventh Applicants	:	N/A
Ninth Applicants	:	N/A
Tenth Applicants	:	N/A
Eleventh Applicant	:	N/A
Respondent	:	Atkinson Legal

Case(s) referred to in decision(s):

Allbeury v Corruption and Crime Commission [2012] WASCA 84; (2012) 42 WAR 425
Cameron v Renouf [2008] WASC 60
Caratti v Boban Pty Ltd (Administrators Appointed) [No. 2] [2015] WASC 139
Caratti v Mammoth Investments Pty Ltd (No 2) [2018] WASCA 6
Certain Lloyd's Underwriters v Cross [2012] HCA 56; (2012) 248 CLR 378
Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd [2015] HCA 21; (2015) 256 CLR 375
Mohammadi v Bethune [2018] WASCA 98
Patterson v Humfrey [No 2] [2016] WASC 343
Porter v Steinberg [2019] WASC 291
State of Victoria v Tymbook Pty Ltd and Anor [2010] VCAT 418
White v Department of Natural Resources and Environment [2001] VCAT 2451
Witham v Holloway [1995] HCA 3; (1995) 183 CLR 525

REASONS FOR DECISION OF THE TRIBUNAL:

Introduction

1 The second applicant in these proceedings has applied to the Tribunal for the grant of a certificate (**s 86 certificate**) under s 86(2)(c) of the *State Administrative Tribunal Act 2004* (WA) (**SAT Act**) (**s 86 Application**). The s 86 certificate which is sought pertains to orders made by the Tribunal on 11 October 2018 (**Orders**) which the second applicant wishes to enforce in the Supreme Court. The respondent to the proceedings opposes the s 86 Application on a variety of bases, including on the basis that it has complied with the Orders.

2 The proceedings out of which the s 86 Application arose have a protracted history, the genesis of which lies in a dispute between a number of owners of strata titled units in a building in Cockburn known as the Linx at Nexus (**building**), and the respondent. Amongst other things, that dispute concerned whether the respondent had properly maintained the building, and in particular the roof of the building, including a roof top garden and living area. There were eleven applicants (or groups of applicants) who pursued the proceedings against the respondent in relation to that dispute. The Orders which are the subject of the s 86 Application were made by the Tribunal, by the consent of all of the parties, to settle that dispute.

3 Initially, it was the second and third applicants to the proceedings (the owners of Lot 57 and Lot 46 respectively) who contended that the respondent had not complied with the Orders. None of the other applicants to the proceedings sought to pursue the s 86 Application.[1] However, ultimately the third applicant indicated that she did not wish to pursue the s 86 Application.[2] Consequently, it is now only the second applicant which contends that the respondent has not complied with the Orders, and which seeks to enforce the Orders. The second applicant's concern lies with an alleged non-compliance with the Orders only in relation to the lot owned by the second applicant (that is, Lot 57).

[1] The seventh applicants subsequently formally confirmed that they did not wish to participate, and that they considered the respondent had complied with the Orders.

[2] At a directions hearing on 23 June 2020 the third applicant indicated that she intended to pursue an agreement with the respondent for the remediation of the common property above her unit and remedial work within her unit, and consequently did not intend to pursue enforcement proceedings in the Supreme Court.

4 For the reasons which follow, I have concluded that the Orders are not appropriate for filing in the Supreme Court.

5 In these reasons for decision I deal with the following matters:

(i) The background to the s 86 Application;

(ii) The terms of the Orders;

(iii) The s 86 Application;

(iv) Events after the s 86 Application was filed;

(v) The parties' contentions;

(vi) The proper construction of s 86(2)(c) of the SAT Act;

(vii) Why the decision is not appropriate for filing in the Supreme Court; and

(viii) Next steps.

(i) The background to the s 86 Application

6 On 29 March 2018, Mr Gary Rogers (the first applicant in the proceedings) and Ms Annette Fennell[3] (a director of the company subsequently named as the second applicant in the proceedings) filed an application in the Tribunal under the *Strata Titles Act 1985* (WA) (**ST Act**). The proceedings concerned a dispute between some of the owners of units in the building,[4] and the respondent, concerning whether the respondent had arranged for repairs to the main roof of the building, concerns about the adequacy of the respondent's disclosure of information to owners concerning what work was proposed, and the costs to owners, and whether the respondent was acting in accordance with the wishes of a majority of the owners of the units.

7 The applicants in the proceedings later filed a document setting out amended orders which they sought, and the grounds on which those

[3] Some orders of the Tribunal refer to Ms Fennell as the twelfth applicant in the proceedings. That appears to be an error, which in turn has given rise to some confusion as to whether Ms Fennell is a party in her own right. No order has ever been made by the Tribunal to join Ms Fennell as an applicant in the proceedings. While Ms Fennell made the s 86 Application, that Application must be understood as having been made by the second applicant, acting through its director, Ms Fennell.

[4] After the proceedings were commenced, additional owners were subsequently joined to the proceedings as the third to eleventh applicants.

orders were sought.[5] The amended orders which were sought were in similar terms to the Orders ultimately made and to which the s 86 Application relates. The amended grounds for that application give a flavour of the background to the dispute. In those amended grounds, the applicants contended, amongst other things, that:

- from the registration of the strata plan, the building had been affected by water leaking from the roof and the roof top garden and living area into other aspects of the Common Property and various lots (including Lot 57);
- between 2014 and 2017, various building works had been completed on the roof and roof top garden and living area of the building in an endeavour to address those issues;
- experts had provided reports in 2014 and 2017, detailing, amongst other things, moisture ingress into the building and deficiencies with the construction of the roof and the roof top garden and living area and related hydraulic services;
- various lots within the building had been damaged by the water moisture and damp ingress caused by the failing roof and roof top garden and living area;
- the respondent's insurer had recognised that issues with the building's roof needed to be rectified, but had refused cover based on the history of water ingress problems with the building and the potential for future damage, which it regarded as likely to relate to maintenance and building defect problems;
- the respondent commenced proceedings in the Building Commission, which were later referred to the Tribunal, against the builder of the building in relation to the defects with the roof, water ingress and drainage issues, and resulting damage. Those proceedings were settled, and the builder paid the respondent a lump sum in return for a release from any further claims; and
- the applicants alleged that the respondent had failed to address the defects described above and that its failure to do so constituted a breach of its obligation under the ST Act to keep

[5] On 8 June 2018, SM Aitken granted leave to amend the application by substituting the orders sought and the grounds for the application, with those set out in the document titled amended orders sought and grounds dated 1 June 2018.

> the common property in good and serviceable repair, and to properly maintain and, where necessary, renew and replace the common property.

8 In the course of directions hearings before Senior Member Aitken, some progress was made to engage the parties in discussion of the means by which the dispute might be resolved, by undertaking repairs or maintenance work to the roof, roof top garden and living area of the building. On 20 July 2018, Senior Member Aitken made orders requiring the respondent to file and serve a project plan for the works which were the subject of the orders sought by the applicants, including a timeframe within which the repair of the roof, roof top garden and living area would be completed, so that they complied with all applicable standards and the Building Code of Australia.

9 By 3 August 2018, the respondent had indicated that it would consent to the amended orders sought by the applicants, with the exception of the date by which the applicants sought that the respondent comply with those orders. On 3 August 2018, the latter issue - essentially the only remaining issue in dispute - was listed for determination at a final hearing later in 2018.

10 Shortly before that final hearing, the parties reached agreement to resolve the dispute in its entirety and to that end, the Orders were made by Senior Member Aitken, by consent of the parties.

(ii) The terms of the Orders

11 The Orders were in the following terms:

> By consent it is ordered that:
>
> 1. The Respondent by no later than 9 January 2019 cause the repair, renewal or replacement of the roof of the building by a qualified person/s to ensure that the roof conforms to all appropriate standards and the Building Code of Australia, provided that if the works are delayed due to inclement weather or any other cause outside the control of the contractor, which is certified in writing by the contractor stating the reason for the delay and the number of working days of the delay, then the date for completion is extended accordingly.
>
> 2. The Respondent within 14 days of the satisfaction of above Order 1 obtain a technical report and certification from a recognised expert/s in the appropriate engineering or building discipline certifying to it that the building works completed to comply with above Order 1

have caused the roof of the building to conform with all appropriate standards and the Building Code of Australia.

3. The Respondent by no later than 9 January 2019 cause the repair, renewal or replacement of the roof top garden and living area of the building by a qualified person/s to ensure that the roof top garden and living area conforms to all appropriate standards and the Building Code of Australia, provided that if the works are delayed due to inclement weather or any other cause outside the control of the contractor, which is certified in writing by the contractor stating the reason for the delay and the number of working days of the delay, then the date for completion is extended accordingly.

4. The Respondent within 14 days of the satisfaction of above Order 3 obtain a technical report and certification from a recognised expert/s in the appropriate engineering or building discipline certifying to it that the building works completed to comply with above Order 3 have caused the roof top garden and living area of the building to conform with all appropriate standards and the Building Code of Australia.

5. The Respondent immediately advise its insurer about any works undertaken in compliance with above Orders 1 and 3.

6. The Respondent immediately cause the prevention of any water ingress in any lot caused by the failing of any aspect of the Common Property roof and roof top garden and living area and any associated hydraulic services of the building.

7. The Respondent immediately cause by qualified persons the remediation of any and all damage, premature deterioration and the removal of all moisture, mould and mildew from any lot caused by any water or damp ingress into any such lot from the Common Property roof and roof top garden and living area of the building.

8. The Respondent cause by qualified persons the remediation of any and all damage, premature deterioration and the removal of all moisture, mould and mildew from the Common Property caused by any water or damp ingress onto or into the Common Property by any failing of the required waterproof qualities of the roof and roof top garden and living area of the building.

9. The Respondent within 14 days of the satisfaction of each of above Orders 7 and 8 obtain a technical report and certification from a recognised expert/s in the appropriate engineering or building discipline certifying to it that the work completed to comply with each of the above Orders 7 and 8 has been satisfactorily performed in accordance with all appropriate standards.

> 10. The Respondent immediately provide its insurer with copies of the certificates it receives under above Orders 2, 4 and 9.

12 It may be observed at the outset that the terms of the Orders are unusual in that in some respects they are quite detailed and prescriptive, and in other respects they are expressed in broad and general terms. In strata disputes such as this, the Tribunal would not typically make orders in such terms in order to compel a strata company to undertake repairs and maintenance work on common property. The unusual terms in which the Orders are expressed may perhaps be explained by the fact that the Orders were made at the request, and by the consent, of the parties, and at that time, the respondent was not legally represented. Be that as it may, the Orders nevertheless stand as final orders of the Tribunal, with which all parties are required to comply.

(iii) The s 86 Application

13 Decisions of the Tribunal that are not monetary orders may be enforced in accordance with s 86 of the SAT Act.[6] Section 86(2) of the SAT Act provides:

> 'A person seeking to enforce a decision under this section may file in the Supreme Court –
>
> (a) a copy of the decision that a judicial member or the executive officer has certified to be a true copy; and
>
> (b) the person's affidavit as to the non-compliance with the decision; and
>
> (c) a certificate from a judicial member stating that the decision is appropriate for filing in the Supreme Court.'

14 A 'decision' of the Tribunal includes an order, direction, or determination of the Tribunal.[7]

15 Once the documents referred to in s 86(2) are filed in the Supreme Court, the 'decision' is taken to be a decision of the Supreme Court and may be enforced accordingly,[8] including by proceedings for contempt. I discuss the nature of those proceedings further below.

Documents filed in support of the s 86 Application

16 The s 86 Application was made on 28 August 2019. In support of that Application, the second and third applicants filed affidavits and two bundles of documents (**applicant's bundles**). Because only the

[6] SAT Act s 86(1).
[7] SAT Act s 3.
[8] SAT Act s 86(4).

second applicant now pursues the s 86 Application, and only in respect of alleged non-compliance with the Orders in so far as they concern Lot 57, I have not referred to the materials filed in so far as they concerned the third applicant's concerns about compliance with the Orders in so far as they affected her lot (Lot 46).

17 In support of the s 86 Application, the second applicant filed a document described as an 'affidavit' made by Ms Fennell and dated 28 August 2019. While that document was signed, it was not in the form of an affidavit. I will refer to that document as Ms Fennell's witness statement.

18 In Ms Fennell's witness statement, she claimed that damage to Lot 57 had never been repaired to comply with the Orders. She claimed that 'the water ingress remains in the same position as reported back in August 2018, therefore the recent and limited repairs on 'sections' of the main roof could be described as having failed to stop the water ingress' and that 'my unit remains unrepaired with continued water ingress and mould within the main roof cavity and internal surfaces'. Ms Fennell contended that the only way to resolve these problems was by the appointment of an administrator to the strata company so that suitably qualified persons could be appointed to conduct the work required to comply with the Orders.

19 The applicant's bundles include documents which make reference to related proceedings in the Tribunal, to which it is appropriate, for the sake of completeness, to make brief mention.

20 On 1 March 2019, the second and third applicants in these proceedings made two applications to the Tribunal. The first (CC 328 of 2019) was an application to the Tribunal pursuant to s 102(1)(e) of the ST Act, for the appointment of an administrator to the strata company, on the basis that the Orders imposed duties on the strata company, with which it had not complied. The grounds for that application included that 'owners within the [O]rders have been subject to repairs not being to the satisfaction of the [O]rders internal within lots and damage as caused by common property defects' and '[o]wners unaware of the satisfaction of the [O]rders carried out on the common property due to the inability to engage a response from the Council of Owners … no technical reports, certifications by qualified persons have been presented to owners'.

21 The second related application (CC 329 of 2019) was an application to the Tribunal under s 90 of the ST Act, for the provision of information or documents by the respondent to the applicants, including documents which would enable the applicants to determine whether there had been compliance with the Orders.

22 At a directions hearing in respect of these related applications, counsel for the respondent submitted that his instructions were that the remedial work required by the Orders had been completed. The respondent agreed to provide the second and third applicants with a copy of the certification it had obtained to confirm that the remedial work had been performed. Senior Member Aitken noted that if there remained a concern on the part of the second and third applicants as to whether the remedial work required by the Orders had been undertaken, they could apply for a s 86 certificate and pursue the enforcement of the Orders in the Supreme Court.[9] Both of the related applications were withdrawn.[10]

Steps taken following the receipt of the s 86 Application by the Tribunal

23 Given the somewhat unusual background to the s 86 Application, that Application was listed for directions before me on 24 September 2019. On that occasion, Ms Fennell, who appeared for the second applicant, indicated that there were continuing problems with water ingress into Lot 57 (so that she contended that there had not been compliance with order 1 of the Orders) and that the remediation of mould and damage from the water ingress had not been undertaken (so that she contended that there had not been compliance with order 7).

24 In contrast, counsel for the respondent contended that the respondent had complied with orders 1, 2, 3, 4 and 5. He submitted that one of the documents within the applicants' bundle was a report of an expert (Structerre) which had been engaged to confirm that the work had been done. In relation to orders 6 to 10, counsel for the respondent submitted that the respondent had obtained a report from an expert, Signature Mould Services (SMS), which indicated that there was no water ingress into Lot 57, and that the respondent's position was that any mould problems in Lot 57 were not attributable to water ingress, so that it was not obliged to remedy those in order to comply with the Orders.

[9] Ts 15 March 2019 pages 21 and 37.
[10] Ts 15 March 2019 page 38 and orders of the Tribunal dated 15 March 2019.

25 In the course of the directions hearing on 24 September 2019, the parties indicated that they were agreeable to obtaining the assistance of the Tribunal to endeavour to resolve the dispute, and to consider engaging an independent expert or experts to investigate and report on water ingress, mould and air quality in Lot 57 with a view that the opinions given would be accepted by them all. I made orders to enable that to occur. At that stage, the matter proceeded on the basis that the second applicant did not then seek to pursue the grant of the s 86 certificate.

26 Several attempts to mediate the dispute were made in the following months. By June 2020, however, it appeared that the utility of further mediations had been exhausted. After some consideration, the second applicant confirmed that it wished to proceed with the s 86 Application. Counsel for the respondent submitted that, for a variety of reasons, this was not a case in which the Orders were appropriate for filing in the Supreme Court, and pressed for the dismissal of the s 86 Application. I made an order that following the filing of further documents by the parties, the s 86 Application be determined on the papers.

(iv) Events after the s 86 Application was filed

27 At a directions hearing on 26 May 2020, Ms Fennell indicated that in the course of the various attempts to mediate their dispute following the filing of the s 86 Application, the parties to that Application had agreed to engage independent experts to conduct an inspection, that those experts had made recommendations, and that those recommendations had not been met.[11] Ms Fennell claimed that the parties had reached agreement, and that the respondent had agreed to undertake the recommendations contained in the experts' reports.[12]

28 Counsel for the respondent confirmed that in respect of the second applicant's lot (Lot 57), it had been agreed that a jointly appointed independent expert would be engaged to assess whether there was water ingress into Lot 57. He submitted that that expert, Mr Martelli, had provided a report, and that Mr Martelli's opinion was that there was no water ingress into Lot 57. However, Mr Martelli made a number of other general recommendations for further action in relation to maintenance which were of relevance to Lot 57.[13] The chair of the

[11] Ts 26 May 2020 page 4.
[12] Ts 26 May 2020 page 5.
[13] Ts 26 May 2020 pages 11 - 12.

strata council for the respondent, Mr Murphy, advised the Tribunal that the respondent had done some of that remedial work, but that progress in undertaking that maintenance had been thwarted by a dispute with Ms Fennell about the terms on which access would be provided to Lot 57.[14]

(v) The parties' contentions

29 The respondent opposes the grant of a s 86 certificate.

30 The respondent was granted leave to file a statement of issues, facts and contentions (**respondent's SIFC**) and a bundle of documents (**respondent's bundle**), which set out its case as to why it was not appropriate to issue a s 86 certificate in this case. In support of its position, the respondent also relies on the affidavit of Jennifer Mary Reeve sworn 2 July 2020. Ms Reeve is a member of the strata council for the respondent. In so far as the respondent's SIFC addressed factual matters in respect of compliance with the Orders, and in relation to Lot 57, Ms Reeve deposed that those factual matters were true and correct.

31 The respondent opposes the grant of the s 86 certificate because it says that it has substantially complied with the Orders. Counsel for the respondent submitted that Orders 1 to 5, and Order 10 (in part), concerned works that the respondent had already set in train, as at the date the Orders were made, to deal with water ingress. He pointed to a work order, in respect of the works to which Order 3 referred, issued by the respondent's strata manager dated 20 September 2018 (a copy of which was in the applicants' bundles). Counsel for the respondent submitted that certificates of practical completion for the works described in Orders 1 and 3 were also contained in the applicants' bundles, that Structerre provided a report dated 30 January 2019 (also in the applicants' bundles) which was substantially in compliance with Orders 2 and 4, and that those documents had been forwarded to the respondent's insurance broker for provision to its insurer, in compliance with Order 5 and Order 10 (to the extent that it concerned compliance with Orders 2 and 4).[15]

32 Counsel for the respondent submitted that in so far as Order 7 was concerned – which required the remediation of damage caused by water ingress – the respondent had complied with that Order. In respect of

[14] Ts 26 May 2020 page 20.
[15] Respondent's SIFC [14].

the second applicant's lot (Lot 57) the respondent submitted that no remediation work was required.[16]

33 Counsel for the respondent also relied on a report provided by SMS dated 22 May 2019 (a copy of which was contained in the respondent's bundle). That report indicated that after an inspection on 15 May 2019, SMS found an extremely small amount of mould (the size of a 50 cent piece) on a ceiling cornice in Lot 57, but high levels of airborne fungal contamination in the unit. SMS concluded that as there were no other signs of water intrusion or mould contamination, or any high moisture or humidity readings, within Lot 57, there was nothing to suggest that the structure of the building was contributing to the high readings, and recommended instead that the unit be opened up to permit air flow to clear the mould spores.

34 Counsel for the respondent submitted that Orders 6, 8, 9 and Order 10 (in part) concerned possible future water ingress.[17] In respect of Lot 57 he submitted that there was no water ingress.[18] He further submitted that the parties had agreed to jointly engage, as an expert, Mr Rick Martelli, to determine whether there was any water ingress into Lot 57, and if so, where it was located, whether it was caused by any failure of the common property roof or associated hydraulic systems, and to make any recommendations.[19]

35 A copy of Mr Martelli's report, dated 4 February 2020 (**Martelli report**), was in the respondent's bundle. In that report, Mr Martelli opined that there was no evidence of water ingress entering the roof space following the water test; that the staining to the ceiling in Lot 57 was consistent with previous water ingress that most likely occurred prior to the roof remedial works being conducted; and that the remedial works to the roof and gutters provided suitable hydraulic capacity for an average 1:100 year rainfall intensity.[20] The respondent says that a copy of the Martelli report was sent to the respondent's insurance broker for provision to its insurer, and pointed to copies of supporting documentation in its bundle of documents.[21]

[16] Respondent's SIFC [15].
[17] Respondent's SIFC [16].
[18] Respondent's SIFC [24].
[19] Respondent's SIFC [25].
[20] Respondent's SIFC [26]; Martelli report page 5; respondent's bundle, page 54.
[21] Respondent's SIFC [28].

36 Counsel for the respondent therefore submitted that there had been no breach of orders 6 to 10 (in relation to Lot 57).[22]

37 Counsel for the respondent noted, however, that Mr Martelli had made some recommendations as to further maintenance works which should be undertaken 'to capture previous internal water staining to ceilings and any potential future water ingress which may manifest from exposure to wind driven storm conditions'.[23] These included the installation of weather seals on any transverse fixings not already fitted with weather seals; the grading of transverse flashing to prevent ponding over the fixings; that the small section of mould on the ceiling above Lot 57 should be cut out and replaced; that all surfaces subject to mould contamination be cleaned by a qualified mould removalist and thereafter that clearance testing should be undertaken by a qualified third party; that small ceiling inspection panels should be installed adjacent to affected areas to provide access to the roof space to permit monitoring during winter rains; the installation of wall flashing securing with fixings and with a weather fold adjacent to the bedroom parapet; and the extension of parapet flashing to the bedroom over the wall render.[24]

38 Counsel for the respondent submitted that the respondent had offered to undertake all of Mr Martelli's recommendations, other than to undertake the clearance testing of mould. He submitted that SMS had subsequently undertaken the cleaning of all surfaces subject to mould contamination, and pointed to an invoice rendered by SMS for that work.[25]

39 Counsel for the respondent submitted that the respondent had given notice to enter the second applicant's lot to carry out painting works but a dispute had arisen with Ms Fennell about the COVID-19 precautions which would need to be taken. Furthermore, he noted that the work recommended in the Martelli report in relation to the common property adjacent to Lot 57 would need to be the subject of special provision in the respondent's budget for the 2020 financial year, the financial implications of which were of some concern amongst owners.[26]

[22] Respondent's SIFC [29].
[23] Martelli report page 5; respondent's bundle, page 54.
[24] Martelli report page 6; respondent's bundle, page 55.
[25] Respondent's bundle, document 8.
[26] Respondent's SIFC [37] - [38].

40 Counsel for the respondent also pointed to other factors relevant to whether a s 86 certificate should be granted in this case. First, he submitted that the Orders were not clear and unambiguous; in respect of Orders 6 to 10 in particular, that they were unclear in that they purported to impose a future and ongoing obligation to comply; and that orders 5 to 7 and 10 were not capable of immediate compliance.[27]

41 Secondly, counsel for the respondent submitted the question of the appropriateness of the filing of the s 86 certificate had to be considered at the time when the Orders were made, and at the time when the decision to provide the certificate is being made.[28] Counsel for the respondent submitted that circumstances applicable at the time of the Orders included that the respondent already had in train a process to carry out the works, that the respondent was unrepresented at the time that it consented to the making of the Orders, and that the Orders were draconian in nature.[29] Counsel for the respondent also submitted that relevant current circumstances included the considerable efforts of the respondent, as evidenced in its willingness to obtain the Martelli report, and to effect the recommendations in that report; the effect of the COVID-19 pandemic on the respondent's ability to carry out the works in Lot 57 in light of objections raised by Ms Fennell; and the conduct of the parties generally.[30]

42 Counsel for the respondent submitted that detecting the source or path of water ingress was notoriously difficult,[31] and there may be a dispute as to whether there is ingress at all (as is the case in respect of Lot 57). Counsel for the respondent submitted that it was preferable that a claim of this kind was dealt with as a dispute concerning the strata company's obligation to repair and maintain the common property, rather than by issuing a s 86 certificate and thereby permitting contempt proceedings to be pursued.[32]

43 Counsel for the respondent submitted that this was not a case of a deliberate and voluntary breach of the Orders by the respondent, and that the respondent had endeavoured to deal with the substance of Orders 6 - 10, namely any ongoing water ingress to Lot 57.[33]

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[27] Respondent's SIFC [47].
[28] Respondent's SIFC [48].
[29] Respondent's SIFC [49].
[30] Respondent's SIFC [50].
[31] Respondent's SIFC [51].
[32] Respondent's SIFC [52].
[33] Respondent's SIFC [53] - [54].

44 Counsel for the respondent submitted that the grant of a certificate under s 86(2)(c) involved the exercise of judicial discretion and this was a case for the exercise of discretion to decline the grant of a certificate.[34]

The second applicant's case in relation to the s 86 Application

45 The second applicant filed a document described as 'Applicants Affidavit and Response to the Respondent's Statement of Issues Facts and Contentions' (**Second Applicant's Response**). In that document, the second applicant posed a list of 'issues'. However, most of those issues appeared to have no connection with the question whether a s 86 certificate should be granted, and instead appeared to seek a decision of the Tribunal in the nature of an advisory opinion.

46 The second applicant set out a detailed chronology of steps it says it has taken in seeking to compel the respondent to arrange for remedial works to resolve water ingress issues in the building, and in Lot 57. It is apparent that the second applicant considers that the water ingress problems affecting Lot 57 have not been resolved.

47 There were some issues, however, that did not appear to be in dispute. Critically, one of the matters about which there was no dispute was that after the s 86 Application was initially made, and after I had referred the parties to mediation, they reached an agreement to jointly brief Mr Martelli, and reached agreement on the terms of the brief to be given to Mr Martelli.[35] It is also not in dispute that Mr Martelli undertook an inspection and provided a report. There is a dispute as to whether the respondent agreed that it would implement all of Mr Martelli's recommendations, but in any event, the respondent has expressed its willingness to comply with all of those recommendations bar one.

48 However, it now appears that the second applicant disputes the conclusions reached by Mr Martelli, and questions the adequacy of the inspection he undertook, as the following extract from the Second Applicant's Response indicates:

> '[The Martelli report] concludes that there was no evidence of water ingress, however if we review [the Martelli report] he only inspected a small area of Lot 57 and limited catchment area of the Strata Scheme roof. The inspection was limited to the area directly above the living

[34] Respondent's SIFC [55] - [58].
[35] Second Applicant's Response [59].

> area of Lot 57. Only two of the four water marks are recorded as moisture tested by Mr Martelli. The ensuite, bathroom / laundry and third bedroom areas of the ceiling were not inspected on the day, however the lot as a whole comes under the catchment area for the box gutter drain. The water test was conducted on a hot January day and … we can conclude that the roof has already been water tested and exposed by 9.32am … to direct sunlight on a hot January day, it wasn't until 10.18am … that the internal moisture reading was taken.'[36]

49 It is also apparent that the second applicant disputes whether Ms Fennell prevented the completion of the work recommended by Mr Martelli, as a result of conditions she sought to impose on entry into Lot 57.

50 Finally, it is apparent from the Second Applicant's Response that it has continued to obtain evidence in support of its claim of ongoing water ingress into Lot 57.[37] In addition, by an email dated 22 April 2021, Ms Fennell forwarded further documentation to the Tribunal, which she regarded as evidence of continuing water ingress into Lot 57. The latter material was filed without leave, and the respondent objected to its late submission by the second applicant. I have not taken the material forwarded to the Tribunal on 22 April 2021 into account in determining the s 86 Application, other than to note that it demonstrates that the second applicant continues to be of the view that water ingress into Lot 57 is an ongoing issue.

(vi) The proper construction of s 86(2)(c) of the SAT Act

51 In order to determine whether to issue the s 86 certificate, it is necessary to be clear about what s 86(2)(c) requires. The submissions of the respondent in opposition to the grant of the s 86 certificate raise for consideration the proper construction of the words in s 86(2)(c) of the SAT Act. Orthodox principles of statutory construction require that the meaning of legislation be discerned by having regard to the text, and context, of the legislation, including the statutory purpose. Consequently, while the focus is, of course, on the meaning of the text, the text must be construed in its context.[38] In so far as that context includes the statutory purpose, that purpose may be discerned from an express statement of purpose in the statute, inference from its text and structure and, where appropriate, reference to extrinsic materials.[39]

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[36] Second Applicant's Response [79].
[37] See, eg, Second Applicant's Response [84].
[38] ***Mohammadi v Bethune*** [2018] WASCA 98 [31].
[39] ***Certain Lloyd's Underwriters v Cross*** [2012] HCA 56; (2012) 248 CLR 378 [25].

52 I turn, first, to consider the ordinary meaning of the words used in s 86(2)(c) of the SAT Act.

The ordinary meaning of the words used in s 86(2)(c) of the SAT Act

53 The certificate given by the judicial officer under s 86(2)(c) must state that the decision 'is appropriate for filing in the Supreme Court'.

54 Several observations may be made about s 86(2)(c). First, it clearly requires the exercise of discretion by a judge of the Tribunal, informed by the formation of an opinion by the judge, namely that the decision of the Tribunal is one which is appropriate for filing in the Supreme Court.

55 Secondly, the ordinary meaning of the word 'appropriate', when used as an adjective, includes 'suitable or fitting for a particular purpose, person, occasion'[40] and 'specially fitted or suitable, proper'.[41] In its context in s 86(2)(c), then, 'appropriate' means suitable, fitting, or proper.

56 Thirdly, that question of appropriateness concerns whether the decision of the Tribunal is appropriate 'for filing in the Supreme Court'. To construe those words in isolation, that is, to consider solely whether the decision is one which may appropriately be filed as a court document, would be a nonsense. Clearly, the question of appropriateness is directed to whether the decision is appropriate for filing in the Supreme Court, on the basis that that commences the enforcement process in the Supreme Court.

57 Fourthly, it is apparent that the question of appropriateness is considered by the judge having regard to the circumstances which exist at the time he or she is considering the application for the grant of the certificate.

58 The role of the judge in considering the exercise of discretion to grant a s 86 certificate is thus to consider whether, having regard to the circumstances at that time, the decision (that is, the order) made by the Tribunal is one which it is appropriate - that is, suitable, fitting or proper - to be enforced in the Supreme Court as if it were a decision of that Court.

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[40] *Macquarie Dictionary Online*.
[41] *Oxford English Dictionary Online*.

59 Nothing in s 86(2)(c) identifies the content of the requirement that the decision be 'appropriate' for filing in the Supreme Court. On its face, that requirement is capable of permitting the consideration of a wide variety of factors bearing on enforcement of the decision in the Supreme Court. However, the content of the requirement in s 86(2)(c) that the decision be appropriate for filing in the Supreme Court is more particularly informed by reference to the surrounding statutory context.

Contextual considerations – s 86 as a whole

60 The following considerations, arising from the immediate context within which s 86(2)(c) appears, are relevant to the content of the requirement that the decision of the Tribunal be appropriate for filing in the Supreme Court.

61 First, it is apparent that the purpose behind the issue of the certificate is not to confirm that the decision which is sought to be enforced is one which was actually made by the Tribunal. That purpose is met by the requirement in s 86(2)(a) of the SAT Act to file a copy of the decision which has been certified as a true copy by the executive officer of the Tribunal.

62 Secondly, the existence of prima facie evidence that the decision has not been complied with is established by the requirement under s 86(2)(b) for filing an affidavit, in which the applicant for enforcement deposes to non-compliance with the decision. The filing of that affidavit in the Supreme Court supports the conclusion that it is for the Supreme Court to determine whether, in fact, there has been compliance with the orders. However, to my mind, that does not mean that the question of compliance is irrelevant when considering whether the decision is appropriate for filing in the Supreme Court. It could hardly be said that a decision was appropriate for filing in the Supreme Court for enforcement if evidence demonstrating compliance with the decision had been provided to the judge in the Tribunal.

63 Those considerations suggest that the role of a certificate under s 86(2)(c) is directed to achieving a different purpose. Some indication of that purpose may be discerned from other contextual considerations, and in particular, how non-monetary orders, as compared with monetary orders, of the Tribunal are enforced.

Context – how are the Tribunal's orders enforced?

64 Those broader contextual considerations include the following matters.

65 First, the Tribunal does not have the power to enforce its own orders. Generally speaking, the enforcement of orders of the Tribunal must be pursued in the courts, in accordance with s 85 or s 86 of the SAT Act, and the provisions of the *Civil Judgments Enforcement Act 2004* (WA) (CJE Act).[42]

66 The filing of a certificate issued under s 86(2)(c), together with the other documents referred to in s 86, is the gateway to the enforcement of the Tribunal's non-monetary orders. It is of central importance in the administration of justice that the Tribunal's decisions and orders (like decisions and orders of courts) are complied with, and in the event that they are not, that they are enforced. These considerations militate against the exercise of discretion under s 86(2)(c) in such a way as to render it difficult for a party to pursue enforcement of the Tribunal's orders in the Supreme Court, because to do so would undermine the effectiveness of the enforcement procedure commenced by the filing of documents under s 86.

67 Secondly, and on the other hand, if it had been intended that every claim of non-compliance with an order of the Tribunal could be pursued for enforcement in the Supreme Court, there would have been no need for the requirement for a certificate to be issued by a judge of the Tribunal to confirm the appropriateness of the order for filing in the Supreme Court. That suggests that the requirement for a certificate has a filtering or screening role in identifying which orders of the Tribunal should be the subject of enforcement proceedings in the Supreme Court.

68 Thirdly, the latter conclusion is reinforced when s 85 of the SAT Act is considered. In the case of the enforcement of a monetary order, s 85(1) of the SAT Act provides that a person to whom payment is to be made:

> 'may enforce the order by filing in a court of competent jurisdiction –

[42] That general position is subject to an exception, namely when the Tribunal exercises its review jurisdiction, and affirms or varies a decision of a decision maker, or substitutes its own decision for that made by the decision maker. In a case of that kind, the Tribunal's decision will then be regarded as, and given effect as, a decision of the decision maker: see SAT Act s 29(5). If an issue as to the enforcement of such a decision arises, that enforcement will be governed by the legislation applicable to the decision maker (because the Tribunal's decision is given effect as a decision of that decision maker).

(a) A copy of the order that the executive officer has certified to be a true copy; and
(b) The person's affidavit as to the amount not paid under the order and, if the order is to take effect upon any default, as to the making of that default.'

69 Once those documents are filed, the order made by the SAT is taken to be an order of the court and may be enforced accordingly.[43] While the requirements of s 85(1)(a) and (b) mirror the requirements of s 86(2)(a) and (b), there is no requirement in s 85 for the filing of a certificate of the kind required under s 86(2)(c). The absence of a requirement for the filing of a certificate in relation to a monetary order suggests that the requirement for a certificate under s 86 has some relation to the different nature of the enforcement process for a non-monetary order, as opposed to a monetary order.

70 Fourthly, unlike proceedings for the enforcement of monetary orders, which largely involve an administrative process, and rarely involve determinations to be made by a judicial officer, proceedings for the enforcement of non-monetary orders of the Tribunal in the Supreme Court are likely to be dealt with by a judge of that Court. The enforcement of non-monetary orders (those which require a person to not do an act, to cease doing an act, or to do an act, other than to pay money or to give possession of real or personal property to another person) is governed by Div 2 of Pt 5 of the CJE Act.[44] Disobedience to an order of that kind is a contempt, and a person entitled to the benefit of a judgment of that kind may request the Court to deal with the non-compliant party for contempt.[45] In addition, in order to enforce a non-monetary judgment of that kind, a person entitled to the benefit of the judgment may apply to the court for an order addressed to the person entitled to the benefit of the judgment, or a person appointed by the court, that authorises that person to do the act concerned, or as much of it as is practicable, at the expense of the obligated person.[46] The court may make orders providing for the expenses of carrying out the order to be determined by the court, and such an order may be the subject of an enforcement order.[47]

71 Disobedience of a court order constitutes a civil contempt, although if that disobedience involves deliberate defiance (that is, if it

[43] SAT Act s 85(3). The enforcement of monetary judgments is governed by Pt 4 of the CJE Act.
[44] CJE Act s 97.
[45] CJE Act s 98.
[46] CJE Act s 99(2).
[47] CJE Act s 99(6).

can be described as contumacious) it may involve a criminal contempt.[48] Contempt proceedings for disobedience of an order made by the Tribunal are civil proceedings, but the contempt must be proved beyond a reasonable doubt.[49] A proceeding for contempt by disobedience to an order will involve a hearing at which the party seeking to enforce will be required to prove the contempt, and if proven, the Court will then determine the penalty to be imposed. The requirements for proof of a punishable contempt of court are: an order was made by the court (or in the case of orders of the Tribunal, that the documents referred to in s 86(2) of the SAT Act were filed in the Supreme Court, so that the decision of the Tribunal is treated as if it were an order made by the Supreme Court); the terms of the order are clear, unambiguous and capable of compliance; the order was served on the contemnor or service has been dispensed with; the contemnor has knowledge of the terms of the order; the contemnor has breached the terms of the order; and the act or omission which constituted the breach of the order was deliberate and voluntary.[50] The punishment for contempt of court may include imprisonment. If enforcement proceedings are pursued in the Supreme Court, then the determination of all of these issues, if they are contested, will inevitably consume scarce judicial resources.

72 Finally, it is not open to the Supreme Court to transfer an enforcement proceeding for a non-monetary order to another court.[51]

73 Having regard to all of these considerations, it may be inferred that the purpose behind s 86(2)(c) of the SAT Act is that the issue of the certificate involves a screening or filtering process, performed by a judge of the Tribunal, to determine whether the decision is one which is appropriate (that is, suitable, fitting or proper) for filing in the Supreme Court, with the consequence that it may be the basis for enforcement proceedings, including proceedings in the nature of contempt proceedings. That purpose will be served by the judge considering

[48] The distinction between criminal and civil contempt is opaque, and has been described as illusory: ***Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd*** [2015] HCA 21; (2015) 256 CLR 375 [42]; ***Witham v Holloway*** [1995] HCA 3; (1995) 183 CLR 525, 534.

[49] ***Caratti v Boban Pty Ltd (Administrators Appointed) [No. 2]*** [2015] WASC 139 (***Caratti***) [85] (Mitchell J); see also ***Allbeury v Corruption and Crime Commission*** [2012] WASCA 84; (2012) 42 WAR 425 [61] - [64] (Buss JA).

[50] See, eg, ***Porter v Steinberg*** [2019] WASC 291 [37] (Tottle J); ***Caratti*** [19] - [21], [86] - [88] (Mitchell J).

[51] Cf s 132(4) of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (**QCAT Act**) which permits the Queensland Supreme Court to transfer to the District Court or a Magistrates Court a proceeding for the enforcement of a non-monetary order made by the Queensland Civil and Administrative Tribunal, if that order is of a kind that may be made by the District or Magistrates Courts or is otherwise capable of being enforced in those courts.

whether there is any reason why it would not be suitable, fitting or proper for the decision to be filed, and thus enforced, including by contempt proceedings, in the Supreme Court, but subject always to the overarching principle that the proper administration of justice requires that the Tribunal's orders be complied with, and in the event that they are not, that they are able to be enforced.

Section 122 of the Victorian Civil and Administrative Tribunal Act 1998 (Vic) (VCAT Act)

74 Support for that construction of s 86(2)(c) may also be drawn from decisions addressing the construction of s 122 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) (**VCAT Act**). Section 86 of the SAT Act mirrored the terms of s 122 of the VCAT Act until the amendment of s 122 in 2020.[52]

75 The operation of s 122, prior to this amendment, was considered in ***White v Department of Natural Resources and Environment***[53] and in ***State of Victoria v Tymbook Pty Ltd***.[54] Those decisions established the following principles.

76 An applicant for a certificate must establish to the satisfaction of the judicial officer that the other party has failed to comply with the decision of the tribunal. In a case where there had, in fact, been compliance with the decision, it would be wholly inappropriate to issue the certificate.[55]

77 In a case where there has been partial compliance with the decision of the tribunal, the appropriate course is to make application to the tribunal, in the proceeding in question, for further directions.[56]

78 Final orders made by a tribunal cannot be revisited, except on appeal or pursuant to an express power, such as the power to correct mistakes.[57] While the tribunal cannot otherwise alter the terms of the

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[52] Section 122 now simply provides that a person in whose favour a non-monetary order is made may enforce that order in the Supreme Court and for the purposes of the enforcement, the order is taken to be an order of the Supreme Court. The requirement for the issue of a certificate has thus been dispensed with. See s 69 of the *Justice Legislation Amendment (Access to Justice) Act 2018* (Vic), which commenced operation on 1 July 2020.
[53] ***White v Department of Natural Resources and Environment*** [2001] VCAT 2451 (10 October 2000) (***White***).
[54] ***State of Victoria v Tymbook Pty Ltd and Anor*** [2010] VCAT 418 (25 March 2010) (***Tymbook***).
[55] ***White*** [21].
[56] ***White*** [21].
[57] ***Tymbook*** [28].

order, it retains such power as it may have to make ancillary orders which are necessary or incidental to give effect to the decision.[58]

79 Even after a certificate has been issued, and at least before the certificate has been filed in the Supreme Court, the tribunal retains any power it has to make such ancillary orders. However, once the certificate has been filed in the Court (at which point it is taken to be an order of the Court itself), orders relating to the implementation of that order must be made by the Court.[59]

80 For the sake of completeness, I note that after the decisions in ***White*** and ***Tymbook***, the VCAT Act was amended (with effect from 1 July 2020[60]) to include s 120A in the VCAT Act. Section 120A provides:

> (1) A person in whose favour an order of the Tribunal is made may apply to the Tribunal for review of the order to remedy a problem with enforcing or complying with the order.
>
> (2) An application under subsection (1) is to be made in accordance with, and within the time limits specified by, the rules.
>
> (3) The rules may limit the number of times a person may apply under this section in respect of the same matter without obtaining the leave of the Tribunal.
>
> (4) The Tribunal may vary the order, or revoke the order and make any other order that the Tribunal could have made in the proceeding in which the order was made, if the Tribunal is satisfied that—
>
> (a) there are problems with enforcing or complying with the order; and
>
> (b) having regard to those problems, it is appropriate to vary the order, or revoke the order and make another order (as the case requires).

81 Clearly, the purpose behind the insertion of s 120A into the VCAT Act was to expressly permit the VCAT to reopen or renew a proceeding where there has been a problem with enforcement.[61]

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[58] ***Tymbook*** [28] - [31], [37] - [39].
[59] Cf ***Tymbook*** [25].
[60] *Justice Legislation Amendment (Access to Justice) Act 2018* (Vic), s 67.
[61] The inclusion of a provision in terms of s 120A was prompted by the Access to Justice Review (recommendation 5.9) which recommended that the VCAT Act be amended to enable VCAT to reopen or renew a proceeding where there had been a problem with enforcement, in the same way as was permitted by section 133 of the QCAT Act. Section 133 permits a party to a proceeding to apply to the tribunal for a

The inclusion of such an express power would eliminate the possibility of any argument that once the tribunal makes final orders disposing of the proceedings (including making a monetary order or a non-monetary order) it is *functus officio* and has no power to reopen the proceedings to amend or vary those final orders.

82 The SAT Act does not contain a provision similar to s 120A of the VCAT Act. The absence of such a provision in the SAT Act does not, in my view, mean that this Tribunal has no power to make any further orders after it has made final orders in a proceeding. While final orders cannot be amended or varied (other than pursuant to an express power, such as the application of the power to correct a mistake,[62] or on appeal), in my view, it remains open to the Tribunal to exercise its power to make ancillary orders[63] which may prove necessary or convenient for giving effect to the final orders it has made.[64]

Conclusion: the content of the requirement for satisfaction that the decision is appropriate for filing in the Supreme Court

83 Having regard to the matters discussed above, the role of a judge of the Tribunal in considering whether to issue a s 86 certificate is to consider whether, in light of all of the circumstances at the time that the application under s 86 is made, the decision (that is, the order) of the Tribunal is one which it is appropriate (that is, suitable, fitting or proper) to be enforced in the Supreme Court as if it were a decision of that Court, subject always to the overarching principle that the proper administration of justice requires that the Tribunal's orders be complied with, and in the event that they are not, that they are enforced.

84 Having regard to these considerations, when a party seeks the grant of a certificate under s 86(2)(c), the judge dealing with the application will consider all of the circumstances of the case, including (and not limited to) the following:

- Whether the applicant for the certificate has provided prima facie evidence of non-compliance with an order of the Tribunal

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'renewal' of a final decision made by the tribunal. Such an application may be made if it is not possible for the tribunal's final decision in a proceeding to be complied with, or there are problems with interpreting, implementing or enforcing the tribunal's final decision in a proceeding.

[62] SAT Act s 83.

[63] SAT Act s 73.

[64] By way of comparison, the Supreme Court may give parties the liberty to apply to seek further orders necessary for the performance of a final order of the Court: See ***Patterson v Humfrey [No 2]*** [2016] WASC 343 [8] - [16]; ***Cameron v Renouf*** [2008] WASC 60 [28] - [31] (Newnes J); cited with approval in ***Caratti v Mammoth Investments Pty Ltd (No 2)*** [2018] WASCA 6 [88].

(for example, by filing an affidavit, a witness statement or a statutory declaration). While it is not the role of the judge to make a determination as to whether or not there has been non-compliance with the order of the Tribunal, in the absence of such evidence, the judge could not be satisfied that the order was appropriate for filing in the Supreme Court;

- The nature of the order made by the Tribunal. Orders in the nature of programming orders or directions, for example, would not be 'appropriate' for filing in the Supreme Court;

- Whether there has been a complete failure to comply, or a partial failure to comply with the Tribunal's order. In the case of partial compliance, further directions by the Tribunal (in the exercise of its power to make ancillary orders) may facilitate complete compliance;

- Whether the failure to comply is attributable to ambiguity in the order of the Tribunal. If the order is not clear and unambiguous it is unlikely to be appropriate for enforcement in the Supreme Court (because it could not be the basis for a contempt proceeding, nor could the Court appoint another person to perform an order which was not clear in its terms);

- Whether the party entitled to the benefit of the order has agreed to accept performance in a different way. In the absence of such an agreement the order must be complied with according to its plain meaning,[65] but if the parties have agreed to performance in a manner different from that required by the terms of the order itself, it may not be appropriate to enforce the order itself;

- Whether other means exist for the party alleging non-compliance or partial compliance with the order to secure performance. By way of example, under the *Building Services (Complaint Resolution and Administration) Act 2011* (WA) (BSCRA Act) if the Tribunal is satisfied that a building remedy order (made under s 36(1)(a) of the BSCRA Act) or a home building work contract remedy order (referred to in s 41(2)(a) of the BSCRA Act) has not been complied with, or only partially complied with, the Tribunal may revoke the order and make an

[65] ***Tymbook*** [53].

order for the payment of a sum of money as compensation for the failure to comply.

85 In some cases, the supporting evidence submitted by a party seeking a s 86 certificate will leave no room for doubt that there has been no compliance with an order of the Tribunal. In that case, the judge of the Tribunal may be satisfied that the order is appropriate for filing in the Supreme Court, and will be able to issue the certificate, without further information. In other cases, however, where the judge has some doubt as to whether he or she can be satisfied that the order is appropriate for filing in the Supreme Court (for example, where the judge considers that non-compliance with the order may be in doubt) it will be appropriate to list the application for a certificate for a directions hearing, on notice to the allegedly non-compliant party, in the proceeding in which the order was made. That directions hearing will permit the judge to make such further enquiries of the parties as may be necessary, or to raise alternative means of ensuring compliance or resolving any dispute about compliance.

(vii) Why the decision is not appropriate for filing in the Supreme Court

86 Having taken into account the history of these proceedings, and the submissions and documents filed by the parties,[66] I am not satisfied that the Orders are appropriate for filing in the Supreme Court. I have reached that conclusion for the following reasons.

87 First, this is not a case in which it is claimed that the respondent has failed to comply with the Orders at all. There does not appear to be any dispute that the respondent has complied with the Orders, save in so far as the second applicant contends that the respondent has not complied with the orders in so far as they affect Lot 57.

88 Secondly, even to that extent, there is a dispute as to whether the respondent has failed to comply with the Orders. It is not necessary or appropriate for me to resolve that dispute, having regard to the other circumstances to which I refer below.

89 Thirdly, I accept the submission of counsel for the respondent that it is arguable that the meaning of the Orders, especially order 6, is ambiguous. The absence of any time limitation in respect of the obligation imposed on the respondent by that order means that it is

[66] Other than the documents filed by the second applicant by email on 22 April 2021, save to the extent noted at [50] above.

unclear how the order is to operate. Further, it is not clear what the phrase 'associated hydraulic services of the building' means.

90 Fourthly, there is clearly an ongoing dispute between the parties as to whether there is any water ingress into Lot 57. However, if such water ingress is occurring, it is not immediately clear that any such ingress must inevitably be said to have been caused by the failing of any aspect of the common property roof, roof top garden, living area, or any associated hydraulic services of the building (whatever they might be) so that it could be said that there has been non-compliance with order 6.

91 Fifthly, as I have already observed, there does not appear to be any dispute that the second applicant and the respondent reached an agreement about the means to resolve their dispute about compliance with the Orders, namely that they agreed to jointly engage an independent expert, Mr Martelli, to inspect the roof and Lot 57, and to provide his opinion as to whether there continued to be water ingress into Lot 57. That opinion was obtained. While it is apparent that the second applicant does not agree with the opinion, the fact that it is arguable that the parties agreed to resolve the question of compliance with the Orders by obtaining and relying upon the opinion of Mr Martelli, and using it as a guide to what works should be undertaken, suggests that it would not now be appropriate for the Orders to be the subject of enforcement proceedings in the Supreme Court.

92 Sixthly, quite apart from the question of compliance with the Orders, there is clearly an ongoing dispute between the second applicant and the respondent as to ongoing water ingress into Lot 57 (**present dispute**). The second applicant clearly contends that water ingress into Lot 57 continues to occur. If, as it appears, the second applicant also contends that it is the responsibility of the respondent to attend to the remediation of any defect in the common property to which the water ingress is attributable, together with any consequent damage to Lot 57, then the preferable means to resolve the present dispute would be for the second applicant to bring an application in the Tribunal under s 197 of the ST Act, alleging the existence of a scheme dispute, arising from an alleged failure by the respondent to comply with its duty under s 91 of the ST Act to keep the common property in good and serviceable repair, and to properly maintain it. Pursuit of such an application would permit the Tribunal to resolve the parties' present dispute, irrespective of what the Orders required, or the extent

to which the respondent complied with the Orders. In contrast, if the second applicant files the Orders in the Supreme Court for enforcement, that course appears likely to embroil the second applicant and the respondent in costly litigation about the proper construction of the Orders, and whether, and the extent to which, the respondent has complied with the Orders. If non-compliance with the Orders cannot be established, the parties' present dispute may well remain unresolved, notwithstanding the pursuit of the proceedings in the Supreme Court.

(viii) Next steps

93 The application for the issue of a certificate under s 86(2)(c) of the SAT Act will be dismissed.

94 The second applicant is at liberty, if it considers it necessary to do so, to file an application in the Tribunal under s 197 of the ST Act, on the basis of a scheme dispute of the kind described in [92] above. The parties should, however, be mindful of the cost of any further litigation and the desirability of seeking to resolve any issue about maintenance of the common property as quickly as is possible. If that can be done without further litigation, that is the preferable course.

I certify that the preceding paragraph(s) comprise the reasons for decision of the State Administrative Tribunal.

GD
Associate to the Honourable Justice Pritchard

14 MAY 2021